

It is ordered, That respondent Harold F. Reed, Jr., an individual, shall within sixty (60) days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist.

IN THE MATTER OF
GIFT PRODUCTS, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 7025. Complaint Jan. 10, 1958—Decision, Aug. 8, 1960

Order requiring a Chicago distributor of various articles of merchandise to cease supplying push cards to others for use in distributing its merchandise by games of chance, and itself selling merchandise by such means.

Mr. William A. Somers for the Commission.

Mr. Horace J. Donnelly, of Washington, D.C., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Respondents are charged with having violated the Federal Trade Commission Act in connection with the sale and distribution of merchandise by means of pushcards involving a game of chance, gift enterprise or lottery scheme; it is also charged that by furnishing to others such pushcards, accompanied by order blanks, instructions

and other printed matter, respondents have placed in their hands the means of conducting lotteries and games of chance in the sale of merchandise, contrary to an established public policy of the United States Government.

The respondents have denied generally the allegations of the complaint, and have alleged "as separate and additional affirmative defense" that (1) the complaint fails to state a cause of action; (2) the Federal Trade Commission lacks jurisdiction in that intra-state transactions only are involved; (3) the acts and practices complained of are not unfair acts and practices and do not violate any public policy of the United States Government; and (4) the statute as sought to be interpreted is unconstitutional and void and an unwarranted delegation of power, and impinges upon the right of due process.

After the case-in-chief in support of the allegations of the complaint was rested, counsel for the respondents stated that respondents did not desire to present further evidence and the taking of evidence in this proceeding was closed. Thereafter various motions were filed on behalf of respondents, all of which have been disposed of excepting a motion to strike certain exhibits and a motion to dismiss which was accompanied by a "Memorandum of Points and Authorities". Counsel supporting the complaint filed answer to these motions, to which reply was made on behalf of the respondents. Proposed findings and conclusions were submitted by counsel supporting the complaint; a request by defense counsel was granted that paragraphs 1 and 2 of his motion to dismiss and the supporting memorandum be accepted in lieu of formal proposals. Insofar as said proposed findings and conclusions are accepted, they have been embodied in the initial decision. Those not so embodied are hereby rejected.

Upon the basis of the entire record, the following findings of fact are made, conclusions drawn and order issued.

1. Respondent Gift Products, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with offices and places of business located at 210 South Clinton Street and 555 West Adams Street, Chicago, Ill. Respondent Joseph Freeman is president of respondent corporation and directs and controls its policies, acts and practices; his home office is at 5451 North Menard Street, Chicago, Ill.; he has an office at 210 South Clinton Street, Chicago, Ill. The literature and return envelopes used by respondents bear the address, 555 West Adams Street, Chicago 6, Ill.

2. Respondents were at the time of issuance of the complaint, and for some time prior thereto had been engaged in the sale and distribution of various items of merchandise, including radios, pens, clocks, watches, knives, electric frying pans, mixers, razors and other

products, some of which were transported, or caused to be transported by respondents in interstate commerce. For more than two years a substantial course of business in commerce has been carried on by respondents, mostly by correspondence. During one three-months' period—September, October and November, 1957—the record shows that 24 orders were given on Gift Products stationery over the signature of Joseph Freeman (or J. Freeman) directing Capitol Mailers, 555 West Adams Street, Chicago, Ill., to mail a total of approximately 840,000 letters, each containing a circular describing a product, a pushcard, an order referring thereto, and a Gift Products return envelope addressed to 555 West Adams Street, Chicago. There is no reason to believe that these activities have been discontinued.

3. Typical of Gift Products' mailing orders are the following:

Commission's exhibit	Dated	For a mailing—
17-A.....	9/13/57	"of 74,000 names * * * for our \$32.95 Stantex Radio mailing";
17-B.....	9/18/57	"of 102,000 names * * * for our \$24.95 Georgian Clock & Lamp set mailing"; Permit No. 2035;
17-D.....	9/18/57	"of 15,500 names * * * for our \$32.95 Stantex Radio mailing"; Permit No. 2035;
17-E.....	9/18/57	"of 50,000 names * * * for our \$7.95 Bridal Doll Lamp mailing"; Permit No. 2035;
17-F.....	9/23/57	"of 72,000 names * * * for our \$12.95 Honey Bear mailing";
17-G.....	9/23/57	"of 40,000 names * * * for our \$32.95 Stantex Portable Radio mailing";
17-H.....	9/23/57	"of 45,000 names * * * for our \$24.95 Georgian Clock & Lamp set mailing";
17-I.....	9/30/57	"of 14,000 names * * * for our \$32.95 Stantex Portable Radio mailing";
17-J.....	9/30/57	"of 14,000 names * * * for our \$24.95 Georgian Clock & Lamp set mailing";
17-K.....	9/30/57	"of 10,000 names * * * for our \$24.95 Mama & Baby Bear mailing."

In October, 1957, there were similar orders for mailings to 27,000 names, 5,000 names, 18,000 names, 103,000 names, 50,000 names, 24,500 names, 9,750 names "to go 3d class mail", 9,750 names "*to go first class mail*", 4,000 names (\$29.95 card), 4,000 names (\$32.95 card), and 9,750 names (Commission's Exhibit 17 L-V). In November, 1957, the record shows three similar orders to send Honey Bear mailings to 147,000 names. These several orders were filled by Capitol Mailers, one of whose coowners stated that during 1957 he did not remember making mailings for any one else who "would insert punchboards in their literature".

4. The names used in these various mailings were obtained from various mailing list brokers. Four of these lists, containing, respectively, 50,000 names, 10,000 names, 100,000 names and 30,000 names, were described as containing the names of persons of whom "the greatest majority", "more than 60%", "60% or more" and "more than 90%" had addresses outside the State of Illinois. A coowner of Capitol Mailers testified that prior to mailing "we have a 48-State

separation * * * we get a mixed list of 48 states. We sort it that way." While there is no evidence of a sale to any of the persons to whom these particular mailings were sent, it is inconceivable that so many letters were mailed without producing some substantial returns for respondents. There is in the record testimony of witnesses who had received, in the mailboxes at their residences outside the State of Illinois, promotional materials, including pushcards, accompanying circulars and return envelopes, identical to some that were mailed pursuant to the orders above described.

5. The hearings in this proceeding were held between April 18, 1958, and August 6, 1958, and numerous motions and other pleadings and documents have been filed on behalf of respondents up to May 10, 1960. At no time has there been any evidence or suggestion that the respondents have ceased these business activities; hence it is normal and proper to assume that they are still being continued and are profitable. However, no conclusions are drawn from these assumptions, and the decision herein is not based thereon.

6. Samples of pushcards and literature which were contained in respondents' mailings and which had been received by the persons who testified are in the record as exhibits. For example, Commission's Exhibit 9A is a leaflet describing a "Giant 2-foot Honey Bear"; Commission's Exhibit 9B is a respondents' order blank for two musical Honey Bears and two retractable ballpoint pens—it provides for a "free additional valuable surprise gift if order is received within 20 days"; Commission's Exhibit 9C is a Honey Bear pushcard. On the pushcard is a centrally located seal bearing the legend "Do not remove seal until entire card is sold"; around the edge are 37 perforated discs which can be pushed out by purchasers who pay for the privilege of punching according to the printed scale, which is: "No. 1 pays 1¢ No. 6 pays 6¢ No. 14 pays 14¢ No. 19 pays 19¢ No. 22 pays 22¢ No. 24 pays 24¢. All others pay 39¢. None higher." "No's 1 and 24 receive a beautiful Ball Point retractable pen", according to the legend. Each of the 37 discs contains a name, and these 37 names are printed on the back of the card so that the purchaser of a punch or punches can enter his own name opposite the appropriate disc name or names. After the sale and removal of all the discs the center seal is removed and a name is then revealed, corresponding to one of the names on the discs. Whoever punched out this disc is the winner of a Honey Bear. The persons who punched numbers 1 and 24 win and receive ballpoint pens, and the vendor of the punches gets the other Honey Bear and a surprise gift, upon remitting \$12.95 to respondents within a limited time.

7. On the back of the card is the statement:

This card is given to you absolutely free. If you wish you can use this as a sales card.

It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so.

IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME. TOTAL \$12.95.

Other cards contain statements: "Lucky name under seal receives this beautiful Dormeyer Electric Food Mixer" (CX 4B); "superb Shave King Electric Razor" (CX 6B); "Dinette Set" (CX 11B); "Blend King" mixer (CX 15B); or "Dormeyer Electri-Fri Pan" (CX 16A).

8. The sales of respondents' merchandise by means of said pushcards are made and the articles of merchandise are allotted to the participants in the lottery in accordance with the legends or instructions on the various cards. Whether the purchaser of a chance or push receives an article of merchandise or nothing for the amount paid is determined wholly by lot or chance. The principal prize offered has a value substantially greater than the price paid for any one chance or push, and the "lucky" person who receives it gets it for much less than its stated or actual value. Those who are not "lucky" get nothing except the opportunity to participate in the lottery by making a push. The articles of merchandise are thus distributed to the public wholly by lot or chance.

9. The distribution of respondents' free pushcards and other literature is an invitation to or solicitation of those who receive them to engage in a lottery scheme or game of chance and thus to procure merchandise at no cost to themselves. This is only a slight modification of the method of merchandising of those who engage in the sale of pushcards and punchboards and, incidental thereto, offer to provide for an additional sum of money the merchandise to be used as premiums or prizes. The respondents' plan definitely supplies to and places in the hands of others the means of conducting lotteries and games of chance in the sale of merchandise. The law applicable to these various schemes was discussed extensively in the Commission's decision in the Matter of *R. B. James, et al., trading as Chicago Board Company*, 53 F.T.C. 1119, which was upheld on review by the United States Court of Appeals, Seventh Circuit, February 7, 1958, 253 F. 2d 78; rehearing denied 3/31/58; *cert. denied* 358 U.S. 821; *rehearing denied*, 358 U.S. 896.

10. The Commission has held that the distribution in commerce of devices which aid and encourage merchandising by gambling is contrary to the interest of the public. The United States Court of

Appeals for the Eighth Circuit, *Zitzerman v. FTC*, December 18, 1952, 200 F. 2d 519, said, citing numerous cases:

It is now well settled by controlling decisions that the sale of goods by a plan or method which involves the use of a game of chance, gift enterprise, or lottery is a practice which is contrary to the established policy of the Government of the United States and violative of the Federal Trade Commission Act. It is equally well established that selling in interstate commerce the means or instrumentalities by which merchandise can or may be sold by games of chance, gift enterprise or lottery is an unfair method of competition. Placing in the hands of others the means of engaging in such acts or practices is contrary to the public policy and the public interest.

11. The United States Court of Appeals for the Seventh Circuit, in *Modernistic Candies, Inc., et al. v. FTC*, 145 F. 2d 454, November 15, 1954, said:

It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce. We think the Commission also has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandising by gambling. The gamblers and those who deliberately and designedly aid and abet them are both engaged in practices contrary to public policy. Merchandising by gambling should not be divided into insulated acts, which appear innocent when examined separately. This unfair practice should be viewed as a whole. If the Federal Trade Commission is to police merchandising by gambling, it must police those who designedly and deliberately aid and abet this practice * * * (S & D 1945-1948, p. 291).

12. The law is not equivocal or uncertain. Respondents cannot be said to have distributed their pushcards on such a widespread scale as is indicated by their voluminous mailings, unintentionally or without design. They have sold their own merchandise in commerce by the use of pushcards; they have distributed pushcards in commerce and thus placed in the hands of others the means to engage in the practice of selling merchandise by lottery, game of chance or gift enterprise, all of which is contrary to public policy. The respondents are thus guilty of having engaged in unfair acts and practices in commerce in violation of the Federal Trade Commission Act. The allegations of the complaint have been established by substantial, reliable, probative evidence. The Federal Trade Commission has jurisdiction, and the proceeding is in the public interest.

13. There remain to be disposed of the two pending motions. The request to strike certain exhibits is supported in respondents' memorandum by the argument that there is no evidence of record establishing that respondents are engaged in interstate commerce and that certain exhibits had never been in the possession of the witness, Mrs. Petroff, of Gary, Ind., who testified particularly concerning Commission's Exhibits 2D and 2E that she had received an order

blank like Commission's Exhibit 2D and a return envelope like Commission's Exhibit 2E; that she had received a pushcard through the mail, which she sold; that afterward she sent the money to the Gift Products Company and received in return two portable radios, one of which she kept and one she gave to the person who won. She said that she received "Two ballpoint pens and a bunch of literature". The radios she thought were "Sanotex or Sanitex, something like that". She testified also that she had sold other cards and received other merchandise from Gift Products Company. There was other evidence relating to the various exhibits to which the motion to dismiss pertains which convinced the hearing examiner that the exhibits which were admitted emanated from respondents, were relevant to the proceeding and therefore admissible in evidence. Their materiality and weight were not determined by their admission.

14. The memorandum also refers to the testimony of other witnesses and recites some comments made by the hearing examiner during the course of the proceeding relative to their statements that certain proposed exhibits had been found in their mailboxes. The fact, however, that such exhibits had been found in mailboxes does not constitute proof that such exhibits had been placed there by a mailman, by a messenger, or by a delivery-boy. The conclusion that the respondents were or had been engaged in interstate commerce is based on other facts. The statements and incidents mentioned do not warrant the striking of the exhibits referred to in respondents' motion, nor do they impinge upon or in any manner affect the rulings made in the record as to the admission of exhibits. Nothing has been presented in respondents' motion to strike which was not given consideration at the time the exhibits were received in evidence or has not been carefully reviewed and reconsidered since. The motion of respondents to strike will be denied.

15. One of the grounds for respondents' motion to dismiss is that "Respondents have been deprived of their right to a fair and unbiased adjudication herein by virtue of the fact that at the behest and on the complaint of the Federal Trade Commission, there has been lodged against the individual respondent a criminal information alleging violation of the first paragraph of Section 10 of the Federal Trade Commission Act (15 U.S.C. 50) growing out of the present proceedings". In this proceeding, respondent Joseph Freeman, appearing as a witness pursuant to subpoena, stated his name, address and business, then declined to testify further, saying, "I believe that any testimony I might give might be incriminating and debasing, and therefore decline to testify any further." Again the witness declined to testify "on the ground that it may tend to in-

criminate me, * * * and degrade me". The fact that said respondent refused to testify and was thereafter prosecuted for such refusal does not establish a lack of due process in this proceeding. The hearing examiner did not originate nor participate in the initiation or prosecution of, or have any other connection with, the criminal prosecution of Joseph Freeman. The decision herein is in no way affected by that proceeding. Based upon the findings of fact and the conclusions hereinabove set forth, respondents' motion to dismiss is also denied. Accordingly,

It is ordered, That respondent Gift Products, Inc., a corporation, and its officers, and respondent Joseph Freeman, individually, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches, radios, knives, electric mixers or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, pushcards or any other devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme;
2. Selling or otherwise disposing of any merchandise in commerce by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That respondents' Motion To Strike Exhibits be, and the same hereby is, denied.

It is further ordered, That respondents' Motion To Dismiss be, and the same hereby is, denied.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision filed on May 31, 1960, and the Commission having determined that said initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered, That the aforesaid initial decision be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Decision

IN THE MATTER OF
OUTDOOR SUPPLY CO., INC.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 7482. Complaint, May 6, 1959—Decision, Aug. 9, 1960*

Order requiring a manufacturer of outdoor supply equipment in Long Island City, N.Y., to cease misrepresenting the size of its sleeping bags by labels and advertising describing as "cut size 36 x 72", etc., bags the finished size of which was some five inches shorter and three inches narrower than the "cut size".

Mr. Charles W. O'Connell supporting the complaint.
Respondent, *Pro Se*.

SECOND INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

On May 6, 1959 the Commission issued its complaint in this matter charging respondent with using false, misleading and deceptive statements to describe sleeping bags which it made and sold. A letter from Sidney W. Henschel, vice president of respondent, was received and treated as an answer. In this answer it was asserted that the statements charged to be unfair and unlawful were required to be used in labelling under the regulations of the State of California. It was also asserted that many of respondent's competitors used the same descriptive statements.

A hearing was held and the hearing examiner filed his initial decision on September 15, 1959. Thereafter, the Commission remanded the matter to the hearing examiner for the purpose of receiving additional evidence. Additional evidence has now been taken and counsel supporting the complaint has filed additional proposed findings of fact and order which are adopted herein. An official of respondent who appeared for it has not filed any proposed findings of fact and order.

Upon consideration of the whole record the following findings as to the facts are made.

1. Respondent, Outdoor Supply, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 27-01 Bridge Plaza North, Long Island City, N.Y.

2. Respondent is now, and for some time last past has been, engaged in the manufacture, distribution, sale and advertising of sleeping bags and various other types of outdoor supply equipment.

3. In the course and conduct of its business respondent now causes, and for some time last past has caused, its said products, when sold,