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## Findings

its sales representatives. Consequently, we are issuing our own findings, conclusions and order to cease and desist in lieu of the initial decision of the hearing examiner which is vacated and set aside.

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IN THE MATTER OF  
THE BALTIMORE LUGGAGE COMPANY ET AL.

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

*Docket 7683. Complaint, Dec. 8, 1959—Decision, Mar. 15, 1961*

Order requiring the manufacturer of "Lady Baltimore" luggage to cease deceptively pricing its merchandise by preticketing it with price tags \$2.00 higher than the prices at which it regularly sold.

*Mr. Anthony J. Kennedy, Jr.* for the Commission.

*Mr. Robert L. Sullivan, Jr.* and *Mr. William J. Pittler*, of Baltimore, Md., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The Baltimore Luggage Company, a corporation, and Gertrude Holtzman and Samuel J. Holtzman, individually and as officers of said corporation, hereinafter called respondents, are charged with fictitious pricing of luggage in violation of the Federal Trade Commission Act.

Hearings have been held at which oral testimony and documentary evidence was received in support of and in opposition to the allegations set forth in the complaint. Proposed findings of fact, conclusions of law and order have been submitted by respective counsel and oral argument heard thereon. These have been considered. All proposed findings of fact and conclusions of law not specifically found or concluded herein are rejected. Upon the basis of the entire record, the undersigned hearing examiner makes the following findings of fact, conclusion of law and order:

## FINDINGS OF FACT

1. The Baltimore Luggage Company is a corporation organized and doing business under the laws of the State of Maryland with its office and principal place of business located at 304 North Smallwood Street, Baltimore, Maryland. The individual respondents Gertrude Holtzman and Samuel J. Holtzman are officers of the corporate respondent and formulate, direct and control the acts

and practices of the corporate respondent. Their address is the same as that of the corporate respondent.

2. The respondents are now and for some time past have been engaged in the manufacture, distribution and sale of luggage to retail dealers for resale to the public. In the course and conduct of their business, the respondents now cause, and for some time last past, have caused their luggage, when sold, to be shipped from their place of business in the State of Maryland to purchasers thereof located in the various states of the United States and the District of Columbia. The respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said luggage, in commerce, as "commerce" is defined in the Federal Trade Commission Act. The respondents are now and have been in substantial competition in commerce with corporations, firms and individuals also engaged in the sale of luggage of the same general kind and character as that sold by respondents.

3. Respondents manufacture approximately eight different sizes of luggage in eight colors. The luggage is sold under the trade name "Lady Baltimore." A pre-ticket, matching the color of the luggage, is placed on and attached to each piece of luggage by respondents prior to final inspection in the factory. On the face of each ticket is an amount in large figures purporting to represent the regular and customary retail price of the particular piece of luggage. The luggage is priced according to size. On the reverse side of the ticket, in small figures, is a list showing the purported regular retail price for each of the eight sizes of luggage (CX 1-8). These pre-tickets are on each piece of luggage when it is shipped from respondents' factory to approximately 1,276 retail store dealers in cities located in approximately 46 states of the United States and the District of Columbia, and is still attached to the luggage when it is received by the respective retail dealers. The evidence shows and it is found that respondents' luggage is sold in the metropolitan trade areas of New York, New York, Philadelphia, Pennsylvania, and Washington, D. C., at approximately \$2.00 per item less than the price shown on the pre-ticket attached to the item of luggage. One witness, Mr. John W. Greene, an attorney-examiner employed by the Federal Trade Commission, testified that he visited two retail department stores in Philadelphia, Pennsylvania, Strawbridge and Clothier and John Wannamaker, and four stores in Washington, D. C., Woodward and Lothrop, Beckers Leather Goods Company, Hecht Company, and Lansburgh's, where respondents' luggage was on display for sale to the public, and respondents' tickets were attached to said luggage. The purported regular retail

price printed on each ticket was approximately \$2.00 in excess of the price at which the store was selling the particular item of luggage.

4. In some of the stores which Mr. Greene visited each piece of "Lady Baltimore" luggage also had attached to it a store ticket, in addition to respondents pre-ticket. The price shown on the store ticket was \$2.00 less than the price shown on respondents' pre-ticket. Also, in some of these stores, there was a display card which had been furnished to the retail stores by respondents. This display card listed the purported regular retail price of each size of respondent's luggage which corresponded to the prices listed on respondents' pre-tickets attached to each piece of luggage. In some of the stores, there was also a store display card which showed the store's actual retail selling price of each piece of luggage which was \$2.00 less than the price shown on respondents' pre-ticket attached to the piece of luggage and respondents' display card on the counter.

5. The evidence further shows and the examiner finds that, out of approximately 1,276 sales outlets for respondents' luggage, approximately 387 of these retail stores in at least twelve states regularly and customarily sell respondents' luggage at approximately \$2.00 per item less than respondents' pre-ticketed price. RX-1 together with the testimony of Mr. Rivkin, Director of Advertising and Sales for respondent corporation supports this finding. The sales by these retail stores of respondents' luggage represent more than one third and less than one half, i.e.,  $9/24$  of the total dollar sales volume of respondents' luggage. By placing and attaching tickets to their luggage and furnishing retail store customers with display cards which contain prices approximately \$2.00 in excess of the price at which the retail store regularly and customarily sells said luggage at retail, respondents thereby represent that the prices shown on said tickets and display cards are the usual and regular retail price for each item of luggage and thereby place in the hands of the retailer the means and instrumentality (the pre-ticket and display card) whereby the retailer may mislead and deceive the public as to the regular and customary retail price of the item of luggage.

6. Counsel for respondents do not deny that in the trading areas of New York, New York, Philadelphia, Pennsylvania and Washington, D. C., and also in those areas delineated on RX-1, the retail price at which respondents' luggage is sold in retail stores is approximately \$2.00 less than respondents' pre-ticketed price. However, counsel contend that this practice does not extend to every trade area throughout the United States and that, in determining

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respondents' "usual and regular retail price," respondents' sales on a national basis should be considered rather than be confined to the trading areas of New York, Philadelphia, and Washington, D.C. In other words, respondents' counsel contend that the words "usual and regular retail price" mean the price at which respondents' customers, taken as a whole, throughout the United States, sell respondents' luggage. Under such a theory, respondents' fictitious pricing practices would have to be followed by their retail store customers in every section of the United States or as counsel contends, in more than 50 percent of the market areas of the country before respondents could be held to be in violation of the Federal Trade Commission Act. Such a contention is absurd on its face.

7. Nevertheless, counsel cite *The Orloff Co., Inc., et al.*, Docket No. 6184; *Newville, Inc., et al.*, Docket No. 6405; and *Ma-Ro Hosiery Company, Inc., et al.*, Docket No. 6436, as authorities for the above proposition. These decisions do not support such a doctrine. In the three cases cited, one of the allegations in the respective complaints, as here, was that respondents misrepresented the usual and regular retail selling price of watches and hosiery by pre-ticketing with false and exaggerated prices. In those cases, as here, the evidence shows that the amounts appearing on the tickets were substantially in excess of the prices at which the watches and hosiery were usually and regularly sold at retail. Here, the evidence shows and it has been found that, respondents knowingly placed tickets on its luggage containing prices approximately \$2.00 in excess of the price at which said luggage was then usually and regularly selling for in retail stores located in New York, Philadelphia and Washington, D. C., to say nothing of the additional retail stores located in the trading areas listed on RX-1. It is found, therefore, that this position of counsel is not well taken.

8. Respondents also claim that it is the policy of respondents' customer retail stores in the Philadelphia and Washington trading areas to remove the perforated portion of respondents' pre-ticket containing the pre-ticketed price prior to the time the luggage is placed in the store and in only a few isolated instances is the pre-ticket price permitted to remain attached to the luggage and this is due to the negligence of respondents' retail store customers. Irrespective of the policy of respondents' retail customers, the evidence shows and it has been found that, in the luggage departments of each of the stores which Mr. Greene visited, with one exception, respondents' pre-ticket remained intact on each piece of "Lady Baltimore" luggage. In the case of the one exception, respondents' purported regular retail price figure was shown on the ticket. If

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respondents intended that the portion of its pre-ticket containing the purported regular retail price be removed prior to its display for sale to the public, why did respondents place the price tag on the luggage in the first place? Respondents' purpose is self-evident—to make it appear to the store customer that the store was selling the luggage at approximately \$2.00 less than the regular retail price and the customer would believe he or she was getting a reduced price. It is apparent that respondent corporation was aware that its price tags were being used for deceptive purposes.

## CONCLUSIONS OF LAW

The use by respondents of the aforesaid false, misleading and deceptive representations and practices have had and now have the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' luggage by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby, and is being done to competition in commerce. The acts and practices of respondents as found herein were and are to the prejudice and injury of the public and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. This proceeding is in the public interest.

## ORDER

*It is ordered,* That respondents, The Baltimore Luggage Company, a corporation, and its officers and Gertrude Holtzman and Samuel J. Holtzman, individually and as officers of the said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of luggage or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by means of pre-ticketing or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail in the trade area or areas where the representations are made.
2. Furnishing to others any means or instrumentality by or through which the public may be misled as to the usual and customary prices of respondents' merchandise.

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3. Putting any plan into operation through the use of which retailers or others may misrepresent the usual and regular retail price of merchandise.

## OPINION OF THE COMMISSION

By Secret, Commissioner:

The complaint in this matter charges respondents with violation of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents to cease and desist from the practices found to be unlawful. Respondents have appealed from this decision.

Respondents are engaged in the manufacture of luggage which they sell to retail dealers located throughout the United States. This luggage, sold under the trade name "Lady Baltimore", is made in eight sizes and in eight colors. Each piece of luggage, when shipped by respondents, has attached to it a tag or ticket which sets forth the size and color of the article and an amount in dollars and cents opposite the word "Price". On the back of the ticket the various sizes of luggage manufactured by respondents are listed and opposite the name or designation of each size is an amount which purports to be the price of that particular size. The hearing examiner found and respondents conceded that the luggage in question is usually and regularly sold at retail in the New York, Philadelphia and Washington trade areas for approximately \$2.00 less per article than the amount printed on the ticket attached to the article. The hearing examiner further found that items of respondents' luggage bearing these tickets were displayed for sale to the public by retailers in the aforementioned trade areas. He held, therefore, that respondents had falsely represented that the amounts shown on the tickets were the usual and regular retail prices of their luggage in those trade areas and further that respondents had placed in the hands of retailers the means and instrumentality by which the public could be misled as to the usual and regular prices of respondents' merchandise.

We will consider first respondents' argument that the evidence does not support the hearing examiner's finding that pieces of their luggage had the price tickets attached to them when displayed by retailers. This finding is based on the testimony of the Commission's investigator who stated that he had seen the tickets on luggage displayed in retail stores in Philadelphia and Washington. Respondents claim that this testimony is rebutted by the testimony of luggage buyers for two of the stores visited by the investigator. One of the

buyers testified that at the time of the investigator's visit respondents' tickets were displayed on only three or four pieces of luggage and had been removed from the remainder. The other buyer testified, in effect, that respondents' luggage would sometimes "get on the floor without the ticket being torn off." We think this testimony tends to corroborate rather than contradict that of the investigator. Respondents' further statement that they had advised retailers to remove the portion of the ticket showing the "price" of the article cannot overcome the direct evidence that retailers had failed to do so. Respondents' argument on this point is, therefore, rejected.

Respondents next object to the hearing examiner's finding that the "prices" preticketed on their luggage were not the usual and regular prices of such luggage in certain trade areas. They contend that their entire national retail market, rather than specific trade areas, is the proper basis for determining the usual and regular prices of their luggage. They also point out in this connection that approximately 70% of their retail customers, located in 34 states and representing about 62.5% of respondents' total dollar volume of sales, sell the luggage at the preticketed prices. In making this argument, respondents cite as authority for their position the Commission's decisions in the matters of *The Orloff Company, Inc.*, Docket No. 6184; *Newville, Inc.*, Docket No. 6405; *Ma-Ro Hosiery Company, Inc.*, Docket No. 6436; and *Sam S. Goldstein*, Docket No. 7414.

We held in the cases cited by respondents that the preticketing of merchandise with an amount in excess of the price at which such merchandise is usually and regularly sold at retail is an unfair trade practice. The issue of whether the usual and regular retail price should be determined on the basis of a national retail market as opposed to a local retail market was not raised, however. Moreover, we did not hold in those cases, nor have we held in any decision, that it is necessary to consider all retail sales of a product on a nationwide basis in determining whether a certain amount is the usual and regular retail price of that product. Nor have we held that a showing that a pre-ticketed price is the usual and regular price of a product in some sections of the country is sufficient to establish that that price is the usual and regular price of the product throughout the country, including those sections in which it is not the usual and regular price.

Members of the purchasing public in the aforementioned trade areas may well believe that the preticketed product is being sold at a reduced price by the store in which the article is offered for sale and that the higher amount marked on the ticket is the prevailing price for the product elsewhere in the same trade area, not necessarily in some other trade area. Although such a person may be interested in knowing the usual and regular price of merchandise in other

sections of the country, he is particularly interested in knowing whether he is getting a bargain in the trade area in which he is making his purchase. It is our opinion that respondents' price tickets have the capacity and tendency to mislead him in that respect.

Respondents finally contend that there is no evidence to support the hearing examiner's conclusion that their preticketing practices have the capacity to mislead members of the purchasing public into the purchase of substantial quantities of their luggage. This argument must also be rejected. Since it has been repeatedly held that a claim that a product is being offered for sale at a reduced price is an important factor in effecting the sale of that product, we believe that the hearing examiner's conclusion is amply supported by the showing that respondents have misrepresented the usual and regular prices of their products in certain trade areas. Evidence that members of the purchasing public have actually purchased respondents' product as a result of the preticketing practices is not required.

Respondents' appeal is denied, and the initial decision will be adopted as the decision of the Commission.

#### FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs in support thereof and in opposition thereto, and the Commission having rendered its decision denying the appeal:

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

*It is further ordered*, That respondents 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.

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#### IN THE MATTER OF

#### WREN SALES COMPANY, INC., ET AL.

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

*Docket 7731. Complaint, Jan. 6, 1960—Decision, Mar. 15, 1961*

Order requiring Chicago distributors of toys, cameras, electrical appliances, and other merchandise, to cease furnishing operators and members of the public with push cards and descriptive matter for use in the sale of their said merchandise by games of chance or lottery schemes.

*Mr. William A. Somers* for the Commission.

*Bass & Friend*, of New York, N.Y., by *Mr. Edwin Kaplan*, for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is based upon a complaint brought under Section 5 of the Federal Trade Commission Act, charging the respondents with violation of the Federal Trade Commission Act through the use of lottery schemes or games of chance in the sale and distribution of their merchandise.

This proceeding is now before the hearing examiner for final consideration upon the complaint, answer thereto, testimony and other evidence, proposed findings of fact and conclusions of law filed by both parties, and oral argument. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by the parties and oral argument in support thereof, and all findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner having considered the record herein and being duly advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom, and order:

1. Respondent Wren Sales Company, Inc., is an Illinois corporation located at 537 South Dearborn Street, Chicago, Illinois. Respondents Julius Rosenstein, Eleanor Rosenstein and Celia Seiden are individuals and officers of the corporate respondent and have dominant control of the policies and sales activities of the corporate respondent.

2. Respondents are engaged in the sale and distribution in interstate commerce of toys, cameras, electric appliances and other items of merchandise through the use of a plan of merchandising which involves the operation of games of chance or lottery schemes when such merchandise is sold and distributed to the purchasing public. There is no controversy as to the facts in this proceeding. The respondents mailed push cards to members of the public, together with instructions and circulars explaining respondents' plan of selling and distributing their merchandise through the use of said push cards. For example, one of respondents' said push cards contains 37 partially perforated discs, each bearing a different feminine name. Concealed in each disc is the price to be paid by the person selecting the particular name. The names of the purchasers are noted on the reverse of the card in the space provided, opposite the feminine name appearing on the disc. The push card also has a large master seal within which is concealed one of the feminine

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names appearing on the disc. The person selecting the name corresponding with the one under the master seal receives a doll or other item of merchandise allotted to said card. The recipient of the card, after selling the chances, remits the money collected to the respondents and receives both the prize to which the winner is entitled and a duplicate item as compensation for services in selling the chances on the card. The cost of the chances ranges from 1¢ to 39¢. The amount of money the purchaser pays for said chance and whether a purchaser receives an article of merchandise or nothing for the amount paid is thus determined wholly by lot or chance. The articles of merchandise have a value substantially greater than the price paid for each chance or push. In forwarding the prizes to the parties selling the card the respondent generally forwards additional push cards, covering other items of merchandise, to be disposed of in the same manner.

3. The persons to whom respondents furnish said push cards use the same in selling and distributing respondents' merchandise in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of respondents' merchandise.

## CONCLUSIONS

1. The aforesaid acts and practices of the respondents as herein found are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

2. The law is now firmly established that the practice of selling goods through the use of sales plans or methods which involve a game of chance, gift enterprise or lottery, including the use of push cards as in the present case, is contrary to the established public policy of the United States, and the sale and distribution of such devices designed for the purpose of selling merchandise by games of chance or lottery is violative of the Federal Trade Commission Act.<sup>1</sup>

<sup>1</sup> *F.T.C. v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304; *Walter H. Johnson v. F.T.C.* (C.C.A.7) 78 F. 2d 717; *Hofeller v. F.T.C.*, (C.C.A.7) 82 F. 2d 647; *F.T.C. v. F. A. Martocchio Co.*, (C.C.A.8) 87 F. 2d 561; *F.T.C. v. A. McLean & Son, et al.*, (C.C.A.7) 84 F. 2d 910; *Chicago Silk Co. v. F.T.C.*, (C.C.A.7) 90 F. 2d 689; *Minter Brothers, et al., v. F.T.C.*, (C.C.A.3) 102 F. 2d 69; *Helen Ardelle, Inc., et al., v. F.T.C.*, (C.C.A.9) 101 F. 2d 718; *Bunte Brothers, Inc., v. F.T.C.*, (C.C.A.7) 104 F. 2d 996; *National Candy Co., et al., v. F.T.C.*, (C.C.A.7) 104 F. 2d 999; *Ostler Candy Co., et al., v. F.T.C.*, (C.C.A.10) 106 F. 2d 962; *Benjamin Jaffe v. F.T.C.*, (C.C.A.7) 123 F. 2d 814; *McAfee Candy Co., et al., v. F.T.C.*, (C.C.A.5) 124 F. 2d 104; *David Kritzik t/a General Merchandise Co. v. F.T.C.*, (C.C.A.7) 125 F. 2d 351; *Douglas Candy Co. v. F.T.C.*, (C.C.A.8) 125 F. 2d 665; *Philip Harry Koolish, et al., t/a Standard Distributing Co., v. F.T.C.*, (C.C.A.7) 129 F. 2d 64; *Louis Keller, et al., d/b/a Casey Concession Company v. F.T.C.*

3. In a number of cases in which the facts were identical with the facts in the present case, the Circuit Courts of Appeal have condemned the sale of merchandise by means of a game of chance or lottery as being in violation of the Federal Trade Commission Act: *Chicago Silk Co. v. F.T.C.*, (C.C.A.7) 90 F. 2d 689; *Benjamin Jaffe v. F.T.C.*, (C.C.A.7) 123 F. 2d 814; *David Kritzik t/a General Merchandise Co., v. F.T.C.*, (C.C.A.7) 125 F. 2d 351; *Philip Harry Koolish, et al., t/a Standard Distribution Co., v. F.T.C.*, (C.C.A.7) 129 F. 2d 64; *Seymour Sales Co., v. F.T.C.*, (C.C.A.D.C.) 216 F. 2d 633, 635.

4. The contention of the respondents that prior decisions were based to a great extent upon the fact that children were involved, is without merit. The same contention was raised in *Hofeller v. F.T.C.*, (C.C.A.7) 82 F. 2d 647 in which the Court held:

It cannot be denied that the persuasive argument in the *Keppel* case was based on the fact that the customers of the candy were, in the main, children. We are not satisfied, however, that the conclusion there reached is not here applicable. It will be noted that the Supreme Court emphasized the factor of lottery and chance in determining what constituted an unfair method of competition, and it spoke in general terms, at times without limitation to instances where the consumers were children.

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It is quite impossible to escape the conclusion that where a competitive method employs a device whereby the amount of the return is made to depend upon chance, such method is condemned as being contrary to public policy.

In addition, it must be noted that the respondents have overlooked that portion of the present record which shows that in many instances the prizes involved were dolls or toys which appealed to children, and that push cards and other material were actually sent through the mail to a 13-year-old girl, indicating respondents were using a mailing list not confined to adults.

5. The respondents offered the testimony of two psychiatrists to show that a casual gambler was not a psychopathic personality, and

(C.C.A.7) 132 F. 2d 59; *Wolf v. F.T.C.*, (C.C.A.7) 135 F. 2d 564; *Jaffe v. F.T.C.*, (C.C.A.7) 139 F. 2d 112; *Lee Boyer's Candy v. F.T.C.*, (C.C.A.9) 128 F. 2d 261; *Sweets Company of America, Inc., v. F.T.C.*, (C.C.A.2) 109 F. 2d 296; *Deer, et al., v. F.T.C.*, (C.C.A.2) 152 F. 2d 65; *Modernistic Candies, Inc., et al., v. F.T.C.*, (C.C.A.7) 145 F. 2d 454; *Chas. A. Brewer & Sons v. F.T.C.*, (C.C.A.6) 158 F. 2d 74; *Consolidated Mfg. Co., et al., v. F.T.C.*, (C.C.A.4) 199 F. 2d 417; *Globe Cardboard Novelty Co., Inc., et al., v. F.T.C.*, (C.C.A.3) 192 F. 2d 444; *Esther Zitserman t/a J. M. Howard Co., v. F.T.C.*, (C.C.A.8) 200 F. 2d 519; *Bernice Feitler, et al., t/a Gardner & Company v. F.T.C.*, (C.C.A.9) 201 F. 2d 790; *Gay Games Inc., et al., v. F.T.C.*, (C.C.A.10) 204 F. 2d 197; *Seymour Sales Co., et al., v. F.T.C.*, (C.C.A.D.C.) 216 F. 2d 633; *Hamilton Mfg. Co. v. F.T.C.*, (C.C.A.D.C.) 194 F. 2d 346; *Lichtenstein, et al., v. F.T.C.*, (C.C.A.9) 194 F. 2d 607; *Berk Mfg. Co., Inc., et al. v. F.T.C.*, (C.C.A.9) 194 F. 2d 611; *U.S. Printing & Novelty Co., Inc., et al., v. F.T.C.*, (C.C.A.D.C.) 204 F. 2d 737; *Surf Sales Co., et al., v. F.T.C.*, (C.C.A.7) 259 F. 2d 744.

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offered the testimony of a former City Magistrate of New York, who had presided in the so-called Gambler's Court, to show that casual gambling was not contrary to public policy. Under the decisions hereinbefore referred to, this proffered testimony is not relevant or material to the issues in this proceeding. Testimony of witnesses as to how, in their opinion, the question should be determined would be useless and improper. "The Supreme Court has, in the *Keppel* case, declared the law on this subject, not for one State or one Circuit only, but for the entire United States, . . ." *Helen Ardelle, Inc., et al., v. F.T.C.*, (C.C.A.9) 101 F. 2d 718, 720.

## ORDER

*It is ordered*, That the respondents Wren Sales Company, Inc., a corporation, and its officers, and Julius Rosenstein, Eleanor Rosenstein and Celia Seiden, individually and as officers of said corporation, and their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of toys, cameras, electrical appliances and other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to, or placing in the hands of others, push cards or any other lottery device, either with merchandise or separately, which are designed or intended to be used in the sale of respondents' merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.
2. Selling or otherwise disposing of any merchandise, wares or goods by means of a game of chance, gift enterprise, or lottery scheme.

## OPINION OF THE COMMISSION

By Anderson, Commissioner:

The complaint in this matter charges respondents with violation of the Federal Trade Commission Act by selling and distributing merchandise through use of sales plans involving the operation of games of chance, gift enterprises or lottery schemes. The hearing examiner held in his initial decision that the allegations of the complaint were sustained by the evidence and ordered respondents to cease and desist from the practices found to be unlawful. Respondents have appealed from that decision.

The principal argument presented on this appeal is that a distinction should be made between "casual" gambling and "professional" gambling in matters involving the sale of merchandise by a game of

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chance or lottery scheme. Respondents argue in this connection that "casual" gambling, as distinguished from "professional" gambling, is not contrary to public policy and that a sales scheme which involves only the former is not an unfair trade practice. They then contend that the sale of their merchandise by use of push cards does not constitute "professional" gambling since the push card is not designed for exposure to the general public and since the seller of the chances does not expect to make a profit.

Respondents' argument ignores both the facts of record and the established law on the subject of lottery merchandising. In the first place, the record clearly discloses that respondents distribute their push cards to the general public and that the seller of the chances does expect to make a profit and is, in fact, compensated for his efforts. In the second place, it makes no difference whether the sale of respondents' merchandise through use of push cards may be characterized as "casual" gambling or "professional" gambling. The unfairness of the method lies in the fact that it employs the element of chance as a factor in the sale of merchandise to the public. This method of selling, as well as the practice of furnishing to others devices designed or intended to be used in the sale of merchandise to the public by chance or lottery, have been repeatedly and consistently condemned by the courts during the past 27 years. *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934); *Federal Trade Commission v. F. A. Martoccio Co.*, 87 F. 2d 561 (8th Cir. 1937); *Benjamin Jaffe v. Federal Trade Commission*, 123 F. 2d 814 (7th Cir. 1941); *Lichtenstein v. Federal Trade Commission*, 194 F. 2d 607 (9th Cir. 1952); *Gay Games, Inc. v. Federal Trade Commission*, 204 F. 2d 197 (10th Cir. 1953); *Bernard Rosten v. Federal Trade Commission*, 263 F. 2d 620 (2d Cir. 1959). Respondents' argument on this point is, therefore, rejected.

We have considered the other arguments advanced by respondents and are of the opinion that they are also without merit. Having examined the entire record, we find no error in the ruling made by the hearing examiner during the course of this proceeding, and we are in complete accord with his findings of fact and conclusions of law as set forth in the initial decision.

Respondents' appeal is denied and the initial decision is adopted as the decision of the Commission.

#### FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition

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thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

*It is ordered*, That respondents 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.

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IN THE MATTER OF  
KAISER STEEL CORPORATION

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF  
SEC. 7 OF THE CLAYTON ACT

*Docket 8027. Complaint, June 27, 1960—Order, Mar. 16, 1961*

Order dismissing without prejudice complaint charging the second largest producer of steel in the western States with violation of Sec. 7, Clayton Act, by acquisition of 45% of the voting stock of a substantial competitor.

Before *Mr. Edward L. Creel*, hearing examiner.

*Mr. R. D. Young* and *Mr. M. E. Richardson* for the Commission.

*Thelen, Marrin, Johnson & Bridges*, of San Francisco, Calif.,  
for respondent.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

This matter having come on for hearing by the Commission upon its own motion, and the Commission having determined that the