

not participating by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

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IN THE MATTER OF

JONAS GERSON TRADING AS HAVEN COMPANY

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

*Docket 8470. Complaint, Feb. 28, 1962—Decision, Mar. 22, 1963*

Order requiring a Chicago distributor of numerous articles of merchandise, including wallets, pens, cameras, carving sets, and umbrellas, to cease supplying purchasers of his merchandise means of selling it by use of a lottery scheme, in that a sales catalog he distributed to them contained a pull card for use in the sale of the articles.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jonas Gerson, an individual, trading as Haven Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

## Complaint

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PARAGRAPH 1. Respondent Jonas Gerson is an individual trading as Haven Company, with his principal office and place of business located at 849 West Washington Boulevard, in the city of Chicago, State of Illinois.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution, through others, of numerous articles of merchandise including wallets, pens, cameras, carving sets, and umbrellas.

PAR. 3. In the course and conduct of his said business, respondent causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business, as described above, the respondent sells and distributes said articles of merchandise by means of a lottery scheme. Respondent causes to be distributed to members of the public, representatives and salesmen, and prospective representatives and salesmen, certain advertising literature including a sales catalog. Respondent's merchandise is distributed to the purchasers thereof in the following manner:

A portion of said sales catalogs consists of a list on which there are designated a number of items of merchandise and the prices thereof. Adjacent to the list is printed and set out a device commonly called a pull card. Said pull card consists of a number of tabs, under each of which is concealed the name of an article of merchandise and the price thereof. The name of the article of merchandise and the price thereof are so concealed that purchasers, or prospective purchasers, of the tabs or chances are unable to ascertain which article of merchandise they are to receive or the price which they are to pay until after the tab is separated from the card. When a purchaser has detached the tab and learned which article of merchandise he is to receive and the price thereof, his name is written on the list opposite the named article of merchandise.

When the person or representative operating the pull card has succeeded in selling all of the tabs or chances, collected the amounts called for, and remitted the amount collected to the respondent, the said respondent thereupon ships to said operator, salesman or representative the merchandise designated on said card, together with a premium as compensation for operating the pull card and selling the said merchandise listed thereon. The said operator of the card delivers the merchandise to the purchasers of tabs from said pull cards in

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accordance with the list filled out when the tabs were detached from the pull card.

PAR. 5. The persons to whom respondent furnishes the said pull cards use the same in purchasing, selling and distributing respondent's merchandise in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of his merchandise in accordance with the sales plan hereinabove set forth.

The sale of merchandise by the aforesaid method also constitutes the sale of merchandise by means of a gaming device inasmuch as the identity of the article involved and the amount of money to be expended are unknown to the purchaser or participant until the tab is removed from the sales catalog or card.

The use by respondent of the aforesaid sales plan in connection with the sale of his merchandise is a practice which is contrary to established public policy of the Government of the United States and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 6. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

*Mr. DeWitt T. Puckett* and *Mr. Thomas J. Whitehead* supporting the complaint.

*Mr. Lester P. Schwartz* and *Mr. Joseph F. Wagner*, of New York, N.Y., for respondent.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

OCTOBER 9, 1962

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on February 28, 1962, charging him with engaging in unfair acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act by the use of a sales plan, in connection with the sale of his merchandise, constituting a lottery or gaming device. A copy of said complaint, with notice of hearing, was duly served upon respondent. Respondent thereafter appeared by counsel and filed answer denying, in substance, having engaged in the illegal practices charged.

Hearings on the charges were thereafter held on May 23, 1962, and July 24, 1962, in New York, New York, and Indianapolis, Indiana,

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respectively, at which testimony and other evidence were offered in support of, and in opposition to, the allegations of the complaint, said evidence being duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of all the evidence and pursuant to leave granted by the undersigned, proposed findings, conclusions of law and an order, and/or briefs were filed on August 31, 1962, and September 4, 1962, by counsel supporting the complaint and respondent respectively.

After having reviewed the entire record in this proceeding, and the proposed findings and conclusions and supporting briefs,<sup>1</sup> the undersigned finds that this proceeding is in the interest of the public and, based on the entire record and from his observation of the witnesses, makes the following:

## FINDINGS OF FACT

1. Respondent Jonas Gerson is an individual trading as Haven Company, with his principal office and place of business located at 849 West Washington Boulevard, in the city of Chicago, State of Illinois.

2. Respondent is now, and for some time last past has been, engaged in the sale and distribution, through others, of numerous articles of merchandise including wallets, pens, cameras, carving sets, and umbrellas.

3. In the course and conduct of his said business, respondent causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. Respondent's merchandise is sold by mail through members of the public whose names are obtained from telephone directories and other directories and lists. Respondent mails to such individuals certain advertising literature, including a sales brochure, inviting them to distribute his merchandise in accordance with the plan therein described, and to receive in return a "free" gift or premium. Typical of the advertising literature used by respondent in the sale of his merchandise is a four-page illustrated brochure, as follows:

The first three pages and a portion of the fourth page contain

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<sup>1</sup> Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

illustrations of so-called "gifts" or "premiums" which can be obtained by distributing the various articles of merchandise listed on the fourth page. The recipient of the brochure is invited to sell the articles listed on the fourth page to his friends and neighbors, in accordance with the plan therein described, advising him that: "Each article is an outstanding value selected from hundreds of items and its price is clearly printed UNDER THE RED PULL RECEIPT ON PAGE 4". The person acting as sales representative or distributor is advised that upon disposing of all of the articles listed on page 4 he has the option of receiving one of the premiums or gifts listed or, in lieu thereof, the sum of \$7.50 in cash.

The fourth page of the brochure contains illustrations of 12 articles, which are stated to be "Outstanding Values", and which "[y]our friends will be delighted to buy \* \* \* as all are WORTH MUCH MORE!" In the lower right-hand corner of the fourth page below the illustrations there appears a device which is commonly called a pull card. This is the device referred to on the first page of the brochure as "THE RED PULL RECEIPT ON PAGE 4". The device consists of a series of 12 separate tabs, arranged in four vertical columns, each column containing three tabs. The tabs are red in color and each contains the legend: "PULL HERE". Underneath each pull tab, and invisible until the perforations are broken and the tab is lifted, is the first name of a person, a price and the name of one of the articles illustrated above the pull card. Thus, under one of the pull tabs the following appears:

ANN—97¢

Pair of Lamps

Each pull tab corresponds to a different one of the 12 articles illustrated on the page.

To the left of the pull card is a list describing each of the articles illustrated on the page. The list is arranged in three vertical columns, with the description of the article appearing in the third column. The first column, which is headed "Price", contains the price of each of the articles described in the third column, the price being preceded by a person's first name. Thus, for the article which is partially described as: "A pair of two-way copperplate Hurricane Lamps", the price column reads: "ANN—97¢". The prices listed vary from a low of 97 cents (Ann) for the Hurricane Lamps, to a maximum of \$1.98 (identified as "KEN") for an umbrella. Each of the first name designations and accompanying price corresponds to an identical name and price appearing on the back of each pull tab. Between the first, or "Price" column, and the third column describing each article, is a

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column headed "Name of Purchaser" which contains blank spaces for writing in the name of the purchaser of each article.

Immediately above the pull-tab device there appears the following note:

NOTE: This is a sales sheet. It is not a punchboard or a gambling device. Do not construe or accept for use as a gambling device.

The list of names on the pull slip and corresponding names on list shown to left are alphabetically arranged and are for the purpose of making it easier for the seller to list customers' names in proper spaces.

Here's how it works. *You may purchase from the list shown on the left where the merchandise is described or you may pull any one of the slips below on the back of which is printed the article and price. If not satisfied with the item you picked you are not obligated to buy it.* All merchandise is fully guaranteed to be as represented, and is sold with a money back guarantee. [Emphasis supplied.]

Immediately above the "NOTE" and between it and the illustrations of the articles there appears the following additional legend:

This sheet is given to you absolutely free. If you wish you can use this as a sales sheet. It can be used with any merchandise. Prospective purchaser is not obligated to pay unless he desires to do so. If you desire to purchase merchandise from us you can do so at any time.

The total price of all 12 articles listed in the brochure is \$19.95. The prospective sales distributor is advised, in a further note appearing in connection with the list of articles, that respondent is "able to give these values because our overhead is low based on uniformity of packing." The distributor is therefore requested to "try to sell the 12 useful items" described. While he is also advised that if he is unable to sell all 12 items his order will be filled and that he will receive a 25% allowance for himself on the articles sold, the order blank provided in the brochure is primarily for use in connection with orders for all 12 items as a package.

The record discloses that normally orders received by respondent from his sales distributors are for one each of all 12 items listed in the brochure and that the distributor normally receives a gift or premium for himself. Upon receipt of the articles ordered the distributor undertakes to distribute them to the customers to whom he sold them, having retained a list of such customers on the form provided by respondent.

5. Respondent contends that the sale and distribution of his merchandise in accordance with the plan above described does not constitute the use of a lottery scheme or gaming device since, (a) the "prospective purchaser \* \* \* has the option to buy the merchandise with or without the use of the pull tab", and (b) even where he does make use of the pull tabs there is no game of chance involved since

he "is not obligated to buy what he pulls". Respondent's contentions in this respect are based on the note and explanatory material appearing above the pull-tab device, which purport to give the purchaser these options. In the opinion of the examiner respondent's argument is lacking in merit since, (a) the so-called "sales sheet" is obviously designed for use as a gaming device, and (b) the evidence discloses that it is normally used as a gaming device and that the explanatory material appearing thereon is largely overlooked or ignored in practical operation.

While the sales brochure does contain the relatively obscure statement that the distributor may use it as "a sales sheet", its principal appeal is centered around the pull-tab device. On the very first page the prospective distributor's attention is immediately and prominently directed to "THE RED PULL RECEIPT ON PAGE 4". The distributor is repeatedly encouraged to dispose of the complete assortment of 12 articles for the total price of \$19.95, so as to be able to obtain his gift or premium.<sup>2</sup> This would ordinarily be accomplished through the use of the pull-tab device as the simplest expedient for avoiding duplicate orders for some items and a lack of orders for others. The pull-tab device is presented to him as the most obvious way of disposing of the merchandise "in practically no time at all" and of securing a gift for himself, without going through the tedious process of trying to sell it directly item by item.

The testimony concerning the actual use of the brochure by sales distributors discloses that in each instance the sales distributor disposed of the merchandise by having prospective customers pull the tabs. Almost invariably the solicitors approached prospects not as salesmen seeking to sell merchandise, but by exhibiting the pull-tab device and asking the person whether he would like to "take a chance". This uniformity of practice among the distributors is readily understandable in view of the obvious appeal made in the brochure to the use of the pull-tab device. It also reflects the normal reaction to be expected, given the type of solicitor through whom respondent distributes its merchandise and the type of customer to whom it is ultimately sold. Many of the distributors and their customers are factory workers or housewives with a relatively low level of education and sophistication. Frequently, they have either sold or purchased so-

<sup>2</sup> On the first page of the brochure the prospective distributor's attention is referred at least six times to the "12 articles" or "complete assortment of 12 articles" and he is several times informed that he must obtain \$19.95 to receive his gift. The order blank on page 2 contemplates the remittance of \$19.95, unless the distributor wishes to deduct a cash premium of \$7.50 or to pay for the articles C.O.D. The blank spaces for filling in the name of the purchaser on page 4, provide only one blank for each customer per article. The distributor is also advised on page 4 that respondent is able to give such excellent values "because our overhead is low based on uniformity of packing," and the distributor is urged: "Do try to sell the 12 useful articles." [Emphasis supplied.]

called chances through punchboard, push card or similar gambling devices, or have seen such devices in use. Such persons would readily associate respondent's pull-tab device with other gambling devices which they had seen and would be apt to overlook, ignore or not understand explanatory material of the type used in connection with respondent's pull-tab device.<sup>3</sup>

While the note also purports to offer the prospective customer (as distinguished from the solicitor) the option "to purchase from the list shown on the left \* \* \* or you may pull any one of the slips below on the back of which is printed the article or price", it is clear that this option has no practical significance in the context in which the customers are solicited. Given the physical appearance of respondent's pull-tab device and its similarity to other gambling devices, it is inevitable that those interested in using it will do so by pulling the tabs, particularly where they are solicited on the basis of "taking a chance". The fact is that each of the persons to whom respondent's solicitors sold any merchandise did so by using the pull tabs, rather than by selecting an article he wished to purchase. Their reactions are in accord with what would be expected of the average person using the brochure who, according to respondent's own expert witness, Dr. Wladimir G. Eliasberg, "would find the tabs here and would pull one".<sup>4</sup>

Respondent's further contention that even where the pull-tab device is used the customer will not regard it as a game of chance since he "is not obligated to buy what he pulls", is based on the assumption that the statement to this effect, which appears in the note, will invariably come to the attention of the customer. Respondent apparently relies on the testimony of Dr. Eliasberg, who expressed the opinion that after a customer had pulled an article which he could not use he would then read the note to find out what alternatives he had. This opinion was based primarily on Dr. Eliasberg's personal reaction in examining the device and not on any scientific study of persons using such devices. The examiner is satisfied that the reaction of Dr. Eliasberg (who admittedly had never previously used such devices) would not be the same as the average factory worker or housewife, many of whom have had prior experience in "taking a chance" and, generally speaking, lack Dr. Eliasberg's sophistication and perspicacity in looking for alternatives.

<sup>3</sup> One of the solicitors testified that he had not seen the explanatory note, and he instinctively proceeded to use the device in the same manner as other similar devices he had seen "around the shop," by asking fellow employees "to take a chance" and pull the tabs (R. 107). Another solicitor, who had seen the note but had elected to use the pull-tab device in selling the merchandise, when asked why she had not tried to sell the merchandise directly, replied: "It never entered my mind to sell it outright. I just sold it with the tabs." (R. 124.)

<sup>4</sup> R. 49.

Such persons, as the evidence of actual usage discloses, look at the device in a cursory manner and do not take the trouble to read any notes appearing in fine print.<sup>5</sup> Each of the customers who purchased a "chance" from the solicitors who testified in this proceeding, invariably accepted the article which he or she had pulled, even though advised in some instances by the solicitor that he or she was not obligated to do so. The examiner is satisfied that in the latter instances the customers either did not comprehend what they were being told or felt honor bound not to welch after having "taken a chance".<sup>6</sup>

It is clear from the pull-tab device and from the evidence concerning its use that if not for the note and explanatory material the public would regard respondent's sales brochure as involving some type of lottery or gaming device, inasmuch as the identity of the article to be received and the amount of money to be expended are unknown to the purchaser or participant until the tab is removed from the pull-tab device. This was conceded by respondent's expert witness, Dr. Eliasberg, who testified that anyone looking at the brochure without observing the note would "associate it with some type of lottery device".<sup>7</sup> The examiner is satisfied from the evidence as a whole, including that discussed above, that generally speaking the public would not notice or understand the explanatory material and would, despite it, regard respondent's so-called sales sheet as a lottery or gaming device. It is, accordingly, concluded and found that respondent sells and distributes articles of merchandise by means of a lottery scheme or gaming device, and that he supplies to and places in the hands of others the means of conducting lotteries or games of chance in the sale of his merchandise.

#### CONCLUSIONS

1. It is now well settled by controlling decisions too numerous to mention that the practice of selling goods by means of a plan or method which involves the use of a gaming device or lottery is a practice which is contrary to the public policy of the United States, and that where such practice occurs in commerce it is in violation of

<sup>5</sup> One of the solicitors, when asked how long customers looked at the device, testified (R. 142):

"They didn't take too much time. A lot of them were on the job and just looked at it for a second or two. Or they would look at it at home. I would go over and visit the neighbors and sit and talk with them, and they'd take a chance on it."

<sup>6</sup> The attitude of such people is typified by that of one of the solicitors who, upon being asked whether he would give a customer something else if he pulled an article he didn't want, replied (R. 111):

"A. No, it wouldn't be right.

"Q. In what respect?

"A. He pulled a chance here and he had to keep it."

<sup>7</sup> R. 64.

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the Federal Trade Commission Act. See, e.g., *FTC v. Keppel & Bro.*, 291 U.S. 304 [2 S. & D. 259]; and *Surf Sales Co. v. FTC*, 259 F. 2d 744 [6 S. & D. 453] (7th Cir., 1958). It is also well settled that the Commission's jurisdiction is not limited to those directly engaged in conducting the game of chance or lottery in connection with the sale or distribution of merchandise to the ultimate consumer, but also includes those who supply the means or instrumentality for others to conduct same. *Chicago Board Co. v. FTC*, 253 F. 2d 78 [6 S. & D. 385] (7th Cir., 1958); *Consolidated Manufacturing Co. v. FTC*, 199 F. 2d 417 [5 S. & D. 426] (4th Cir., 1952); and *Modernistic Candies v. FTC*, 145 F. 2d 454 [4 S. & D. 288] (7th Cir., 1944). Consequently, it is immaterial that respondent "does not have control over the purchaser or the actual consumer of the merchandise \* \* \* [but] is merely a seller of goods by means of a sales sheet",<sup>8</sup> since he is the author of a plan, and supplies the means or instrumentality, for conducting a game of chance or lottery. Likewise immaterial is the fact that some distributors may have offered prospective customers "the opportunity of buying the merchandise without the use of the pull-tab",<sup>9</sup> since the pull-tab device is clearly "designed to serve as an instrumentality for the sale of articles of merchandise by lottery methods".<sup>10</sup> Its use for that purpose being illegal, it is of no consequence that some distributors may conceivably elect not to use the illegal device. Furthermore, the evidence discloses that in actual practice it is generally used in the manner for which it is designed.

2. The principal feature which purports to distinguish respondent's device from the great bulk of punchboards, pushcards, pull cards and similar devices which have been held to be illegal is the fact that the note appearing above it purports to advise the user that he is not obligated to accept the article designated by the tab pulled by him. As has already been found, such note is overlooked or ignored in practice. In the opinion of the examiner it is a mere subterfuge intended to avoid responsibility for the obvious illegality of the pull-tab device. Similar or identical notes have already been held by the Commission and the courts not to confer a cloak of immunity on an otherwise illegal gambling device. *Wolf v. FTC*, 135 F. 2d 564 [3 S. & D. 564] (7th Cir., 1943); *E. & J. Distributing Co. v. FTC*, 193 F. 2d 179 [5 S. & D. 349] (2d Cir., 1952), *cert. denied*, 344 U.S. 823.

3. Respondent's defense rests principally on *J. C. Martin Corp. v. FTC*, 242 F. 2d 530 [6 S. & D. 251] (7th Cir., 1957), involving a pull-tab device and note similar to that used in the instant proceeding and

<sup>8</sup> Respondent's Brief, p. 4.

<sup>9</sup> *Id.* at p. 2.

<sup>10</sup> *Globe Cardboard Novelty Co. v. FTC*, 192 F. 2d 444, 448 [5 S. & D. 342] (3d Cir., 1951); *Seymour Sales Co. v. FTC*, 216 F. 2d 633, 636 [5 S. & D. 700] (D.C. Cir., 1954).

in the *Wolf* and *E. & J. Distributing Co.* cases. The court in the *J. C. Martin* case held that the device there involved did not constitute an illegal lottery, reversing the contrary holding of the Commission. Respondent's brochure and sales plan is admittedly patterned after that in the *J. C. Martin* case.<sup>11</sup> Counsel supporting the complaint contend that the *J. C. Martin* holding is in conflict with that in the *Wolf* and *E. & J. Distributing Co.* cases and should not be followed.

In considering whether to apply the holding in the *J. C. Martin* case to the instant case, it should be noted at the outset that it was not based on the fact that the note purported to give a prospective customer the option of purchasing an article outright, rather than utilizing the tab device, and advised him that he was not obligated to buy the article selected by a tab. The court, agreeing with the holding in the *Wolf* case, concluded that: "The objection to the pull tab scheme cannot be removed by offering the individual an unobjectionable alternative". Its reversal of the Commission's holding was based, rather, on the ground that the device did not constitute a lottery scheme since "every participant \* \* \* will in any event receive the equivalent of the amount contributed by him and he is not under any hazard of pecuniary loss, nor offered the chance of receiving something of more value than the amount contributed by him".

It may be argued, as do counsel supporting the complaint with considerable persuasiveness, that the holding in the *J. C. Martin* case is directly contrary to that in the *Wolf* and *E. & J. Distributing Co.* cases (both of which sustained the Commission's position), and that therefore the *J. C. Martin* case should not be followed here. However, it is the opinion of the examiner that the *Martin* case is, in any event, distinguishable from the other two cases and from the situation in the instant case. The court in the *Martin* case itself distinguished its holding from that in the *Wolf* case on the ground that the examiner had dismissed the following allegations of the complaint:

Some of [petitioners'] articles of merchandise have purported and represented retail values greater than the prices designated for them, but are distributed to the consumer for the price designated on the tab which he pulls. The prices of others of the articles are higher in proportion than the articles first mentioned. The apparent greater values of some of said articles induces members of the purchasing public to purchase the tabs or chances in the hope that they will receive articles of merchandise of greater value than the designated prices to be paid for same.

<sup>11</sup> Although a resident of Brooklyn, New York, respondent established his place of business in Chicago in order to take advantage of the Seventh Circuit Court of Appeal's decision in the *J. C. Martin* case. Presumably, he did not do so in New York, where he continues to reside, because of the contrary holding of the Second Circuit in the *E. & J. Distributing Co.* case.

Noting that the examiner had "found that there was no evidence supporting these allegations", the court concluded that "the *Wolf* case is not controlling". In the instant proceeding prospective participants were advised in the brochure that the items which were being offered were "WORTH MUCH MORE" and were "OUTSTANDING VALUES". From the manner in which the articles were illustrated in the brochure and the description of them the impression was created that they were worth more than the amounts indicated by the tabs. There is no evidence in the record as to the actual value of these articles, although there is some indication of complaints by customers that upon pricing similar articles in the store they found them to sell for less than the prices charged by respondent. In any event, it seems clear that participants in the scheme were induced to "take a chance" because of the impression that they might receive something having a value greater than the price they paid.

The *J. C. Martin* case may also be distinguished from the situation in the instant case for the reason that the scheme there used by respondents was found to be illegal on the narrow ground that it constituted a lottery. The examiner there specifically found that respondents' sales methods "involve and contemplate the use of lottery devices", and the Commission affirmed, per curiam, "the hearing examiner[']s holding that the respondents have violated Section 5 of the Federal Trade Commission Act by supplying to others lottery devices for use in the sale of their merchandise". In reversing the Commission, the Court of Appeals considered the scheme solely in terms of whether it contained all of the elements of a lottery in the technical sense, and concluded that it did not.

The complaint in the instant proceeding challenges respondent's practices not merely as constituting a lottery, but as involving a "gaming device". It is clear that a device which is calculated to appeal to the public's gambling instincts may be considered an unfair act or practice, within the meaning of the Federal Trade Commission Act, even though it may not technically be a lottery within the meaning of some penal or other statute. As stated in *Modernistic Candies, Inc. v. FTC*, 145 F. 2d 454, 455 [4 S. & D. 291]:

We think the Commission \* \* \* has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandise by gambling. \* \* \* Merchandise by gambling should not be divided into insulated acts, which appear innocent when examined separately.

The court in that case held to be illegal the distribution of a punch-board device "designed, intended and conducive to gambling; its use suggests and was intended to encourage gambling". Similarly, in *Seymour Sales Co. v. FTC*, 216 F. 2d 633 [5 S. & D. 700] (CA DC,

1954), push card devices were held to be illegal because they were “designed to and in fact are used to suggest and encourage merchandising by gambling”. The court in *Globe Cardboard Novelty Co. v. FTC*, 192 F. 2d 444 [5 S. & D. 342] (3d Cir., 1951) declared, broadly, that it is “contrary to the public policy of the United States for sellers to market their goods *by taking advantage of the consumer’s propensity to take a chance*” (emphasis supplied). Relying on such holdings, it was held in the special concurring opinion in *Calvine Cotton Mills*, 51 FTC 294, that a sales promotional plan which is “intended to appeal to the gambling instincts of purchasers and prospective purchasers [is] contrary to public policy” and therefore is illegal under the Federal Trade Commission Act, not “*because it is a technical lottery, but because it is a method of merchandising which constitutes an unfair trade practice*”.

The evolution in the definition of the practices intended to be outlawed by the Federal Trade Commission Act is indicative of a Congressional intent that Section 5 should not be given a grudging or niggardly interpretation. The original bill which became the Federal Trade Commission Act declared “unfair competition” to be unlawful. As finally enacted, this term was changed to read “unfair methods of competition”. In referring to this change in terminology, the Supreme Court noted that “it was because the meaning which the common law had given to those words was deemed too narrow that the broader and more flexible phrase ‘unfair methods of competition’ was substituted” (*FTC v. R. F. Keppel & Bro.*, 291 U.S. 304, 311) [2 S. & D. 259, 263]. The court also stated (p. 313) that—

A method of competition which casts upon one’s competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, *even though it is not criminal*, was thought to involve the kind of unfairness at which the statute was aimed. [Emphasis supplied.]

Under the original provision of Section 5, which was limited to outlawing “unfair methods of competition”, it was held that Congress intended to vest in the Commission jurisdiction not merely over practices which were considered to be unfair at common law or under the Sherman Act, but “adequate powers to hit at every trade practice then existing [when the law was passed] or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages” (*FTC v. Cement Institute*, 333 U.S. 683, 693 [4 S. & D. 765]). Because of the fact that this broad concept of the Commission’s jurisdiction was held to be subject to the limitation that the unfair practices must have a substantial effect on competition (*FTC v. Raladam*, 283 U.S. 643) [2 S. & D. 116], the Federal Trade

Commission Act was amended in 1938 so as to outlaw not merely "unfair methods of competition", but also "unfair or deceptive acts or practices", in commerce. It seems clear that by thus broadening the Commission's jurisdiction, Congress did not intend to give the Commission any lesser jurisdiction over trade practices which, while not directly related to competition, are unfair because of their effect on the public or on public morals. Consequently, a method of competition which appeals to the public's baser gambling instincts would seem to clearly fall within the Commission's jurisdiction, irrespective of whether it technically constitutes a lottery or otherwise violates the penal laws.

Respondent contends that it makes no difference that the complaint attacks its pull-tab device as constituting a "gaming device", as well as a "lottery" scheme, since it does not fall into either category. It is respondent's position that the two terms "have similar and analogous meanings" and that in both instances the element of chance must be present. Respondent argues that there is no element of chance present here since each participant will receive an article of value equivalent to the amount contributed by him, and he is under no hazard of pecuniary loss nor given a chance to receive something of greater value than he contributed.

In the opinion of the examiner respondent's position is based on erroneous legal and factual assumptions, and is without merit. In the first place, the mere fact that the participant receives an article of value for his contribution does not negate the existence of the element of chance. As stated in *Wolf v. FTC*, 135 F. 2d 564, 566 [3 S. & D. 564]:

\* \* \* there can be no serious doubt that a method of distribution which contemplates the offering to the purchaser of an opportunity to pull a chance to see which article of a list of 20 he may buy constitutes a game of chance, even though each purchaser does receive an article of value for his purchase (*Keller v. Federal Trade Commission*, 132 F. (2d) 59) [3 S. & D. 520].

In the second place, there is no record basis for the assumption that each participant will receive an article equivalent in value to what he contributed. As already found, respondent sought to create the impression that the articles were of greater value than the amounts being paid. Furthermore, the articles were being offered at varying prices and had varying values, and the record does not establish that the value of each article necessarily corresponds to the price indicated by the pull tab. Finally, and most important, value is a relative term and must be considered not merely in terms of price, but in terms of its utility to the individual making the pull. For example, while the ash tray and lighter offered by respondent may

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have a retail value of \$1.59 (the price indicated on the pull tab), it may be valueless to a nonsmoker who pulls that tab. Similarly, the costume jewelry may be worth, at retail, its indicated price of \$1.79, but it may be worthless to a bachelor with no female entanglements.

Whatever may be the reaction of those trained in legal niceties, it is clear that the public—"that vast multitude which includes the ignorant, the unthinking, and the credulous",<sup>12</sup> would regard respondent's pull-tab device as involving a game of chance. The record establishes that those who did use the pull tabs here did so not because they expected to receive a particular article having a value equivalent to what they paid, but because they wanted to "take a chance". The elements of chance involved in their participation were the article they would receive and the price they would pay. These were unknown to them before they pulled the tabs, and it was this uncertainty which aroused their curiosity and resulted in their participation. This clearly constitutes participation in a game of chance,

4. It is concluded that respondent's sales plan, as above found, involves the use of a lottery scheme or gaming device in connection with the sale of respondent's merchandise. The use of said plan is, accordingly, contrary to the established public policy of the United States and constitutes an unfair act or practice within the intent and meaning of the Federal Trade Commission Act.

5. It is further concluded that the acts and practices of respondent, as above found, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

## ORDER

*It is ordered,* That respondent Jonas Gerson, trading as Haven Company or under any other name or names, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of wallets, pens, cameras, carving sets, and umbrellas, or 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, pull cards or any other device or devices 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.

<sup>12</sup> Positive Products Co. v. FTC, 132 F. 2d 165, 167 [3 S. & D. 528] (7th Cir. 1942).

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2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.
3. Supplying to or placing in the hands of others pull cards or any other device or devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a chance or gaming device.
4. Selling or otherwise disposing of any merchandise by means of a chance or gaming device.

## OPINION AND FINAL ORDER

By the Commission:

This case is before the Commission for review of the hearing examiner's initial decision, filed October 9, 1962, finding that respondent engaged in unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act, by the use of a sales plan constituting a lottery or gaming device.

The questions raised by respondent on this review are narrow. Respondent makes no substantial attack on the evidentiary basis for the findings of fact made by the examiner; nor does he make specific objection to any provision of the cease and desist order contained in the initial decision. Relying on the decision of the Court of Appeals for the Seventh Circuit in *J. C. Martin Corp. v. FTC*, 242 F. 2d 530 [6 S. & D. 251] (1957), respondent argues that his sales plan was patterned upon that upheld by the court in the *Martin* case, and that it follows therefore that his plan is likewise legal. The fallacy in respondent's argument, as the hearing examiner pointed out, is that the proof in this record does not have the deficiencies found by the Seventh Circuit to be present in the *Martin* case. We shall not repeat the detailed respects in which, as the examiner found, the proof established that respondent's pull-tab device was, in the context of actual use, an illegal game of chance. The *Martin* case held only that the device there involved was not a lottery because the element of prize, essential to a lottery scheme, was not sufficiently proved. On the facts of this record, the case is clearly distinguishable from *Martin* and is governed by *Wolf v. FTC*, 135 F. 2d 564 [3 S. & D. 564] (7th Cir., 1943), and *E. & J. Distributing Co. v. FTC*, 193 F. 2d 179 [5 S. & D. 349] (2nd Cir., 1952), *cert. denied* 344 U.S. 823. Accordingly, the Commission adopts the findings of fact, conclusions of law, and order contained in the initial decision.

## FINAL ORDER

*It is ordered*, That respondent Jonas Gerson, trading as Haven Company or under any other name or names, his representatives,

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## Complaint

agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of wallets, pens, cameras, carving sets, and umbrellas, or 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, pull cards or any other device or devices 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 by means of a game of chance, gift enterprise, or lottery scheme.
3. Supplying to or placing in the hands of others pull cards or any other device or devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a chance or gaming device.
4. Selling or otherwise disposing of any merchandise by means of a chance or gaming device.

*It is further ordered,* That the respondent herein 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 this order.

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IN THE MATTER OF

TOM MANGAKIS TRADING AS EXCLUSIVE MINK