

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 this order.

IN THE MATTER OF

DANDY PRODUCTS, INC., ET AL.

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

Docket 8467. Complaint, Feb. 9, 1962—Decision, June 28, 1963

Order requiring Chicago distributors of a variety of merchandise, including transistor radios, watches, cameras, ballpoint pens, toy animals, dolls and small electrical appliances, to cease furnishing plans involving games of chance for the resale of its products to the public, such as pushcards and instructions for their use, along with illustrations and descriptions of the articles of merchandise to be received by chance selectors of discs on the cards concealing lucky names.

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 Dandy Products, Inc., a corporation, and Joseph M. Gron, individually and as an officer of said corporation, and Joseph M. Gron and Carlo E. Ferrari, copartners, trading and doing business as Capitol Mailers, hereinafter referred to as respondents, have violated the provisions of the 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:

PARAGRAPH 1. Respondent Dandy Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 9 South Clinton Street, Chicago, Illinois.

Respondent Joseph M. Gron is an officer of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

Individual respondents Joseph M. Gron and Carlo E. Ferrari are copartners trading and doing business as Capitol Mailers with their office and principal place of business located at 555 West Adams Street, Chicago, Illinois. The business address of the respondent

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Joseph M. Gron is as hereinbefore set forth and the business address of the individual respondent Carlo E. Ferrari is the same as that of the partnership. The individual respondents formulate, direct and control the acts and practices of the partnership, including the acts and practices hereinafter set forth.

All of the aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter referred to.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of transistor radios, watches, cameras, ballpoint pens, toy animals, dolls, small electrical appliances, including lamps, cutlery, and other articles of merchandise, to the public.

PAR. 3. Respondents, in the course and conduct of their business, now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped and transported by the respondent partnership from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, in the course and conduct of their business, in offering for sale, selling and distributing their merchandise, furnish, and have furnished, various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is offered for sale, sold and distributed to the purchasing public. Among the methods and sales plans adopted and used by respondents, and which are typical, but not all inclusive, of the practices of the respondents, is the following:

Respondents distribute, and have distributed, to operators and to members of the public certain literature and instructions including, among other things, pushcards, order blanks and circulars which have thereon illustrations and descriptions of said merchandise. Said circulars also explain respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said pushcards, and as prizes to members of the purchasing public who purchase chances or pushes on said cards. One of respondents' said pushcards, which is typical of all pushcards distributed by the respondents, bears 40 names with ruled lines on the back of said card for writing in the name of the purchaser of the push corresponding to the name selected. Said pushcard has 40 partially perforated discs. Each of said disc bears one of the names corresponding to those on the lines on the reverse side. Concealed within each disc is the number which is disclosed only when the disc is pushed or separated from

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the card. The pushcard also has a larger master seal and concealed within the said master seal is one of the names appearing on the discs. The person selecting the name corresponding with the one under the master seal receives a fountain and candlestick ensemble. The pushcard bears the following legend or instructions:

(PICTURE OF TABLE SHOWING CENTERPIECE AND TWO
CANDLESTICKS)

LUCKY NAME UNDER SEAL GETS THIS
SPRAY-A-LITE FOUNTAIN & CANDLESTICK ENSEMBLE

- Translucent marbelized plastic
- Sends up a sparkling fountain of water from petaled water lily
- Measures a full 16" in diameter ● Packet of realistic ferns included
- Automatically recirculates water ● 110 V AC Current ● Complete with cord and plug

COMPLETE WITH MATCHING CANDLESTICK HOLDERS

Pure enchantment wherever you place it * * * on your dining table, buffet or artfully displayed on your sunporch or patio. The entire ensemble is spectacular as a centerpiece or you can use the fountain and candlesticks separately.

Nos. 4 and 17 receive a beautiful retractable ball point pen.

No. 1 pays 1c, No. 4 pays 4c, No. 9 pays 9c, No. 17 pays 17c. All others pay 49c. NONE HIGHER.

Do Not Remove Seal Until Entire Card Is Sold

Push Out
with Pencil

(APPEARING ON REVERSE SIDE)

ADA.....	MIN.....
AL.....	NAN.....
AMY.....	PAT.....
ANG.....	PEG.....
ANN.....	RAY.....
ART.....	ROY.....
BAB.....	SAM.....
BEA.....	SID.....
BEN.....	SIS.....
BES.....	SYB.....
DOC.....	SUE.....
DON.....	TED.....
FAE.....	TES.....
GIN.....	TIM.....
JAN.....	VAL.....
LEA.....	VEE.....
LOU.....	VIC.....
MAE.....	VIV.....
MEG.....	WES.....
MIL.....	WIN.....

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This cards contains 40 names. No. 1 pays 1c; No. 4 pays 4c; No. 9 pays 9c; No. 17 pays 17c; all others pay 49c; NONE HIGHER. 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 obligated to pay unless he desires to do so. IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME.

TOTAL \$17.95

POSTMASTER: This parcel may be opened for postal inspection if necessary.

Sales of respondents' merchandise by means of said pushcards are made in accordance with the above described instructions, and the prizes or premiums are allotted to the customers or purchasers from said cards in accordance with the above legend or instructions. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and the amount to be paid for the merchandise, or the chance to receive said merchandise, are 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.

Respondents furnish, and have furnished, various pushcards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of their merchandise by means of games of chance, gift enterprises or lottery schemes. The sales plans or methods involved in the sale of all of the said merchandise by means of said other pushcards are the same as that hereinabove described, varying only in detail as to the merchandise distributed and the number and prices of chances on each card.

PAR. 5. The persons to whom respondents furnish, and have furnished, said pushcards use the same in selling and distributing respondents' merchandise in accordance with the aforesaid sales plan. Respondents thus apply to and place in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to established public policy of the Government of the United States.

PAR. 6. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

The use by respondents of a sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. 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. Roy B. Pope supporting the complaint.

Mr. Charles H. Rowan and *Mr. Willis W. Hagen*, Milwaukee, Wis., for respondents.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER
NOVEMBER 26, 1962

This proceeding was commenced by the issuance of a complaint on February 9, 1962, charging the respondents with unfair acts and practices, in commerce, in violation of Section 5 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 briefs. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by the parties and briefs in support thereof, and all findings of fact and conclusions 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.

FINDINGS OF FACT

1. Respondent, Dandy Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 9 South Clinton Street, Chicago, Illinois. Respondent, Joseph M. Gron, is president of the corporate respondent and has his office and place of business at the same address as the corporate respondent. Said individual respondent formulates, directs and controls the acts and practices of the said corporate respondent.

2. Individual respondents, Joseph M. Gron and Carlo E. Ferrari, are copartners trading and doing business as Capitol Mailers with their

office and principal place of business at 555 West Adams Street, Chicago, Illinois. The business address of the respondent, Joseph M. Gron, is as hereinbefore set forth and the business address of the respondent, Carlo E. Ferrari, is the same as that of the partnership. The individual respondents formulate, direct and control the acts and practices of the partnership.

3. Respondents, Dandy Products, Inc., and Joseph M. Gron, are now and for some time last past, have been engaged in the offering for sale, sale and distribution of transistor radios, watches, cameras, ballpoint pens, toy animals, dolls, small electrical appliances including lamps, cutlery and other articles of merchandise to the public and have caused their said merchandise when sold to be transported from their place of business in Chicago, Illinois, to purchasers thereof located in the various States of the United States, and now maintain, and for some time last past have maintained, a substantial course of trade in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. The respondents, Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, are now, and for some time last past, have been engaged in providing mailing services to firms in various lines of business requiring assistance in getting out large mailings. Among their customers for whom they provide such mailing services are Sears Roebuck and Company, Standard Oil Company, Swift & Company, Allstate Insurance Company, Lee Ward Company, Dun & Bradstreet, Charles World Encyclopedia and over 100 other firms. Dandy Products, Inc., is only one of their clients and the percentage of Capitol Mailers' total business done for Dandy Products, Inc., is approximately 16 percent. Specifically, the services performed by Capitol Mailers for Dandy Products, Inc., are as follows: the pushcards, circulars, order blanks and return envelopes, together with the envelopes in which they are to be mailed and the mailing lists of the prospective customers are delivered to Capitol Mailers, in bulk, and packaged in large cartons; one of each of the various pieces above described is placed in the envelope to be sent to the proposed customer; a sticker containing the name and address of the proposed customer is affixed and the envelope sealed, and the envelopes are then tied, sacked and delivered to the post office for mailing to various States of the United States. Respondents Joseph M. Gron and Carlo E. Ferrari, copartners trading as Capitol Mailers, in performing such mailing services, act under the direction and control of Dandy Products, Inc. In performing such services, Joseph M. Gron and Carlo E. Ferrari, copartners trading as Capitol Mailers, sell no merchandise in interstate commerce and are merely paid for their services on the basis of \$5.90 per 1,000 items mailed. Joseph

M. Gron and Carlo E. Ferrari, copartners trading as Capitol Mailers, do not process, handle, prepare for mailing or mail, respondent's, Dandy Products, Inc., merchandise.

5. Respondents, Dandy Products, Inc., and Joseph M. Gron, in the course and conduct of their business, in offering for sale, selling and distributing their merchandise, furnish and have furnished, various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is offered for sale, sold and distributed to the purchasing public. Among the methods and sales plans adopted and used by the aforesaid respondents, and which is typical, but not all inclusive, of the practices of the respondents, is the following:

Respondents, Dandy Products, Inc., and Joseph M. Gron, distribute and have distributed, to operators and to members of the public, through the use of the mailing services of Capitol Mailers described above, certain literature and instructions including, among other things, pushcards, order blanks and circulars which have thereon illustrations and descriptions of said merchandise. Said circulars also explain respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said pushcards, and as prizes to members of the purchasing public who purchased chances or pushes on said cards. One of Dandy Products, Inc.'s pushcards, which is typical of all pushcards distributed by them, bears forty names with ruled lines on the back of said card for writing in the name of the purchaser of the push corresponding to the name selected. Said pushcard has forty partially perforated discs. Each of said discs bears one of the names corresponding to those on the lines of the reverse side. Concealed within each disc is the number which is disclosed only when the disc is pushed or separated from the card. The pushcard also has a larger master seal and concealed within the said master seal is one of the names appearing on the discs. The person selecting the name corresponding with the one under the master seal receives a fountain and candlestick ensemble. The pushcard bears the following legend or instructions:

(PICTURE OF TABLE SHOWING CENTERPIECE AND
TWO CANDLESTICKS)

LUCKY NAME UNDER SEAL GETS THIS
SPRAY-A-LITE FOUNTAIN & CANDLESTICK ENSEMBLE

- Translucent marbelized plastic
- Sends up a sparkling fountain of water from petaled water lily
- Measures a full 16" in diameter ● Packet of realistic ferns included
- Automatically recirculates water ● 110 V AC Current ● Complete with cord and plug

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COMPLETE WITH MATCHING CANDLESTICK HOLDERS

Pure enchantment wherever you place it * * * on your dining table, buffet or artfully displayed on your sunporch or patio. The entire ensemble is spectacular as a centerpiece or you can use the fountain and candlesticks separately.

Nos. 4 and 17 receive a beautiful retractable ball point pen.

No. 1 pays 1c, No. 4 pays 4c, No. 9 pays 9c, No. 17 pays 17c. All others pay 49c. NONE HIGHER.

Do Not Remove Seal Until Entire Card is Sold

Push Out with Pencil

(APPEARING ON REVERSE SIDE)

ADA	MIN
AL	NAN
AMY	PAT
ANG	PEG
ANN	RAY
ART	ROY
BAB	SAM
BEA	SID
BEN	SIS
BES	SYB
DOC	SUE
DON	TED
FAE	TES
GIN	TIM
JAN	VAL
LEA	VEE
LOU	VIC
MAE	VIV
MEG	WES
MIL	WIN

This card contains 40 names. No. 1 pays 1c; No. 4 pays 4c; No. 9 pays 9c; No. 17 pays 17c; all others pay 49c; NONE HIGHER. 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 \$17.95

Postmaster: This parcel may be opened for postal inspection if necessary.

6. Sales of the merchandise of Dandy Products, Inc., and the respondent, Joseph M. Gron, by means of said pushcards are made in accordance with the above-described instructions, and the prizes or premiums are allotted to the customers or purchasers from said cards in accordance with the above legend or instruction. Whether a purchaser receives an article of merchandise or nothing for the amount of

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money paid, and the amount to be paid for the merchandise, or the chance to receive said merchandise, are 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. The aforesaid respondents furnish, and have furnished, various pushcards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of their merchandise by means of games of chance, gift enterprises or lottery schemes. The sales plans or methods involved in the sale of all of the said merchandise by means of said other pushcards are the same as that herein above described varying only in detail as to the merchandise distributed and the number and prices of chances on each card.

7. Sales of merchandise of Dandy Products, Inc., pursuant to the aforesaid plan are consummated by mailing the order forms to Dandy Products, Inc., and by direct shipment of the merchandise from Dandy Products, Inc., to the customer. Dandy Products, Inc., also employs another firm, Package Mailers, to ship their merchandise to their customers.

8. The persons, to whom Dandy Products, Inc., and respondent, Joseph M. Gron, furnish and have furnished said pushcards, use the same in selling and distributing said respondents' merchandise in accordance with the aforesaid sales plan. The aforesaid 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 their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

CONCLUSIONS

1. The law is well settled by an unbroken line of decisions too numerous to mention that the practice of selling merchandise by means of a gaming device or lottery, which includes pushcards or punchboards, is a practice which is contrary to public policy of the United States, and that where such practice occurs in commerce it is an unfair trade practice and a violation of the Federal Trade Commission Act. *F.T.C. v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934) [2 S.&D. 259]; *Wren Sales Company, Inc. v. F.T.C.*, 296 F. 2d 456 (C.A. 7, 1961) [7 S.&D. 257]. The main thrust of respondents' argument is directed to the fact that many states in recent years have legalized pari-mutuel betting, bingo, raffles, etc., and in such states these acts are no

longer criminal offenses. In addition, respondents note that in recently proposed federal criminal legislation, and under existing federal criminal enactments, Congress did not include punchboards or pushcards among the various types of gambling paraphernalia excluded as illegal from the mails or interstate commerce. Respondents therefore reason that since these various types of gambling or gambling devices are no longer illegal in many states, and have not been so designated under federal criminal laws, their use in merchandising is no longer against "public policy". Such is not the law. In *Maltz v. Sax*, 134 F. 2d 2 (C.A. 7, 1943), the court in considering this very argument said:

Moreover, in the absence of any statute condemning gambling as illegal, the Federal Courts have consistently condemned it as against public policy. *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227.

In addition, 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, when used in interstate commerce to sell or distribute merchandise, even though the device itself may not technically be a lottery or gambling device within the meaning of some penal or other statute. *Modernistic Candies, Inc. v. F.T.C.*, 145 F. 2d 454, 455 (C.A. 7, 1944) [4 S.&D. 288, 290] and *Lichtenstein v. F.T.C.*, 194 F. 2d 607, 611 (C.A. 9, 1952) [5 S.&D. 367, 372]. It was stated in *Modernistic Candies, Inc.*:

We think the Commission * * * has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandise by gambling * * * .

The Supreme Court has also recognized the distinction between criminal statutes outlawing lotteries and lottery devices and the Federal Trade Commission Act prohibiting *merchandising* by means of lotteries or lottery devices. In the *Keppel Case*, *supra*, the Court said:

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.]

Respondents also argue that prospective customers are given the opportunity of buying the merchandise outright at the stated prices without the necessity of using the pushcards or punchboards supplied by respondents. It is immaterial that some persons may purchase the merchandise without using the pushcards or punchboards, since the pushcard or punchboard devices are clearly designed to serve as an instrumentality for the sale of articles of merchandise by lottery

methods. Its use for that purpose being prohibited under the Federal Trade Commission Act, it is of no consequence that some customers may conceivably elect not to use the lottery device. See *Globe Cardboard Novelty Co., Inc. v. F.T.C.*, 192 F. 2d 444, 448 (C.A. 3, 1951) [5 S.&D. 342, 347] and *Seymour Sales Co. v. F.T.C.*, 216 F. 2d 633, 636 (C.A.D.C., 1954) [5 S.&D. 700, 703].

2. The complaint herein charged, among other things, that, "All of the aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter referred to."¹ The record contains no evidence to support this charge and complaint counsel apparently has abandoned this charge, since no reference to it is included in his proposed findings or conclusions. Although abandoning the charge of conspiracy, between the respondent corporation, Dandy Products, Inc., on the one hand, and Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, on the other hand, complaint counsel seeks a cease and desist order against the individual partners² on the theory that Capitol Mailers is an integral part of the scheme to sell merchandise by means of a lottery and performs an essential function by mailing the push-cards.³ In support of this position, complaint counsel relies on several cases which hold that aiding and abetting this method of merchandising make the participants *particeps criminis* so that all are engaged in unfair trade practices contrary to public policy.

The cases relied upon are as follows: *Modernistic Candies, Inc. v. F.T.C.*, 145 F. 2d 454, 445 [4 S.&D. 288, 290]; *Maltz v. Sax*, 134 F. 2d 2; *Hamilton Manufacturing Co. v. F.T.C.*, 194 F. 2d 346 [5 S.&D. 360]; *U.S. Printing & Novelty Co., Inc. v. F.T.C.*, 204 F. 2d 737 [5 S.&D. 529], and *Wren Sales Company, Inc. v. F.T.C.*, 296 F. 2d 456 [7 S.&D. 257]. The first four cases cited above all concerned manufacturers of punchboards or variations thereof which were sold to others who utilized the punchboards in the sale or distribution of merchandise. Upholding a cease and desist order against the manufacturer of the board in *Maltz v. Sax*, *supra*, the court said:

Therefore, though his making and sale of punch boards may not be gambling, his status is fixed by his inseparable connection with the gambling business, and he will be left where he placed himself * * * .

¹ Complaint, Paragraph 1, first paragraph on p. 1420.

² Inasmuch as Joseph M. Gron, as president of Dandy Products, Inc., was named a party respondent in his individual capacity and the order as hereinafter adopted so includes him, the actual effect of an order against the individual partners would be to include Carlo E. Ferrari.

³ No facts were adduced and no findings were proposed implicating or otherwise associating respondent, Carlo E. Ferrari, with the unfair acts and practices of Dandy Products, Inc., except as to the mailing services herein found.

Capitol Mailers do not manufacture punchboards and their activities cannot be equated to any such close and inseparable connection with the gambling business. As heretofore found, Capitol Mailers performs a mailing service to over a hundred clients including Dandy Products, Inc. It acts under the direction and control of these clients in performing a routine task for which it is paid a set fee per item mailed. It does not process, handle, prepare for mailing or mail respondent's, Dandy Products, Inc., merchandise. Under these circumstances, and in the absence of any precedents extending the doctrine of the cases cited to persons engaged in providing mere routine services, a cease and desist order against Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, is not warranted and the hearing examiner so concludes.

The *Wren* case, referred to above, has no application to Capitol Mailers' activities, since the respondents in that case were engaged in the sale of their merchandise by means of punchboards in the same fashion as respondent herein, Dandy Products, Inc.

It should also be pointed out that as proposed by complaint counsel and as hereinafter adopted by the hearing examiner, the cease and desist order issued in this proceeding includes both respondents Dandy Products, Inc., and Joseph M. Gron, individually and as an officer of said corporation. Since the order will apply to Joseph M. Gron individually, it will apply to his activities as a partner in Capitol Mailers as well as an officer of Dandy Products, Inc., or in any other capacity and insures that the practices found to be against the public interest will be effectively stopped by the order to cease and desist.

In the Matter of *Bristol-Myers Co., et al*, 46 F.T.C. 162, 176 (1949), the Commission had before it a somewhat comparable situation and stated:

The Commission is of the opinion, however, and in the exercise of its sound discretion concludes, that the complaint in this proceeding should be dismissed as to the respondents Pedlar & Ryan, Inc., and Young & Rubicam, Inc. This is for the reason that, although these respondents participated in the dissemination of the advertising found to be false or misleading, they at all times acted under the direction and control of respondent Bristol-Myers Co., their employer, with whom rested the final authority and responsibility for such advertising, and for the further reason that the practices found to be against the public interest will be stopped by the order to cease and desist issued against Bristol-Myers Co.

3. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents, Dandy Products,

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Inc., and Joseph M. Gron, and the element of chance involved therein and thereby are induced to buy and sell said respondents' merchandise.

4. The use by respondents, Dandy Products, Inc., and Joseph M. Gron, of the sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

5. The aforesaid acts and practices of the respondents, Dandy Products, Inc., and Joseph M. Gron, as herein found 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.

6. The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding; and this proceeding is in the public interest.

ORDER

It is ordered, That the respondents, Dandy Products, Inc., a corporation, and its officers, and respondent, Joseph M. Gron, individually and as an officer of 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 transistor radios, watches, cameras, ballpoint pens, toy animals, dolls, electrical appliances, cutlery, or any 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 pushcards or any other lottery device or 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. Shipping, mailing or transporting to agents or distributors, or to members of the purchasing public, pushcards or any other lottery device or devices which are designed or intended to be used in the sale or distribution of respondents' merchandise, wares or goods to the public by means of a game of chance, gift enterprise or lottery scheme.

3. Selling or otherwise disposing of any merchandise, wares or goods by means of a game of chance, gift enterprise or lottery scheme.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as respects respondent, Carlo E. Ferrari.

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OPINION

By MACINTYRE, *Commissioner*, concurring:

With the decision of the Commission, I concur.

I am concurring in that part of the Commission's decision affecting respondent Ferrari only because it is my understanding that the Commission's agreement with the decision to dismiss the complaint as to respondent Ferrari is based on the finding of fact that Ferrari's activities herein amounted to no more than that of a mailing agent employed by others to perform simple mailing chores. Certainly, if the findings of fact were such as to establish that Ferrari acted so as to bring him under the rule of *particeps criminis* with respondent Gron in the latter's business of selling and distributing merchandise through the use of gaming devices, then I would be unable to provide my assent to a dismissal as to respondent Ferrari.

By ANDERSON, *Commissioner*, dissenting in part:

I concur in the holding as to Dandy Products, Inc., and as to Joseph M. Gron, but I cannot agree with the majority's acceptance of the hearing examiner's ruling that the complaint should be dismissed as to Carlo E. Ferrari. As I read the initial decision, the order to cease and desist contained therein will apply to the activities of Ferrari's partner, Gron, as a partner in Capitol Mailers to insure that the practices found to be against the public interest will be effectively stopped¹ but, as to Ferrari, these same activities are not considered to constitute an unfair trade practice and an order as to him is deemed unwarranted.

There can be no doubt from the examiner's findings that Ferrari was fully aware of the fact that Capitol Mailers was assisting Dandy Products, Inc., in the distribution of punchcards to be used in connection with the sale of merchandise.² Gron was his partner in the operation of the mailing service. Moreover, it would have been obvious to even the most casual observer that the material mailed by Ferrari's firm was to be used for the purpose of selling merchandise by game of chance or lottery. Such assistance or participation seems to be no less censurable than the practice of manufacturing punchcards or other lottery devices for sale, distribution or use by another. *Maltz v. Sax*, 134 F. 2d 2 (7th Cir., 1943), and *Modernistic Candies, Inc. v. Federal Trade Commission*, 145 F. 2d 454 (7th Cir., 1944)

¹ "Since the order will apply to Joseph M. Gron, individually, it will apply to his activities as a partner in Capitol Mailers as well as an officer of Dandy Products, Inc., or in any other capacity and insures that the practices found to be against the public interest will be effectively stopped by the order to cease and desist." Initial decision, page 1430.

² The record also shows that Capitol Mailers performed similar services for Gift Products, Inc., respondent in Docket 7025.

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Syllabus

[4 S.&D. 288]. Ferrari's connection with the unfair trade practice would, in my opinion, have "made him an accomplice were it a crime," *F.T.C. v. Standard Education Society*, 86 F. 2d 692, 695 (2nd Cir., 1936) [2 S.&D. 366, 370], and is sufficient to establish liability in this proceeding.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

This matter having been heard by the Commission upon the exceptions to the initial decision filed by respondents and counsel supporting the complaint and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

It is ordered, That the exceptions of respondents and counsel supporting the complaint to the initial decision be, and they hereby are, denied.

It is further ordered, That the hearing examiner's initial decision filed November 27, 1962 be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents Dandy Products, Inc., a corporation, and Joseph M. Gron, individually and as an officer of said corporation 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.

Commissioner Anderson dissenting in part and Commissioner MacIntyre concurring.

IN THE MATTER OF

FELIX FRIEDMAN TRADING AS FELIX FRIEDMAN

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS