

IN THE MATTER OF
GREAT WESTERN DISTRIBUTING COMPANY ET AL.

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

Docket 8525. Complaint, Aug. 10, 1962—Decision, Dec. 31, 1963

Order requiring Lewiston, Idaho, distributors of punchboards and a variety of items of general merchandise to jobbers and retail dealers for resale, to cease selling punchboards or other devices, either with or without mer-

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chandise, which are designed to be used in ultimate sale of the merchandise by means of a lottery scheme.

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 Great Western Distributing Company, a corporation, and Earl C. Jasper, individually and as an officer of said corporation, and Edward J. Carr, an individual, 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 Great Western Distributing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its office and principal place of business located at 125 - 22nd Street North, Lewiston, Idaho.

Respondent Earl C. Jasper is an individual, and is president 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.

Respondent Edward J. Carr is an individual, and is an agent engaged in making sales for the account of the corporate respondent and also for his own account. His business address is the same as that of the corporate respondent.

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 various devices including those commonly known as punchboards; and of a variety of items of general merchandise to jobbers, and to retail dealers, for resale and distribution to members of the general public.

PAR. 3. Respondents, in the course and conduct of their business, now cause, and for some time last past, have caused, said devices and merchandise, when sold, to be shipped and transported from their place of business in the State of Idaho to purchasers and distributors thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said devices and merchandise

in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as hereinabove described, respondents sell and distribute, and have sold and distributed, to said jobbers and retail dealers, punchboards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in selling and distributing merchandise to members of the general public. Respondents sell and distribute, and have sold and distributed, various kinds of punchboards, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of merchandise and vary only in detail. Many of respondents' said punchboards have blank spaces on the face thereof so that respondents or their customers may place instructions or legends thereon, or attach "flares" thereto, that explain the manner in which said devices are to be used, or may be used, in the sale and distribution of various specified articles of merchandise to the general public. Usually the winning numbers and the prizes to be awarded are set forth on said legends or flares. Said devices are used by said jobbers and retail dealers in distributing merchandise in the following manner:

The prices of the punches on said punchboards vary in accordance with the individual device. When a punch is made a printed slip is separated from the punchboard and a number is disclosed. The numbers are effectively concealed from the general public until a selection has been made, a punch completed. Certain designated numbers entitle the customer to a specified article of merchandise. Persons securing lucky or winning numbers receive such articles of merchandise without additional cost and therefore at prices which are lower than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a punch from said board. The various articles of merchandise used in combination with said punchboards are thus sold or distributed to members of the general public wholly by lot or chance.

The use to be made of such punchboard devices, and the manner in which they are used by respondents' customers, is in combination with such merchandise so as to enable said customers to sell or distribute said merchandise by means of lot or chance as herein alleged.

PAR. 5. Many persons, firms and corporations engaged in the sale and distribution of merchandise to the general public, pack and assemble, or have packed and assembled, various articles of merchan-

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dise which they secure from respondents and from others, into assortments comprised of such articles together with punchboards purchased from respondents, or from customers of respondents. Many of said retail dealers have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said punchboards to members of the general public in the manner hereinabove described. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said punchboards, many members of the general public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof many of said retail dealers have been induced to deal directly with respondents, or with jobbers who sell and distribute said merchandise together with respondents' said devices.

PAR. 6. The sale and distribution of merchandise to the general public through the use of, or by means of, such devices in the manner above alleged involves a game of chance or the sale of a chance to procure articles of merchandise at prices lower than the normal retail price thereof and teaches and encourages gambling among members of the public, all to the injury of the public. The sale of said devices for use in the sale and distribution of said merchandise, and the sale of merchandise by and through the use thereof, are practices which are contrary to an established public policy of the Government of the United States and constitute unfair acts and practices in said commerce.

The sale and distribution of said punchboard devices by respondents, as hereinabove alleged, supplies to and places in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the sale and distribution of said merchandise. The respondents thus supply to, and place in the hands of, said persons, firms, and corporations, the means of, and instrumentalities for, engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. The aforesaid acts and practices of respondents, as hereinabove alleged, are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. John J. McNally for the Commission.

Mr. Paul C. Keeton, Lewiston, Idaho, for the respondents.

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Initial Decision

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

JANUARY 31, 1963

On August 10, 1962, the Commission issued and subsequently served its complaint, charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act through the sale of "punchboards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in selling and distributing merchandise to members of the general public." The answer of the respondents denied the essential charges of the complaint.

An informal prehearing conference was held in Washington, D.C., on September 25, 1962, and hearings in support of and in opposition to the complaint were held in Lewiston, Idaho, on November 6 and 7, 1962. The transcript of testimony consists of 180 pages, and 27 Commission exhibits were received in evidence. One exhibit offered by respondents was rejected. Both sides rested at the conclusion of the hearings on November 7, 1962, and proposals were thereafter filed within the time allowed.

After having carefully considered the entire record in this proceeding and the proposals and contentions of the parties, the hearing examiner issues this initial decision. Findings proposed by the parties, which are not adopted herein either in the form proposed or in substance, are rejected as not being supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent Great Western Distributing Company, sometimes hereinafter referred to as Great Western, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its office and principal place of business located at 125 - 22nd Street North, Lewiston, Idaho.

2. Respondent Earl C. Jasper, sometimes hereinafter referred to as respondent Jasper, is an individual, and is president 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. From 1950 until the incorporation of Great Western in 1960, he operated essentially the same business under the same name as a wholly owned unincorporated enterprise.

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3. Respondent Edward J. Carr, sometimes hereinafter referred to as respondent Carr, is an individual, and is an agent engaged in making sales for the account of the corporate respondent. He is also engaged in buying and selling for his own account. His business address is the same as that of the corporate respondent.

4. Great Western is engaged in a general wholesale business. It issues a yearly catalog, travels three salesmen, and sells to approximately 2,000 accounts on a wholesale basis. Many of these accounts are sold to through its salesmen and many are sold to directly as house accounts. It sells a wide variety of merchandise, including hardware, sporting goods, watches, silverware, cameras, shavers, luggage, novelties, etc., including many nationally advertised brands. This merchandise is regularly shipped by it from its place of business in Lewiston, Idaho, to its customers located in the areas in which it operates, including the States of Washington, Oregon, Utah, Wyoming, Montana, and Idaho.

5. In the course and conduct of its business, Great Western sells and distributes, and has sold and distributed, to jobbers and retail dealers, various devices, including those commonly known as punchboards and flares, so prepared and arranged as to involve games of chance, gift enterprises, or lottery schemes when used in selling and distributing merchandise to members of the general public. It sells and distributes, and has sold and distributed, various kinds of punchboards and flares, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of merchandise, and vary only in detail.

6. Many of its said punchboards have blank spaces on the face thereof so that said respondent or its customers may place instructions or legends thereon or attach "flares" thereto that explain the manner in which said devices are to be used or may be used, in the sale and distribution of various specified articles of merchandise to the general public. Usually the winning numbers and the prizes to be awarded are set forth on said legends or flares. Said respondent also sells, or supplies without additional charge, flares for use in connection with punchboards supplied by it or by others, or for use in connection with other devices, to implement or facilitate the sale or distribution of merchandise by lot or chance.

7. As the punchboards and flares are used by said jobbers and retail dealers in distributing merchandise, the prices of the punches vary in accordance with the individual device. When a punch is made, a printed slip is separated from the punchboard and a number is disclosed. The numbers are effectively concealed until a selection of the

slip to be punched has been made and the punch completed. Certain numbers entitle the customer to an article of merchandise designated on the punchboard or on the flare. Persons securing lucky or winning numbers receive such articles of merchandise without additional cost and at prices which are substantially lower than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a punch from said board. The various articles of merchandise used in combination with said punchboards or flares are thus sold or distributed to members of the general public wholly by lot or chance.

8. The number of punches on punchboards sold by Great Western may vary widely, and large punchboards may be used in combination with relatively small boards. In such combination, the punch is made in the first instance on the small or "counter board," and a person receiving a winning number on the counter board thereby wins a punch on the larger or "master board" for a chance to win a relatively valuable item of merchandise.

9. The merchandise assortments distributed by said punchboards may also vary widely, both in the number of items to be distributed and in the value of each item. These assortments of merchandise are arranged or made up in advance by Great Western, or they may be made up in particular combinations requested by specific customers. In either event, they are sold as "deals" or as combinations of punchboards or flares and merchandise typically involving the essential features hereinabove described.

10. In some instances, Great Western sells punchboards to its customers who do not at that time buy merchandise "deals" or sufficient merchandise for distribution by the punchboards so purchased. It is clear, however, that it sells or supplies punchboards and flares, either separately or in combination with merchandise, for the purpose of stimulating its merchandise sales. Respondent Jasper testified that "The only reason we sell these flares is for the benefit we get out of the merchandise sales" (Tr. 166). He testified that it is competitively necessary for his company to supply punchboards and flares in order to sell merchandise for distribution by means of these devices, and in order to be competitive in selling merchandise unrelated to flares and punchboards (Tr. 166-7).

11. Respondent Carr operates as a salesman for and agent of Great Western in selling its merchandise in the State of Montana and, to a limited extent, in the eastern section of the State of Washington. As a salesman for Great Western, his sales in Montana amount to

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about \$40,000 per year, to approximately fifty accounts, most of which is shipped from Great Western's place of business in Lewiston, Idaho, to the Montana accounts.

12. Substantially all of respondent Carr's sales to the Montana accounts for Great Western consist of merchandise assortments or "deals" for sale or distribution in connection with punchboards. Most of those accounts have their own boards, and he sells relatively few boards to them; but in about 40% of his sales to those accounts, he supplies flares for attachment to punchboards, as hereinabove described, which flares define and explain the particular lottery plan under which the merchandise is distributed.

13. In addition to his employment as a salesman for Great Western, which is only for limited periods of time during the year, respondent Carr also buys and sells for his own account under the name "Ed Carr Sales." His sales in this operation are confined to the eastern part of the State of Washington. They consist almost entirely of punchboards and flares sold in combination with merchandise, as hereinabove described, and he makes an average of approximately fifteen such combination sales per month. He purchases his punchboards and 95% of his merchandise from Great Western.

14. The punchboards and merchandise obtained for his own account by respondent Carr from Great Western are sold to him on consignment and picked up by him in his automobile at the warehouse of Great Western in Lewiston, Idaho. He then travels a limited route in the eastern section of the State of Washington where he regularly calls upon about twenty-four customers. Upon his return to Lewiston, Idaho, after completing his sales route in Washington, he pays Great Western for the merchandise and boards which he has sold and returns the unsold portion to Great Western and receives credit for it. Most of the deliveries of punchboards and merchandise sold by him on his own account are made from his automobile and he makes the sales, but in about five or six instances per month shipments are made on his orders by Great Western from its warehouse in Lewiston, Idaho.

15. Great Western and respondent Jasper are well acquainted with the operations of respondent Carr, and actively participate in assisting and furthering them. For all practical purposes, the sales of respondent Carr, both for his own account and as a salesman for Great Western, constitute an extension of the business of Great Western, and are wholly consistent therewith. Accordingly, all of the respondents cooperate and act together in connection with sales made by respondent Carr for his own account and as a salesman for and agent of Great Western.

16. Great Western's total annual sales amount to approximately \$500,000. Its sales of punchboards, punchboards in combination with merchandise, and merchandise in combination with flares, excluding its sales to respondent Carr, amount to approximately \$40,000 per year; and its sales to respondent Carr for his own account amount to approximately \$10,000 per year. Its sales of punchboards and flares separately or in combination with merchandise as hereinabove described are shipped from its place of business in Lewiston, Idaho, to customers located in the States of Washington, Oregon and Montana.

17. Shipments by Great Western upon the orders of respondent Carr of punchboards and merchandise from its warehouse in Lewiston, Idaho, to customers of respondent Carr in the State of Washington constitute interstate transactions. The consignment sales by Great Western to respondent Carr, and his sales and deliveries to customers in Washington, are also in the flow of interstate commerce, involving, as they do: the delivery of merchandise to respondent Carr in Lewiston, Idaho; its transportation by him into Washington, where part of it is sold and delivered to customers whom he regularly serves; return of the remainder to Great Western in Lewiston, Idaho; and payment to Great Western only for that part sold in Washington.

18. Respondents, accordingly, maintain, and have maintained, a substantial course of trade in punchboards and flares, separately or in combination with merchandise, as hereinabove described, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Great Western and respondent Jasper engage, and have engaged, in such commerce in connection with sales to purchasers located in the States of Washington, Oregon and Montana; and respondent Carr engages, and has engaged, in such commerce in connection with sales to purchasers located in the States of Washington and Montana. Great Western also sells and ships merchandise to customers located in the States of Utah, Wyoming and Idaho, but there is no evidence that it sells punchboards or flares, separately or in combination with merchandise, to customers located in those States, except certain sales formerly made in Utah, to which reference is made below.

19. Many persons, firms and corporations located in the States of Washington, Oregon and Montana, and engaged in the sale and distribution of merchandise to the general public as retail dealers, pack and assemble, or have packed and assembled, various articles of merchandise which they secure from respondents and from others, into assortments comprised of such articles, together with punchboards and flares purchased from respondents, or from customers of respondents. Many of said retail dealers have exposed the same to the pur-

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chasing public and have sold or distributed said articles of merchandise by means of said punchboards and flares to members of the general public in the manner hereinabove described. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said punchboards and flares, many members of the general public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof, many of said retail dealers have been induced to deal directly with respondents, or with jobbers who sell and distribute said merchandise together with respondents' said devices.

20. Prior to the issuance of the complaint in this matter, Great Western also made substantial sales in the State of Idaho of merchandise "deals," which included flares and tickets for use in connection with games of skill. When the complaint in this matter was issued, the company discontinued sales of such merchandise deals in Idaho because of the possibility that they may constitute a violation of law.

21. In these deals, the assortment of merchandise sold by Great Western was usually mounted upon a display board, and was sold in combination with a flare and a supply of tickets. The flare listed the winning number for each item of merchandise, and the tickets, typically 2,000, were numbered consecutively. These deals were ordinarily purchased and used by operators of games of skill, such as bowling, shuffleboard, etc. Their customers participated in the game at the regular price, and those who made a sufficiently high score were entitled to draw from a box, glass jar, spindle, or other container, a ticket or coupon so folded or sealed as to conceal the number on the inside. If, when the ticket was opened, the number corresponded with a number on the flare identifying an item of merchandise on the display board, the holder of the ticket was entitled to receive that item without additional cost. The high score affording the right to draw a number was, therefore, determined by the customer's skill in the game, and thereafter his receiving or not receiving an item of merchandise was determined wholly by chance.

22. It seems clear that part of the consideration which induced the customer to pay for the privilege of playing the game of skill was the opportunity to obtain as a prize an item of merchandise by lot or chance if he made a sufficiently high score. It is thus apparent that these merchandise deals, including flares and numbered tickets, also constituted devices for distributing merchandise by lot or chance. There is, however, no evidence of sales by respondents of such merchandise deals to customers located in States other than Idaho; and

accordingly there is no evidence of sales of said devices by respondents in interstate commerce.

CONCLUSIONS

1. The sale and distribution of merchandise to the general public through the use of, or by means of, punchboards and flares in the manner above described involves a game of chance or the sale of a chance to procure articles of merchandise at prices lower than the normal retail prices thereof, and teaches and encourages gambling among members of the public, all to the injury of the public. The sale of said punchboards and flares for use in the sale and distribution of said merchandise, and the sale of merchandise by and through the use thereof, are practices which are contrary to an established public policy of the Government of the United States and constitute unfair acts and practices in said commerce.

2. The sale and distribution of said punchboards and flares by respondents, as hereinabove described, supplies to and places in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the sale and distribution of said merchandise. The respondents thus supply to, and place in the hands of, said persons, firms, and corporations, the means of, and instrumentalities for, engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

3. Respondents' defense is predicated upon the contention that their operations in the State of Washington are sanctioned by the laws of that State and by the regulations of the communities in which they have operated. Respondents contend that in such circumstances any action by the Federal Trade Commission to bar the practice here challenged is not justified. They argue that any such action interferes with local and intrastate authority, and that:

The manufacturer of punchboards is not chargeable with unfair trade practices where their use in given areas is valid in law, since all purveyors in the area on compliance with local laws, may use such boards. The Commission may not bar the transportation of punchboards merely because such action would be beneficial to the public.

4. This defense is not specifically made with respect to respondents' operations in Montana and Oregon, and the record is silent with respect to the legality of such operations in those States. Presumably, however, respondents urge the same principle as a bar to the Commission's jurisdiction over any of their interstate sales of lottery devices which are designed to be used in the sale of merchandise. In any

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event, the lack of affirmative evidence on this point with respect to respondents' sales in Montana and Oregon is not of consequence in view of the disposition which must necessarily be made of respondents' contention.

5. The only case cited by respondents involving a proceeding by the Federal Trade Commission is *J. C. Martin Corporation, et al v. FTC*, 7 Cir., 242 F. 2d 530 (1957). That authority, however, affords no support for the contention upon which respondents defend their position. The Court held in that case that the device there involved did not constitute a lottery scheme because it did not incorporate the element of prize—the opportunity to get something for nothing. There can be no question that the devices here involved incorporate the element of prize and constitute lottery schemes, and the respondents do not contend otherwise.

6. In the *Martin* case, the Court did not consider the question of the Federal Trade Commission's jurisdiction of a lottery scheme operated in accordance with local regulations. In 1960, however, in the same Circuit, the Court considered and decided that question adversely to the present contention of these respondents. In *Peerless Products, Inc., et al v. FTC*, 7 Cir., 284 F. 2d 825 (1960), *cert. denied* 365 U.S. 843, the Court stated, in pertinent part:

Petitioners, in addition, contend that local policy sanctioning the use of merchandise boards, evidenced here by certain municipal ordinances in the State of Washington, limits the power of the Commission over unfair or deceptive acts of competition in interstate commerce. We disagree. Unless Congress specifically withdraws authority in particular areas, the Commission, upon its general grant of authority under 15 U.S.C.A. §45(a)(6), can restrain unfair business practices in interstate commerce even if the activities or industries have been the subject of legislation by a state or even if the intrastate conduct is authorized by state law. *Royal Oil Corporation v. FTC*, 4 Cir., 262 F.2d 741, 743 [6 S. & D. 477] (1959). *Lichtenstein v. Federal Trade Commission*, 9 Cir., 194 F.2d 607, 609-10 [5 S. & D. 677] (1952), *cert. denied*, 344 U.S. 819. In this case there is no congressional limitation on the Commission's use of its full power to order petitioners to cease shipping in commerce punchboards designed for distribution of merchandise when such shipment is so clearly a violation of federal policy as indicated in *Surf Sales, supra*. A local ordinance cannot here circumscribe the plenary power granted to the Commission to police unfair and deceptive practices in interstate commerce.

Counsel have cited, and the hearing examiner has found, no contrary authority.

7. Accordingly, it is concluded that the aforesaid acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public, and constitute unfair acts and practices in commerce in violation of the Federal Trade Commission Act.

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Opinion

ORDER

It is ordered, That the respondents Great Western Distributing Company, a corporation, and its officers, and Earl C. Jasper, individually and as an officer of said corporation, and Edward J. Carr, individually, and respondents' agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

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

OPINION OF THE COMMISSION

DECEMBER 31, 1963

By MACINTYRE, *Commissioner*:

The respondents herein are charged with violation of Section 5 of the Federal Trade Commission Act through the sale of devices so arranged as to involve games of chance, gift enterprises or lottery schemes in the sale and distribution of merchandise to the general public. The hearing examiner, at the conclusion of the hearings, issued his initial decision and order sustaining the allegations of the complaint and the matter is now before the Commission on respondents' appeal from his decision.

Respondents in their exceptions launched a rather broad gauge attack on the initial decision as contrary to both the facts and the law. On oral argument, however, it quickly became apparent that respondents in their appeal do not seriously seek a reversal of the examiner's findings that their distribution of punchboards and related activities violated the law. Rather, they are concerned with the scope and possible construction of the order entered below. Our opinion and order on appeal will be confined to that issue.

At the outset, a brief description of respondents and their activities challenged in this proceeding will be helpful in focusing on the problem at hand. The corporate respondent, Great Western Distributing Company, of Lewiston, Idaho, is engaged in a general wholesale business selling a wide variety of merchandise, including hardware, sporting goods, watches, silverware, cameras, luggage, etc. to approximately 2,000 accounts in the States of Washington, Oregon,

Utah, Wyoming, Montana and Idaho. In addition to its general wholesale business, Great Western has sold various devices, including punchboards and flares¹ designed to sell merchandise to the general public through games of chance, gift enterprises, or lottery schemes. Respondents also furnish assortments of merchandise, which throughout the course of this proceeding have been described as "deals", to customers utilizing punchboards or other gambling devices in the distribution of such products. A "deal", according to Great Western's attorney, is a large board upon which respondents mount a wide variety of merchandise for display purposes, and we adopt that definition for the purposes of this opinion.²

Great Western may sell punchboards and/or flares to customers in conjunction with or without merchandise assortments mounted as "deals". Conversely, respondents may sell "deals" to customers not purchasing punchboards or flares from Great Western. In some instances the record shows that purchasers secure punchboards from sources other than respondents as a device to facilitate resale of respondents' merchandise; in other cases, respondents assert, their customers merely use the deals purchased from Great Western as door prizes or for other purposes not involving the sale or distribution of merchandise within the scope of the Commission's jurisdiction under Section 5 of the Federal Trade Commission Act.³

The examiner entered the order standard in these cases requiring respondents to refrain from:

Selling or distributing in commerce, * * * punchboards or other devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

Respondents object that the prohibition against selling "other devices" which are "designed or intended to be used" in the sale or distribution of merchandise by games of chance is so broad that they would be inhibited from selling merchandise assortments or "deals" for legal purposes, or at least for uses over which the Commission has no jurisdiction merely because the merchandise in question might be distributed or sold in the prohibited manner. They contend their activities will be unduly hampered by uncertainty as to the manner in which the provisions therein will be construed. Respondents have

¹ Flares are apparently legends on cardboard describing prizes and winning numbers which may be attached to punchboards or other gambling devices of a similar nature.

² Pages 4 and 5, Oral Argument.

³ The Commission does not have jurisdiction over lotteries, as such, and confines its regulatory activities to lotteries or other gambling devices used in connection with the merchandising of goods. Cf. *Lichtenstein, et al v. Federal Trade Commission*, 194 F. 2d 607, 611 (9th Cir. 1952), cert. denied 344 U.S. 819 (1952).

expressed the fear that they might innocently sell a merchandise deal in the expectation that it would be used as a door prize but nevertheless be held in violation of the order should the customer subsequently sell the merchandise assortment in conjunction with a punchboard.

Respondents apparently are not concerned with the impact of the order insofar as its provisions run against the sale or distribution of punchboards or flares.⁴ They request, however, modification of the order to exempt those of their transactions involving solely deals. Failing such exemption, they apparently desire advice as to the manner in which the prohibition against the sale of "other devices" with or without merchandise "designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance * * *" will be applied to their sales of merchandise assortments mounted as deals.

There is at this time no necessity for modifying the terms of the order. However, we are persuaded that advice as to the manner in which its terms will be construed in connection with Great Western's sales of merchandise deals will facilitate enforcement of the order by the Commission's staff and compliance by respondents. Our holding herein will be limited to that issue.

Mounting merchandise on a board for display purposes is a neutral device which may be useful in many sales situations not involving the sale or distribution of the goods so mounted by a game of chance or lottery device. In those instances, where the deals on their face indicate no other purpose than display, these devices will not, without more, be construed as coming within the terms of the order's prohibition. Where a deal has obvious utility for legal uses, we will not hold such a device as inherently designed or intended for the prohibited use, although it could be employed for illegal purposes. In this connection, we note that deals as such are not basic to the illegal practices which the Commission has challenged in this proceeding.

On the other hand, if the design of the board indicates by the legend affixed thereto, or in some other manner, that it has been arranged to facilitate the merchandising of products by way of gambling schemes or lottery devices, or if a deal is sold in conjunction with punchboards or other devices with inherent appeal to the public's gambling instinct, then the Commission may well determine, depending on other relevant facts, that the sale of deals under such circumstances is within the scope of the order's prohibition.

The Commission cannot, at this time, anticipate all the problems with which respondents may be faced in complying with the terms

⁴ Pages 19, 25 Oral Argument.

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of the order. Respondents, however, are always free to consult the Commission's staff should they require advice as to whether a proposed course of action will constitute compliance with the order, and if they so desire they may file a more formal request pursuant to Section 3.26 of the Commission's Rules of Practices, directing such question to the Commission itself.

The initial decision as supplemented to conform to the views expressed herein will be adopted as the decision of the Commission.

By ANDERSON, *Commissioner, Concurring*:

I concur in the result reached by the majority, with the understanding that the order to cease and desist entered herein will have been violated if the merchandise deals offered by respondents are designed for gambling or are normally used in connection with the sale of merchandise by lottery or game of chance.

FINAL ORDER

DECEMBER 31, 1963

This matter has been heard by the Commission on respondents' exceptions to the initial decision of the hearing examiner and complaint counsel's answer in opposition thereto. The Commission has determined that respondents' exceptions should be denied and that the initial decision, as supplemented to conform to the views expressed in the accompanying opinion should be adopted as the decision of the Commission. Accordingly:

It is ordered, That the respondents Great Western Distributing Company, a corporation, and its officers, and Earl C. Jasper, individually and as an officer of said corporation, and Edward J. Carr, individually, and respondents' agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

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

It is further ordered, That the initial decision as supplemented to conform to the views expressed in the accompanying opinion be adopted as the decision of the Commission.

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Complaint

It is further ordered, That respondents shall file with the Commission, within sixty (60) days after service of the order herein upon them, a report in writing setting forth in detail the manner and form of respondents' compliance with the order.

IN THE MATTER OFGERT SALOMON TRADING AS KNITTING MACHINES
UNLIMITED ETC.

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

Docket C-672. Complaint, Dec. 31, 1963—Decision, Dec. 31, 1963

Consent order requiring a Los Angeles retailer of yarns, to cease violating the Wool Products Labeling Act by such practices as labeling as containing "100% Mohair", yarns which contained substantially less than 100% Mohair and contained a substantial amount of non-woolen fibers, failing to disclose on labels the percentages of woolen and other fibers in yarns, describing fiber content on labels as "vinyllic (Rhovyl)" instead of using the common generic name, and failing to comply with other labeling requirements; and to cease violating the Federal Trade Commission Act by advertising as "100% Italian Mohair", yarn which contained fibers other than Mohair.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gert Salomon, also known as George Salomon, an individual trading as Knitting Machines Unlimited trading as Yarns Unlimited, hereinafter referred to as respondent, has violated the provisions of the said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 Gert Salomon, also known as George Salomon, is an individual doing business as Knitting Machines Unlimited trading as Yarns Unlimited. Said individual respondent formulates, directs and controls the acts, policies and practices of said proprietorships including the acts and practices hereinafter referred to.

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Respondent is an importer and retailer of wool products with his office and principal place of business located at 915 Wilshire Boulevard, Santa Monica, California, with a branch outlet at 6130 Wilshire Boulevard, Los Angeles, California.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondent has introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondent within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain yarns stamped, tagged or labeled as containing 100% Mohair, whereas in truth and in fact, said yarns contained substantially less Mohair than represented and in addition contained a substantial amount of non-woolen fibers.

PAR. 4. Certain of said wool products were further misbranded by respondent in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain yarns with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; and (3) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and the Rules and Regulations described a portion of the fiber content as "vinyllic (Rhovyl)" instead of using the common generic name of said fiber, in violation of Rule 8 of the aforesaid Rules and Regulations.

(b) The percentages required to be given of each name specialty fiber were not set forth on labels in violation of Rule 18 of said Rules and Regulations.

PAR. 6. The acts and practices of the respondent as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now 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.

PAR. 7. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale and sale of yarn to the general public.

PAR. 8. In the course and conduct of his business, respondent now 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 California to purchasers 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. 9. In the course and conduct of his business respondent has engaged in disseminating and causing to be disseminated in newspapers of interstate circulation, advertising designed and intended to induce the sale of said yarn.

PAR. 10. In the course and conduct of his business and for the purpose of inducing the sale of yarn offered for sale and sold by him, respondent has made and is now making statements and representations directly or by implication with respect to the fiber content of said yarn. Said statements and representations have been made in newspaper advertisements of interstate circulation. Among and typical of the statements and representations contained in the aforesaid newspaper advertisements, but not all inclusive thereof, are the following:

Blue label—100% Finest Italian Mohair 100% Italian Mohair.

PAR. 11. By and through the use of the aforesaid statements and representations of respondent, respondent represented directly or by implication, that the aforesaid yarn was composed of 100% Mohair, whereas in truth and in fact the yarn contained fibers other than Mohair fibers.

Therefore, the statements and representations as set forth in Paragraph Ten, were and are false, misleading and deceptive.

PAR. 12. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has

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had, and now has, 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 respondent's products by reason of said erroneous mistaken belief.

PAR. 13. The aforesaid acts and practices of respondent as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Gert Salomon, also known as George Salomon, is an individual trading under his own name, as Knitting Machines Unlimited and as Yarns Unlimited with his office and principal place of business located at 915 Wilshire Boulevard, in the City of Santa Monica, State of California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Gert Salomon, also known as George Salomon, an individual trading as Knitting Machines Unlimited trading as Yarns Unlimited and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment in commerce, of wool yarn or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.
2. Failing to securely affix to, or place on, each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.
3. Failing to set forth the common generic name of fibers in the required information on labels, tags or other means of identification attached to wool products.
4. Failing to set forth the percentages of specialty fibers in required information on stamps, tags, labels or other means of identification attached to wool products when an election is made to use the generic name of the specialty fiber instead of the term wool.

It is further ordered, That respondent Gert Salomon, also known as George Salomon, an individual trading as Knitting Machines Unlimited trading as Yarns Unlimited and respondent's representatives, agents and employees directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of yarn or any other textile products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in yarn or any other textile products in advertisements applicable thereto or in any other manner.

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

SPIEGEL BROTHERS CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-673. Complaint, Dec. 31, 1963—Decision, Dec. 31, 1963*

Consent order requiring a corporate importer of tools and hardware and its wholly owned sales subsidiary, both in Long Island City, N.Y., to cease misrepresenting imported drill sets by falsely stating in catalogs and on cartons that they were high speed drills, made of an alloy especially formulated for high speed drills, fully guaranteed, and regularly sold for \$42.50 in the trade areas concerned; and to cease selling the drill sets with inadequate disclosure—such as the inconspicuous lettering employed—as to the foreign country of origin.

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 Spiegel Brothers Corporation, a corporation, Steelcraft Tool Corporation, a corporation, and Kurt J. Spiegel, individually and as an officer of each of said corporations, hereinafter referred to as respondents, have 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:

PARAGRAPH 1. Respondents Spiegel Brothers Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 36-50 31st Street, Long Island City 6, New York.

Respondent Steelcraft Tool Corporation, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 36-50 31st Street, Long Island City 6, New York.

Respondent Kurt J. Spiegel is an individual and officer of each of the aforementioned corporate respondents. He formulates, directs and controls the acts and practices of each of the corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of the aforesaid corporate respondents.

Respondents are engaged in a joint and common operation and business enterprise. Respondent Spiegel Brothers Corporation pur-