

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS, JULY 1, 1964, TO DECEMBER 31, 1964

IN THE MATTER OF

J. C. MARTIN CORPORATION ET AL.

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

Docket 8520. Complaint, July 13, 1962—Decision, July 6, 1964

Order requiring New York City sellers of merchandise to cease from supplying others with pull cards or other devices intended to be used in the sale of merchandise by means of chance, lottery, or gift enterprise, selling or disposing of merchandise by such means, and rejecting respondent's contention that a previous case had made this one *res judicata*.

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 J. C. Martin Co.,* a corporation, and John Kaslow, individually and as an officer of said corporation, and John Kaslow, an individual trading as The D. A. Sales Company, 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. Respondent J. C. Martin Co., 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 667 Broadway, in the city of New York, State of New York.

Respondent John Kaslow is an officer of the corporate respondent. He also employs the trade name, The D. A. Sales Company under which all merchandising operations hereinafter described are conducted. He formulates, directs and controls the acts and practices of

*The correct corporate name of this respondent is J. C. Martin Corporation.

all respondents, including the acts and practices hereinafter set forth. His address and that of The D. A. Sales Company are the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale and distribution, through others, of numerous articles of merchandise to the public.

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

PAR. 4. In the course and conduct of their business as aforesaid, the respondents sell and distribute said articles of merchandise, through others, by means of a lottery scheme. Their operational plan is as follows:

Respondents cause to be distributed through the mails, a brochure or catalog depicting, among other things, pictures or description of prizes or premiums offered to persons who sell their merchandise.

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

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

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

PAR. 5. The persons to whom respondents furnish the said pull cards use the same in purchasing, selling and distributing respondents' merchandise in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their merchandise in accordance with the sales plan hereinabove set forth.

The sale of merchandise by the sales plan set forth and described in Paragraph Four hereof also constitutes the sale of merchandise by means of a chance or gaming device inasmuch as the identity of the article involved and the amount of money to be expended are unknown to the purchaser or participant until the tab is removed from the sales catalog or card.

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

PAR. 6. The aforesaid acts and practices of respondents, 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. Thomas Whitehead supporting the complaint.

Mr. Miles Warner of Philadelphia, Pa. for respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

NOVEMBER 1, 1963

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on July 13, 1962 issued its complaint charging J. C. Martin Co.,¹ a corporation, and John Kaslow, individually and as an officer of said corporation, and John Kaslow, an individual trading as The D. A. Sales Company, with violation of Section 5 of the Federal Trade Commission Act. The individual respondent, John Kaslow, is alleged to formulate, direct and control the acts and practices of all the named respondents, and said respondents are alleged to be engaged in the interstate sale and distribution of mer-

¹ The corporate respondent's correct name is J. C. Martin Corporation. See, respondents' answer, page 2.

chandise, through others, by means of a sales plan charged to be both a lottery scheme and a gaming device contrary to the established public policy of the Government of the United States.

In Docket No. 6145 [52 F.T.C. 1674], a prior complaint was issued on December 2, 1953, which charged J. C. Martin Corp., a corporation, and Jack Kaslow² and Seymour Orenstein, as corporate officers and as individuals, with violation of the Federal Trade Commission Act by use of a sales plan involving the distribution of merchandise by means of chance, lottery, or gift enterprise. The Commission's order to cease and desist in this prior proceeding was vacated and set aside by the appellate court³ due to the stated absence of the presentation of proof of the element of prize, held essential along with the elements of consideration and chance as being necessary to a lottery.

Respondents filed answer in the instant proceeding on July 19, 1963. Respondents admit in part and deny in part the various allegations of the complaint and aver that the allegations of the present complaint are but a virtual duplication of those in the prior complaint in Docket No. 6145. Respondents aver that the Commission sought no review of the adverse court decision in this prior proceeding, that it remains conclusive and binding to all parties to the said litigation, and that the institution of the instant proceeding without leave sought or granted by the said court is a violation of the court's mandate.

Respondents' answer also further avers that in the absence of any allegations in the instant complaint of changed facts, changed circumstances, or changed considerations affecting the public interest, the final result in Docket No. 6145, wherein the Commission's order to cease and desist was judicially vacated and set aside, bars the instant proceeding as *res judicata*.

Intervening between the issuance of the complaint and the filing of answer in the instant proceeding,⁴ respondents filed a motion to dismiss the complaint, also based on the aforesaid grounds of alleged violation of the appellate court's mandate and *res judicata*. This motion to dismiss was denied both at the opening and the closing of the hearing held on the merits herein.⁵

² The time period covered in Docket No. 6145 is different from that of this proceeding, but the corporate respondent and Jack Kaslow and John Kaslow, the individual respondent herein, are one and the same. See Tr. 19-23 : 161.

³ *J. C. Martin Corp., et al. v. F.T.C.*, (7th Cir., 1957) 242 F. 2d 530 at 533-534.

⁴ A full and complete chronological recital of the plethora of prolix pleadings in the instant proceeding would appear both repetitious and duplicative of matters of record, and, further, unnecessary of being herein again set forth.

⁵ See authorities cited in answer by complaint counsel in opposition to said motion filed on September 11, 1962, and Tr. 4-16, containing a discussion as to the extent of the said motion before the hearing examiner prior to the ruling made thereon. The motion to dismiss was renewed at the close of the hearing and denied on the record at Tr. 187-191 and if perchance considered renewed by paragraph 4, page 2, of respondents' proposed findings and conclusions, it is again herein made subject to the same ruling.

The hearing on the merits was concluded in approximately a day and a half. Three individuals using respondents' merchandise sales plan and the individual respondent testified during the presentation of the case-in-chief and the individual respondent alone for the defense, after which the case was closed on the record.

All counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses presented, and to introduce such evidence as is provided for under Section 3.14(b) of the Commission's Rules of Practice for Adjudicative Proceedings. The transcript of record consists of 200 pages and Commission Exhibits marked for identification Nos. 1 through 5 were received in evidence. Also marked for identification and received in evidence were respondents' Exhibits Nos. 1 through 3.

Proposed findings of fact, conclusions, proposed order to cease and desist, and a supporting brief were duly filed by counsel supporting the complaint. Counsel for respondents belatedly filed a page and one-half document entitled "Respondents' Proposed Findings and Conclusions" together with motion for leave to file which further stated their brief would follow by the end of October.⁶ No brief was filed by respondents at such time. Proposed findings, conclusions and order submitted by respective counsel and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following Findings of Fact and Conclusions therefrom are made, and the following Order issued:

FINDINGS OF FACT

1. Respondent J. C. Martin Corporation is a corporation 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 667 Broadway, in the city of New York, State of New York. Respondent John Kaslow is the principal officer and stockholder of said corporate respondent and formulates, directs and controls the acts and practices of said corporate respondent. The business address of said individual respondent is the same as that of the corporate respondent.⁷

2. Respondents are now, and for a number of years past have been, engaged in the business of the sale and distribution, through others, of various articles of merchandise to the public. Respondent John

⁶ See, Tr. 197-200.

⁷ See, answer, page 2; Tr. 19-20.

Kaslow, individually and in conjunction with said corporate respondent, employs various trade names under which the said merchandising operations as hereinafter described are conducted. Some of the said operations were and are conducted by the respondents under the name of J. C. Martin Co., and others under the name of The D. A. Sales Company.⁸ Respondents, in the course and conduct of the said business, cause and have caused the said merchandise products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other states of the United States, and at all times mentioned herein have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.⁹

3. Respondents, in the interstate sale and distribution of their aforesaid merchandise, operate the following sales plan:

(a) Names of prospective sales representatives or solicitors for the sale of said merchandise are first secured from commercial lists variously obtained by the respondents.¹⁰

(b) Sales catalogs or brochures prepared by the respondents and illustrating the items of merchandise therein being offered for sale and the prices therefor are caused by respondents to be mailed to the names and addresses of the persons appearing on said lists. Said catalogs or brochures also contain illustrations of a choice of merchandise premiums, or cash amounts in lieu thereof, which are offered by respondents to said prospective representatives or solicitors as an inducement for the making of the aforesaid sales of respondents' merchandise.¹¹

(c) In addition to illustrating the merchandise items of respondents being offered for sale, said catalogs or brochures contain a series of detachable tabs inscribed "PULL HERE", which normally are used in connection with the sale of said merchandise items. On the reverse side of each tab, and concealed from the purchaser until the tab is pulled and detached, is the designation of the item of merchandise and the purchase price therefor being offered for sale or sold to the person pulling or detaching the particular tab. Each of the designated merchandise items and the price for each item, which is concealed under the particular tab, is also set forth in a printed list in said catalogs or brochures opposite or adjacent to said tabs. This list con-

⁸ See, answer, page 2; Tr. 19-21; 151-154; and Comm. ex. Nos. 1, 2, 3, 4, 5.

⁹ See, answer, page 3; respondents' merchandise sales in 1962 approximated from \$300,000 to \$325,000 (Tr. 36) and covered the entire United States (Tr. 155). Of these total sales, \$275,000 were made in states other than the State of New York (Tr. 37).

¹⁰ Tr. 52; respondents annually mail from 350,000 to 1,000,000 sales catalogs or brochures to prospective sales representatives or solicitors (Tr. 69) and the proportion of such number of said recipients answering would run from half a percent to two percent of such mailings (Tr. 68-70).

¹¹ Tr. 53; 154-155; Comm. ex. Nos. 1-B, 2-B, 3-B, 4 at page 17, 5 at page 17.

tains three vertical columns, labeled respectively "Price", "Name of Purchaser", and "Article".

Under the first column labeled "Price" is a printed alphabetical list of a number of different boys' and girls' names with a price appearing under each name. The name and price concealed under one of the adjacent pull tabs will correspond with one of the names and the price thereunder appearing on said list. Under the second column labeled "Name of Purchaser" is a blank space opposite each of the boys' and girls' names in the first column labeled "Price" for writing in the name of the purchaser pulling and detaching the particular tab bearing that boy's or girl's name. Under the third column labeled "Article" is a printed description of the item of merchandise illustrated in the catalog or brochure and being purchased by the person drawing the particular name tab calling for the said item.¹²

(d) Upon pulling and detaching the tab bearing a certain boy's or girl's name, the purchaser pays the price of the merchandise item designated on the pull tab and the buyer's name is written in the appropriate blank space provided for each purchaser's name on the adjacent list. When all the tabs are detached and the money therefor collected, it is remitted to the respondents by the sales representative or solicitor making the sales. Upon its receipt, the respondents ship to said sales representative or solicitor the sold merchandise items for delivery to the respective purchasers, and either the merchandise gift selected or the cash compensation chosen by said representative or solicitor for the making of such sales.¹³

(e) In addition to the making of the aforesaid merchandise sales by the method aforescribed, respondents' sales catalogs and brochures also provide for the sale of said items of merchandise without the use of the pull tabs therein contained. That is, the prospective purchaser may purchase from the descriptive merchandise list adjacent to the pull tabs any or all of the items, or any number of each item, at the prices for the same shown on the said list, without the necessity of detaching any of the pull tabs to obtain the said merchandise.¹⁴ This alternative given the purchaser, however, has no bearing on the legality or illegality of respondents' merchandise sales when made through use of the pull-tab device. Further, the record herein discloses that sales by respondents of the merchandise items on the said list are both dollar-wise and number-wise, designedly and preponderantly made through use of the pull-tab device contained in respondents' said sales catalogs or brochures.¹⁵

¹² Comm. ex. Nos. 1-D, 2-D, 3-D, 4 at page 20, 5 at page 20.

¹³ See footnotes 11 and 12, *supra*.

¹⁴ Tr. 55-56; see, also, footnote 12, *supra*.

¹⁵ Tr. 46-47; 61-64; 155-157; 182-183; 192-197; Respt. ex. No. 1.

4. Respondents' sales catalogs and brochures, as shown to prospective purchasers and purchasers by respondents' sales representatives or solicitors, make various comparative representations as to the retail values of the merchandise items and the respective listed prices for such items as offered for sale and sold under the various pull tabs, as for example:

Show these useful items to your friends!

They are so easy to sell because
they're ALL WORTH MUCH MORE!¹⁶

ALL outstanding values * * *

ALL worth more than the * * * listed prices.¹⁷

These representations as to greater value can do nothing other than stimulate and contribute to the prospective purchaser's and purchaser's inclination to obtain a seeming bargain, no matter which pull tab is detached and which item of merchandise is thereby obtained at its designated price. Respondents would contend, however, that, notwithstanding these representations of greater value than the designated prices for the various merchandise items being offered for sale, each item's cost price bore the same ratio to its designated sales price as did any other of the said items, and, accordingly, all items were of the same relative value no matter which pull tab was detached and which item was drawn.¹⁸

In support of such contention, respondents' exhibits Nos. 2 and 3 were submitted in evidence. These exhibits, however, fail to support respondents' contention. Respondents' exhibit No. 3, for example, based upon the figures appearing on said exhibit when submitted, following the addition of further computations, shows the contrary to respondents' contention to be the actual fact:

Respondents' Exhibit No. 3—Comparisons of Cost Price and Selling Price of 14 Articles Listed

No.	Code	Articles	Cost price	Selling price	Ratio of selling price to cost price ¹	Percent cost price is of selling price ¹
1	Ann	3 pc. heart trays.....	\$0.33	\$1.49	4.5	22.1
2	Bob	6 pc. steak knife set.....	.73	1.98	2.7	36.9
3	Cam	Make-up mirror.....	.59	1.95	3.3	30.3
4	Dan	Bench S & P set.....	.45	1.60	3.8	26.6
5	Eva	Gold lighter.....	.34	1.49	4.4	22.8
6	Flo	Family tree.....	.48	1.59	3.3	30.2
7	Gay	Frozen food knife.....	.34	1.79	5.3	19.0
8	Hal	Flower vase set.....	.51	1.99	3.9	25.6
9	Ida	Register desk set.....	.48	1.89	3.9	25.4
10	Jen	Cig. box and ash trays.....	.40	1.69	4.2	23.7
11	Ken	New mag. can opener.....	.61	1.98	3.2	30.8
12	Lil	Brass pen and pencil set.....	.43	1.95	4.5	22.1
13	May	Kitchen utensil set.....	.62	1.98	3.2	31.3
14	Nan	Nail clipper set.....	.40	1.49	3.7	26.8

¹ Computed on the basis of monetary amounts appearing in above "Cost Price" and "Selling Price" columns on respondents' exhibit No. 3 as submitted in evidence.

¹⁶ Comm. ex. No. 1-D.

¹⁷ Comm. ex. No. 3-D.

¹⁸ Tr. 65.

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It is apparent from the foregoing analysis of respondents' exhibit No. 3, that the ratio of selling price to cost price is not the same for all the items, nor is the percentage that cost price is of selling price the same for all items.¹⁹ For example, a purchaser pulling the tab with the concealed name of "Bob" and the designated sales price of \$1.98 would get an item costing \$.73, sold at only 2.7 times its cost price. The percentage this cost price is of the selling price would amount to 36.9%.

If, on the other hand, the purchaser pulled the tab concealing the name of "Gay" and the designated sales price of \$1.79, he or she would get an item costing \$.34 and sold at 5.3 times its cost price. The cost price here would be only 19.0% of selling price. It is, accordingly, quite obvious that the purchaser drawing the name "Bob" rather than "Gay" would get much the better relative value over cost and a more favorable and relatively lower buying price. These existing differences between the cost price and the designated selling price of the various items so sold by chance, amount to a gain in price advantage to the purchasers pulling the tabs concealing the items bearing the lower ratio of selling price to cost price and the higher percentage that the cost price is of the selling price.

Whether or not the designated sales prices of any or all the items being offered are lower than an actually prevailing higher retail market value, as is represented by the respondents, or whether or not the actual prevailing retail market value is, in reality, lower or much the same as the designated sales prices is not shown by the record. The record only shows, for example, as to respondent exhibit No. 3, that the cost price to respondents of all the merchandise items appearing thereon totals but \$6.71, while the designated selling prices of all such items total \$24.95, of which total selling price amount respondents' sales representative or solicitor has the option of retaining \$10 in lieu of taking a merchandise premium for the making of the sales.²⁰

5. Respondents would further contend that the pull tabs in their sales catalogs or brochures, shown by respondents' sales representative or solicitor to prospective purchasers and purchasers, serve a purpose other than the plain, intended use to be made of the said tabs.²¹ This contention is rejected for, while the pull tabs might serve to help make an easier selection between the various available items by undecided customers, as is argued by respondents, and also act as a receipt for the money paid and as a reminder to the purchaser of merchandise yet to be delivered, it is clear that their intended main purpose and use

¹⁹ Respondents' exhibit No. 3 is directly related to Commission exhibit No. 4 at page 20 (Tr. 174-175). (See also, Tr. 165-179.)

²⁰ Commission exhibit No. 4 at page 17.

²¹ Tr. 51-52; 64.

is to sell respondents' merchandise by means of chance. The fact that respondents' merchandise can be and is sold without use of the pull tabs is also of no moment for the emphasis in respondents' sales catalogs or brochures is for their sales representatives or solicitors to sell such merchandise by use of the pull tabs.²²

For example, Commission exhibit No. 1-A shows the following:

IT'S SO SIMPLE, ANYONE CAN DO IT! You are in business for yourself, so just ask your friends to buy from you, instead of at the store * * * one or more of the 20 useful articles listed on page 4. Each article and its price is also clearly printed UNDER THE PULL RECEIPT ON PAGE 4. You and your friends will enjoy this new way of buying.

In the space provided on page 4, list the buyer's name next to the articles purchased. When you have sold the 20 articles, you will have \$39.95. Fill out the order blank on page 2. Detach and mail it together with money order for \$39.95. Be sure to indicate on order blank which Big Premium you want for yourself.

Further, in Commission exhibit No. 1-D, the following appears:

We are able to give these values because our overhead is low based on uniformity of packing. Do try to sell the 20 useful items. If unable to do so, we will fill your order allowing you a discount of 25% on articles sold, which you deduct from your remittance. If order is less than \$39.95, include list of items sold. To receive a premium, a complete order of \$39.95 must be received by us.

Respondents' sales representatives or solicitors are also afforded a strong incentive to sell all the items called for under the pull tabs because in so doing they obtain the option of either a merchandise premium or of deducting a cash premium in remitting to the respondents. With regard to Commission exhibit No. 1, this cash premium amounts to \$15.00, or nearly 40% of the selling price in comparison to the 25% deducted when selling only a part, and not all, of the said items.²³

Further, respondents' exhibit No. 1 in evidence shows that during the sample month of July 1963, respondents filled a total of 460 orders forwarded by respondents' sales representatives or solicitors in the dollar sales amount of \$13,641.35, and that of this total, 387 orders or 84.1% were for the complete packaged unit of all the merchandise covered by the sales catalog or brochure pull tabs. These sales amounted to \$11,159.82 of the \$13,641.35 of total sales. The balance of \$2,481.52, or 18.2% of the total dollar sales, were accounted for by 73 orders or 15.9% of total orders not calling for the complete packaged unit. These latter sales cover orders forwarded in which all the pull tabs

²² Tr. 58; 155-157; 196-197.

²³ Commission exhibit Nos. 2, 3, 4 and 5, similarly, provide a merchandise or cash premium option and for only a 25% deduction when all the items are not sold.

were not used or where additional items were sold without use of the pull tabs in making the sale.²⁴

Three persons making sales of respondents' merchandise through use of respondents' sales catalogs or brochures testified in this proceeding as to the procedures they followed in the making of such sales.²⁵ The first witness used Commission exhibit No. 2, the second used Commission exhibit Nos. 3 and 5, and the third used Commission exhibit No. 4.

All the merchandise items under the pull tabs were sold and such sales were stated to have resulted only from the use of the pull tabs in said catalogs or brochures.²⁶ The testimony was to the effect that when prospective purchasers were shown the said catalogs or brochures with relation to the buying of respondents' merchandise, they were told by respondents' sales representative or solicitor, "Okay, pull here"²⁷ or asked if they would like to "take a chance."²⁸

6. There can be no reasonable doubt, based on the testimony and an examination of the exhibits of record in the instant proceeding, that respondents' merchandise sales solicited by means of respondents' said sales catalogs or brochures containing the hereinbefore described pull tabs, placed in the hands of others a sales device which had, and now has, the capacity and tendency to give prospective purchasers and purchasers the impression and belief that, upon detaching any of the said pull tabs, they were thereby taking a chance and were engaging in an obvious gamble as to which of the particular various items they would thus obtain and what designated price they would pay.

The very make-up of the sales catalogs or brochures admits and unmistakably brands them to be nothing other than lottery schemes and gaming devices, because the pull tabs therein contained serve no purpose other than to act as an invitation to prospective purchasers and purchasers to take a chance and see what item of merchandise and sales price the luck of the draw would designate. In so doing, such a solicitation cannot be found to be other than a flagrant appeal to the gambling instincts of the public, which is an act and practice

²⁴ Tr. 59; 182-187; 192-194.

²⁵ All three persons were of Puerto Rican descent and prior to their testimony respondents' counsel objected to its competency on the basis of their alleged inability to properly speak and understand the English language. This objection was not sustained and following the observation of their demeanor on the witness stand, and after listening to their testimony as there given, and judging their capability to understand the questions then asked and the nature of the responses made, full probative value is being given to such testimony. See. Tr. 70-72; 108-109; 115-116; 134; 149.

²⁶ Tr. 78, 82, 101-102, 123, 128, 133, 137-138, 148.

²⁷ Tr. 114, 117, 121.

²⁸ Tr. 136-138.

by respondents contrary to the established public policy of the United States, and, therefore, an unfair act and practice within the intent and meaning and violative of Section 5 of the Federal Trade Commission Act.²⁹

7. The 1956 initial decision in Docket No. 6145, at paragraph five, states the following with regard to the complaint in that proceeding:

The three essential elements in a lottery are consideration, chance, and prize. The first two, consideration and chance, obviously are present here; the only question is as to the element of prize. On this point the complaint alleged: "Some of said articles of merchandise have purported and represented retail values greater than the prices designated for them, but are distributed to the consumer for the price designated on the tab which he pulls. The prices of other of the articles are higher in proportion than the articles first mentioned. The apparent greater values of some of said articles, induces members of the purchasing public to purchase the tabs or chances in the hope that they will receive articles of merchandise of greater value than the designated prices to be paid for same."

The complaint in the instant proceeding omits the above allegation of the prior complaint in Docket No. 6145 relative to any representation being made, that some of the merchandise articles listed have greater retail values than the designated prices to be paid for them, with the result that the purchasing public is induced to purchase the pull tabs or chances in the hope of drawing the articles of greater value.

The instant complaint, however, contains the following further and separate charge in paragraph five, which was not stated in the prior complaint in Docket No. 6145:

The sale of merchandise by the sales plan set forth and described in Paragraph Four hereof also constitutes the sale of merchandise by means of a chance or gaming device inasmuch as the identity of the articles involved and the amount of money to be expended are unknown to the purchaser or participant until the tab is removed from the sales catalog or card.

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

The appellate court decision in *J. C. Martin Corp., et al. v. Federal Trade Commission*, footnote 3, *supra*, held that in order to constitute a lottery, the elements of consideration, chance and prize must be present. Pertinent to the lottery question, the *Martin* case held:

²⁹ Docket No. 8470, *Jonas Gerson, an individual trading as Haven Company*, initial decision filed October 9, 1962 and adopted by the Commission on March 22, 1963 [62 F.T.C. p. 1009, 1011].

1. That notice to a prospective purchaser that he is not obliged to buy the article identified by a tab after ascertaining what it is and the price to be paid, does not eliminate the elements of consideration and chance. The court states, "This is no more than a recognition of the common law rule that a gambling transaction is unenforceable."

2. That notice to a prospective purchaser of an option to purchase a desired article outright rather than utilize the tab device, does not eliminate the element of chance. The court stated, "If an individual exercises his option to take a chance by pulling a tab can it be said that he has not taken a chance? The objection to the pull tab scheme cannot be removed by offering the individual an unobjectionable alternative."

3. That the element of prize is essential to the existence of a lottery. According to the court, where "each participant in the scheme will in any event receive the equivalent of the amount contributed by him, and he is not under any hazard of pecuniary loss, nor offered the chance of receiving something of more value than the amount contributed by him, a lottery does not exist."

4. The court rejected a finding of the presence of the essential element of prize based on a test as to whether or not the article of merchandise designated by the pull tab might be of some use or of no use to the particular purchaser, stating, "We believe that it would be stretching the term lottery to the breaking point to sustain this finding of prize in petitioners' sales method."

The most recent Commission opinion involving a sales plan held to constitute both a lottery and a gaming device appears in Docket No. S740, *Jonas Gerson, trading as Haven Company*, issued March 22, 1963 [62 F.T.C. 1009]. The Commission therein adopted the initial decision of the hearing examiner previously filed on October 9, 1962. In the *Gerson* case, a lottery was held existent, based on the representations contained in the sales brochures that the merchandise items being offered were "worth much more" and were "outstanding values", and the impression thereby found created on purchasers using the pull tabs that they would receive items worth more than the retail sales price amounts designated for such items.

The Commission opinion, in adopting the initial decision in the *Gerson* case, stated, "The *Martin* case held only that the device there involved was not a lottery because the element of prize, essential to a lottery scheme, was not sufficiently proved. On the facts of this record, the case is clearly distinguishable from *Martin* and is governed by *Wolf v. FTC*, 135 F. 2d 564 (7th Cir., 1943), and *E. & J. Distributing Co. v. FTC*, 193 F. 2d 179 (2nd Cir., 1952), cert. denied 344 U.S. 823."

In addition to finding the existence of a lottery, however, the initial decision in the *Gerson* case went further and also upheld the complaint's additional allegation that the sales plan involved was a gaming device calculated to appeal to the public's gambling instincts, and, as such, an unfair act or practice within the meaning of the Federal Trade Commission Act, even if technically it might not have constituted a lottery. The *Gerson* initial decision, as adopted by the Commission, cites various supporting cases in such regard, including the special concurring opinion in *Calvine Cotton Mills* (1954) 51 F.T.C. 294 at 298, wherein, in part, it is stated:

* * * it should be made clear that * * * respondent's practice is not being condemned because it is a technical lottery, but because it is a method of merchandising which constitutes an unfair trade practice * * * the Commission should not be concerned with whether the three essential elements of a lottery, namely, prize, consideration and chance are all present in respondent's sales promotion plan * * * Rather, it should be concerned with only the unfair trade practice of distributing merchandise by means which are contrary to public policy. It is clear that respondent's sales promotion plan was intended to appeal to the gambling instincts of purchasers and prospective purchasers and was therefore contrary to public policy.

8. The present matter being found not to be *res judicata*,³⁰ the initial decision in the *Gerson* case, as adopted by the Commission, is controlling in the instant proceeding based on the facts of this record, and, accordingly, it is held that respondents' sales plan, used as herein disclosed, constitutes a lottery scheme and the sale of merchandise by means of a chance or gaming device contrary to the established public policy of the United States and is, therefore, an unfair act and practice in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the matter is not *res judicata*.

2. The complaint herein states a cause of action and this proceeding is in the public interest.

3. It is concluded that respondents' sales plan, as hereinbefore found, involves the use of a lottery scheme and a gaming device in connection with the sale, by chance, of respondents' merchandise, and that respondents have supplied and placed in the hands of others said scheme and device for such use and purpose.

³⁰ See footnote 5, *supra*.

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

ORDER

It is ordered, That J. C. Martin Corporation, a corporation, and its officers, and John Kaslow, individually and as an officer of said corporation, and John Kaslow, an individual trading as The D. A. Sales Company, or under any other name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

OPINION OF THE COMMISSION

JULY 6, 1964

By REILLY, *Commissioner*:

The complaint here charges respondent with a violation of Section 5 of the Federal Trade Commission Act. Specifically, it is alleged that respondents sell and distribute merchandise in interstate commerce by means of a sales plan which:

- (1) Involves a lottery and places in the hands of others the means of conducting lotteries in the sale of their merchandise.
- (2) Constitutes the sale of merchandise by means of a gaming device.

The hearing examiner sustained the complaint on all counts and issued a cease and desist order. Respondents have appealed, and

present the three arguments set out below to support their position that the hearing examiner be reversed and the complaint dismissed.¹

Respondent argues that:

1. *The Hearing Examiner's Initial Decision Is Unsupported by "Substantial and Competent evidence"*.

After reading the two hundred (200) pages of record, we hold that the examiner's decision was supported by the preponderance of substantial, reliable and probative evidence on the record as a whole. Respondents assert, however, that the Commission's witnesses were unable to speak or understand English and that therefore they were incompetent. An examination of the record reveals that in fact two of the three witnesses had considerable trouble with English; however, the examiner had an opportunity to listen to and observe all the witnesses. Their competency is clearly a matter to be determined by him. Barring unusual circumstances, not presented on this record, his ruling on such an issue should not be disturbed. "The weight and credibility to be accorded their [the witnesses] testimony was a matter for the trier of the facts." *Basic Books, Inc., et al. v. Federal Trade Commission*, 276 F. 2d 718, 720 (7th Cir. 1960). Moreover, the record reveals that respondents' counsel took some pains to point out that the witnesses possessed little formal education, their lack of familiarity with Commission proceedings, and the awkwardness which they felt in expressing themselves in English. And, John Kaslow, the individual respondent herein, read into the record on direct examination parts of a statement—which had been prepared by him and his counsel—justifying and explaining his sales plan. Finally, the examiner himself, not being satisfied with the exposition elicited by Commission counsel and respondents' counsel, on several occasions closely questioned Mr. Kaslow as to how his sales plan operated. Thus the examiner was fully apprised of whatever infirmities were present in the witnesses' testimony and moreover had other evidence on which to rely. We find nothing to show that he abused his discretion.

2. *The 1957 proceedings are Res Judicata.*

On December 2, 1953, the Commission in Docket No. 6145 issued a complaint against J. C. Martin Corp., a corporation, and Jack Kaslow and Seymour Orenstein, as corporate officers and individuals. The charge there was that respondents had utilized a "game of chance, gift enterprise or lottery scheme."² The complaint concluded that:

¹ The details of the merchandising plan are set out in the initial decision at pp. 6-7.

² See paragraph 3 of the complaint in Docket 6145 quoted at p. 8 of respondents' appeal brief.

The use by respondents of a sales plan or method involving the distribution of merchandise by means of chance, lottery, or gift enterprise is contrary to the public interest and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.³

The hearing examiner sustained the complaint and in a *per curiam* decision the Commission affirmed.⁴ The Seventh Circuit, however, reversed.⁵ Our reading of that decision convinces us that the court viewed the allegations and proof adduced there as bearing only on the technical presence or absence of a *lottery*. To the court, in order to constitute a lottery, the elements of "consideration, chance and prize must be present." The court rejected the hearing examiner's reasoning, that the element of "prize" was present simply because of the personal preferences of individuals for particular items. It stated that "Since there is no finding here concerning the relative values of petitioner's merchandise,"⁶ the lottery could not be sustained.

Subsequently on July 13, 1962, the Commission issued its complaint against the respondents herein. The only difference in parties is that Seymour Orenstein, named as a respondent in the first complaint, is not named in the present complaint. The present complaint, however, has a charge which is not contained *in haec verba* in the 1952 complaint. For respondent is here charged with selling merchandise by means of a "chance or gaming device." The 1952 complaint did not contain that precise allegation. That complaint spoke in terms of a "game of chance, gift enterprise or lottery." Now respondent argues *res judicata*, declaring that there is no difference between a "lottery" and a "gaming device" and that this case involves no new facts. However, a reading of the cases does not reveal a pinpointing of lotteries as the only method by which the public gambling instinct may be aroused. Other methods are comprehended within the more general terms "merchandising by gambling." The courts have stated:

We think the Commission * * * has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandise by gambling. * * * Merchandise by gambling should not be divided into insulated acts which appear innocent when examined separately. *Modernistic Candies, Inc. v. F.T.C.*, 145 F. 2d 454, 455 (7th Cir. 1944).

True, the applicability of *res judicata* to administrative agencies has involved some controversy. But the vast majority of courts and commentators are agreed that it does not apply to administrative agencies

³ See paragraph 5 of the complaint in Docket 6145 quoted at p. 9 of respondents' appeal brief.

⁴ 52 F.T.C. 1674 (1956).

⁵ 242 F. 2d 530 (1957).

⁶ *Id.* at 534.

with the same force as it does to courts. See generally, Davis, *Administrative Law Treatise*, Sec. 18.01-18.12 (1958). This Commission declared in the *Manco* case, "We are dealing here with new and different issues of fact and law."⁷ This is the case here. The time period covered by this complaint is different, comprehending the period from approximately May 1957 to 1960. Moreover, the theory of this complaint, and the examiner's decision are more comprehensive than the first complaint. They both speak broadly in terms of gaming devices. The proof and theory here are similar, if not identical, to that adduced in *Jonas Gerson T/A The Haven Company*, Docket 8470, 1963 Trade Cases, Para. 70947 [62 F.T.C. 1009], aff'd. 325 F. 2d 93 (7th Cir. 1964), and this case is governed by our decision in that matter.⁸

3. Jurisdiction of the 7th Circuit

Finally, respondent argues that "the Commission lacked authority to reopen the proceedings at Docket 6145 under color of a new docket number without leave of the Court of Appeals for the Seventh Circuit."

We have held above that the doctrine of *res judicata* does not apply to this case. And therefore the argument that this complaint involves a reopening of "the proceedings at Docket 6145" assumes a premise which is at variance with that holding, and so we reject respondents' contention.

At the oral argument before the Commission respondents' counsel alluded to the fact that they had unsuccessfully sought an injunction in both the District and Circuit Courts to stay these proceedings and were at that time seeking Supreme Court review of these unfavorable decisions. Respondents' counsel urged that it would be "unseemly for this Commission to take final action with respect to the matter of jurisdiction before the Supreme Court has had an opportunity to act on the pending petition for certiorari." (Tr. 4.)

On April 20, 1964,⁹ the Supreme Court denied respondents' petition for certiorari. And therefore respondents' argument on this issue is moot.

Respondents' appeal is therefore dismissed and the initial decision and order are hereby adopted by the Commission.

⁷ *Manco Watch Strap Co., Inc.*, Docket 7785, CCH Trade Reg. Rep. Transfer Binder, Para. 15781 at p. 20,591 (1961-1963).

⁸ Considering our limited resources and manpower, the "plethora of prolix pleadings in this matter" (Initial Decision p. 4) seems somewhat out of proportion with whatever public interest is inherent in the present case and similar matters.

⁹ 32 U.S.L. Week 3368 (April 21, 1964).

Complaint

FINAL ORDER

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

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

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