

IN THE MATTER OF
BEAR SALES CO. ET AL.

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

Docket 8627. Complaint, May 18, 1964—Decision, July 8, 1965

Order requiring a Chicago mail-merchandising firm to desist from furnishing its customers pushcards and other devices to be used in selling its merchandise to the public by means of a game of chance, gift enterprise, lottery scheme, chance, or gaming device, or selling or otherwise disposing of any merchandise by such means.

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 Bear Sales Co., a corporation, and E. Robert Baer, individually and as an officer of said corporation, 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 Bear Sales Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 203 North Wabash Avenue, in the city of Chicago, State of Illinois.

Respondent E. Robert Baer is an officer of corporate respondent. He formulates, directs and controls the acts and practices of corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

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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 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 Illinois to purchasers 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, respondents sell and distribute said articles of merchandise, through others, by means of a lottery scheme, game of chance or gift enterprise. Their operational plan is as follows:

Respondents cause to be distributed, through the mails, to operators and to members of the public, certain literature and instructions including, among other things, pushcards, order blanks, circulars including thereon illustrations and descriptions of their merchandise, and circulars explaining respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said pushcards; and as prizes to members of the purchasing and consuming public who purchase chances or pushes on said cards. One of respondents' said pushcards bears 45 masculine and feminine names with columns on the back of said card for writing in the name of the purchaser of the push corresponding to the masculine or feminine name selected. Said pushcard has 45 partially perforated discs. Each of said discs bears one of the masculine or feminine names corresponding to those on the list. Concealed within each disc is a number which is disclosed only when the customer pushes or separates the disc from the card. The pushcard also has a larger master seal and within the master seal is one of the masculine names or one of the feminine names appearing on a disc. The person selecting the name corresponding with the name under the master seal receives a set of three French Poodle dog dolls called "Lillie and her Children." The pushcard bears the following legend or instructions:

Lucky Name Under Seal Gets
Lilli and her Children

Brand new French Poodle Family
Just Begging to be Adopted By your Family.

Lilli is 20 inches tall—Life Size! Sports a handsome
Gold Colored Collar and Chain, Pom Pom bow!

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Beau is Black as ink. This Imp has felt ears, a real Puppy Trim!

Babs is Silvery White and On Her Way to Being a "SHOW" dog!

It's America's most popular dog family for you, for your favorite youngster, teenager or co-ed.

* * * * *

Lucky Numbers 3, 16 and 22 Pay Nothing

No. 1 pays 1¢. No. 6 pays 6¢

No. 12 pays 12¢. No. 14 pays 14¢

No. 19 pays 19¢. All others pay only 39¢. None Higher.

On the right of said pushcard is the said master seal. Printed thereon is the following:

Do Not Remove Seal Until Entire Card is Sold.

Directly underneath the said Master Seal is the following:

Push Out with Pencil.

The pushcard also contains an illustration of the French Poodle dog dolls.

Another of respondents pushcards reads:

Lucky Name Under Seal Gets This
CONTINENTAL BROILER-TOASTER

- Delightfully portable—weighs only 4 pounds
- Triple Plate Chrome—beautiful Lifetime finish
- Multi-position tray—a full 9 in. by 10½ in.!
- Tray and Rack completely washable—rack removable from tray!
- Sta-cool side, front handles—extra stable non-skid feet!
- One-Year GUARANTEE against defects in material and workmanship.

Lucky Nos. 3, 13, 17 pay nothing.

No. 1 pays 1¢. No. 6 pays 6¢. No. 12 pays 12¢.

No. 14 pays 14¢. No. 19 pays 19¢. All others pay only 39¢ none higher.

(MASTER SEAL)

Push out with Pencil.

The pushcard also contains an illustration of the broiler-toaster.

Sales of respondents' merchandise by means of said pushcards are made in accordance with the above-described legend or instructions, and said prizes or premiums are allotted to the customers or purchasers from said cards in accordance with the above legend or instructions. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and the amount to be paid for the merchandise, or the chance to receive said merchandise, are thus determined wholly by lot or chance. The article of merchandise has a value substantially greater than the price paid for each chance or push.

PAR. 5. The persons to whom respondents furnish and have furnished said pushcards use the same in selling and distributing

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respondents' merchandise in accordance with the aforesaid sales plans. Respondents thus supply to and place in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of their merchandise in accordance with the aforesaid sales plans.

The sale of merchandise in accordance with the aforesaid sales plans described in Paragraph Four hereof also constitutes the sale of merchandise by means of a chance or gaming device inasmuch as the amount of money to be expended is unknown to the purchaser until the disc is removed from the pushcard.

The use by respondents of aforesaid sales plans in the sale of their merchandise by and through the use thereof and by the aid of aforesaid sales plans is a practice which is contrary to established public policy of the Government of the United States and constitutes an unfair practice within the intent and meaning of the Federal Trade Commission Act.

PAR. 6. The aforesaid acts and practices of respondents and herein alleged 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 J. Whitehead for the Commission.

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

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

JANUARY 25, 1965

Respondents are charged in the Commission's complaint with the use of lottery methods in the sale and distribution of their merchandise, in violation of the Federal Trade Commission Act. After the filing of respondents' answer to the complaint, a hearing was held at which evidence both in support of and in opposition to the complaint was introduced. Proposed findings and conclusions have been submitted by counsel for the parties, oral argument before the hearing examiner having been waived. The case is now before the examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the evidence or the applicable law.

Respondent Bear Sales Co. is an Illinois corporation with its principal office and place of business at 203 North Wabash Avenue, Chicago, Illinois.

Respondent E. Robert Baer is an officer of the corporate respondent, and formulates, directs and controls its acts and practices. His address is the same as that of the corporation.

Respondents are engaged in the sale and distribution, through others, of numerous articles of merchandise to the public.

In the course and conduct of their business respondents are engaged in interstate commerce within the meaning of the Federal Trade Commission Act. Not only is their merchandise sold and shipped to purchasers residing in States of the United States other than Illinois, but respondents' advertising and sales literature, order forms, and the alleged lottery devices are also mailed from respondents' place of business to numerous members of the public located in States other than Illinois (CX 1A-B; Tr. 27-31; 35-40).

Respondents' method of selling and distributing their merchandise is to send to members of the public advertising and sales literature, order blanks, and a device commonly called a pushcard. One of these cards, which is typical of those used by respondents, involves the sale of an electric broiler-toaster. The card has forty-five partially perforated discs, each of which bears a masculine or feminine name. Under each disc is a number which determines the amount to be paid by persons punching the discs. For example, the person punching the disc which has under it the number twelve pays twelve cents. The numbers are effectively concealed until the disc has been punched or separated from the card.

The card also contains a master seal under which is concealed a name corresponding to one of the names on the discs. When all of the discs have been punched, the master seal is removed and the person who has punched the disc bearing the name corresponding to that under the master seal wins the broiler-toaster (CX 3E).

Thus the amount to be paid and whether persons "playing" the card receive the broiler-toaster or nothing for the amounts paid are determined wholly by lot or chance. The broiler-toaster has a value greatly in excess of the amount paid by any of the persons playing the card.

The operator of the card (member of the public to whom respondents have sent the card) sells the chances on the card among his friends and acquaintances. After all of the chances have been sold and the money collected, the operator remits the total amount to respondents and respondents ship to the operator two of the broiler-toasters, one to be delivered by the operator to the person punching the lucky disc and the other to be retained by the operator as compensation for his services.

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In the circular letter which respondents send to members of the public along with the pushcard, the sales method is set forth as follows:

Show the enclosed card to all your acquaintances. Explain to them that they can win a genuine CONTINENTAL BROILER-TOASTER, guaranteed for 1 year, for as little as 1¢ just by taking a punch on the card. You see, under each of the names is a number. No. 1 pays 1¢, No. 6 pays 6¢, No. 12 pays 12¢, No. 14 pays 14¢, and No. 19 pays 19¢. But regardless of how the number goes *nobody pays a single penny more than 39¢.*

Then, when all the names are punched out you lift the big seal and the person with the name under the big seal—even if they paid only 1¢—wins a deluxe Broiler-Toaster. And you've got yours almost as a gift!

What's more. The persons who get the numbers 3, 13 and 17 pay nothing and even they can win the Broiler-Toaster, too. (CX 3A)

The sales method clearly involves and contemplates a lottery. Respondents thus supply to and place in the hands of members of the public lottery devices to be used in the sale and distribution of respondents' merchandise.

Respondents do not deny that their sales method involves the use of a lottery. Their defense is that their "practices are not inconsistent with the standards of fair dealing of contemporary business practices and public behavioral norms and are therefore not in violation of Section 5 of the Federal Trade Commission Act." (Respondents' Answer to Complaint)

In support of this defense respondents point out that during comparatively recent years a number of the States in the United States have enacted laws permitting Bingo games, raffles, pari-mutuel betting on horse races, etc.; that there is now a state-operated lottery in New Hampshire. Respondents also showed, through the testimony of an expert witness, a professor of marketing at the University of Wisconsin at Milwaukee, and through documentary exhibits introduced through the witness' testimony, that a number of the country's major and reputable business concerns employ games, contests, and various methods in which there is an element of chance, in advertising and marketing their products. Such methods, according to the witness, appeal to the public's curiosity, to its needs and desires for amusement, novelty, etc. (Tr. 54-110; RXs 1-15)

In summary, respondents' position appears to be that whatever may have been the situation in the past, the use of lotteries and games of chance in the sale of merchandise is not now in contravention of public policy and therefore is not in violation of the Federal Trade Commission Act.

The contention must be rejected. Insofar as the state statutes are concerned, they merely provide exceptions to the general rule against gambling. As for the games, contests and other methods used by major business concerns, it is obvious that most of them do not constitute lotteries. If any of them are in fact lotteries, their use is insufficient to show a change in public policy.

Since the decision in *Federal Trade Commission v. Keppel*, 291 U.S. 304 (1934) innumerable decisions have held that the sale of merchandise by lottery means is in contravention of public policy and an unfair practice within the meaning of the Federal Trade Commission Act. A very recent case, which would appear to be decisive of the issue here, is *Dandy Products, Inc. v. Federal Trade Commission*, 332 F. 2d 985 (1964). Referring to a contention made there which is very similar to, if not identical with, the contention made here, the United States Court of Appeals for the Seventh Circuit said:

Without agreeing that morals are relative, as petitioners argue, we have considered petitioners' arguments that there are many contests, involving prizes, used by major companies; that in some states gambling is permitted and in others punchboards are held not to be gambling equipment; that gambling is not immoral per se, and is involved in stock brokerage and other businesses; and that a gambling "instinct" seems to be a weakness in human nature. All these arguments were addressed to the Commission below, and in one degree or another have been addressed to this court, without success, in *Wren Sales*, *Peerless* and *Modernistic Candies*. We are not persuaded that this merchandising practice is less an "unfair method of competition" today than it was in the time of *Keppel*.

It is concluded that respondents' practice constitutes an unfair practice in commerce in violation of the Federal Trade Commission Act and is to the prejudice of the public. The present proceeding is in the public interest.

ORDER

It is ordered, That respondent Bear Sales Co., a corporation, and its officers, and respondent E. Robert Baer, individually and as an officer of said corporation, 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 any merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others, pushcards or any other device designed or intended to be used in the

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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.

OPINION OF THE COMMISSION

JULY 8, 1965

Respondents have been charged with selling merchandise, through others, by means of a lottery scheme, game of chance or gift enterprise. The hearing examiner found that the allegations of the complaint had been sustained by the evidence and entered an order to cease and desist. The matter is before the Commission on cross appeals.

Respondents contend that complaint counsel failed to prove that the practice of selling merchandise by chance is an unfair act or practice under Section 5 of the Federal Trade Commission Act and further contend that this practice is not contrary to the established public policy of the United States. Both of these arguments are rejected. Respondents failed to demonstrate that the public's concern with lotteries as evidenced by the various State and federal laws dealing with lottery and related practices had changed significantly to enable the Commission to conclude that lotteries were no longer against public policy. Similar attempts to show a change in public policy have been rejected by the Commission and the Courts. *Dandy Products, Inc. v. Federal Trade Commission*, 332 F. 2d 985 (7th Cir. 1964), *Wren Sales Co. v. Federal Trade Commission*, 296 F. 2d 456 (7th Cir. 1961), *Goldberg v. Federal Trade Commission*, 283 F. 2d 299 (7th Cir. 1960) and *Surf Sales Co. v. Federal Trade Commission*, 259 F. 2d (7th Cir. 1958).

Counsel supporting the complaint appeals from the scope of the examiner's order, arguing that the order may not apply to the practice of selling merchandise by means of devices designed to appeal to the public gambling instinct but which are not technically lotteries, i.e., do not include all three elements of consideration, chance and prize. We agree that this possibility exists. See *J. C. Martin Corporation v. Federal Trade Commission*, 242 F. 2d 530 (7th Cir. 1957) and *J. C. Martin Corporation, et al.*, Docket No. 8520 (1964) [66 F.T.C. 1], *aff'd* 346 F. 2d 147 (3d Cir. 1965). The complaint specifically alleges that the sale of merchandise in accordance with respondents' sales plans "also constitutes the sale of merchandise by means of a chance or gaming device" and the findings, of course, support this allegation. Consequently, the order will be modified to

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prohibit respondents from selling merchandise by means of a chance or gaming device or placing in the hands of others devices for this purpose.

Respondents' appeal is denied. The appeal of counsel supporting the complaint is granted. An appropriate order will be entered.

Commissioner Elman dissents on the ground that there is no "established public policy of the United States" that requires the Commission to expend its limited resources on this kind of case.

FINAL ORDER

Respondents and counsel in support of the complaint having filed cross appeals from the initial decision of the hearing examiner, and the matter having been heard on briefs and oral argument; and the Commission having rendered its decision denying respondents' appeal and granting the appeal of counsel supporting the complaint and directing modification of the initial decision:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondent Bear Sales Co., a corporation, and its officers, and respondent E. Robert Baer, individually and as an officer of said corporation, 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 any merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others, push-cards or any other device 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, lottery scheme, chance, or gaming device.

2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, lottery scheme, chance, or gaming device.

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

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

Commissioner Elman dissents on the ground that there is no "established public policy of the United States" that requires the Commission to expend its limited resources on this kind of case.
