

FEDERAL TRADE COMMISSION DECISIONS

Complaint

78 F.T.C.

IN THE MATTER OF

MARCOS SALES COMPANY, ET AL.

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

Docket 8770. Complaint, Nov. 27, 1968—Decision, Feb. 25, 1971

Order requiring Chicago, Ill., sellers and distributors of numerous articles of merchandise to the public by means of a lottery scheme to cease supplying to others push cards or other devices for the sale of merchandise by means of a game of chance or lottery or selling 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 Marco Sales Company, a corporation, and Marvin O. 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 Marco Sales Company 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 30 West Washington Street, in the city of Chicago, State of Illinois.

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

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale or distribution, through others, of numerous articles of merchandise to the public by means of a lottery scheme, game of chance or gift enterprise.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents cause, and for some time last past have caused, their said products and devices, when sold, to be shipped from their place of business in the State of Illinois 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 aforesaid business, respondents sell or distribute said articles of merchandise, through others, by a 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 materials, literature and instructions including, among other things, push cards, 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 for its prizes to the operators of such push cards; and as prizes to members of the purchasing and consuming public who purchase chances or pushes on said card.

Among and typical, but not all inclusive, of such push cards are those which bear 23 masculine and feminine names with columns on the back of said card for writing on the name of the purchaser of the push corresponding to the masculine or feminine name selected. Each such push card has 23 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 discs from the card. The push card 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 camera or other stated prizes. The push card depicts a camera or other prizes, discusses the camera's features, and bears the following legend or instruction:

Lucky name under seal gets this AUTOMATIC FLASH CAMERA
No. 1 pay 1¢, No. 7 pays 7¢, No. 9 pays 9¢, No. 11 pays 11¢, No. 25 pays 25¢.
All others pay only 39¢. NONE HIGHER.
LUCKY NUMBERS, 4, 12, 17, 22 PAY NOTHING.

On the right of said push card 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.

Another of respondents' push cards depicts an ash tray or other prizes and bears 24 names and corresponding perforated discs and

Complaint

78 F.T.C.

master seal as aforesaid. In addition to discussing the merits of the ash tray this push card contains the following legend or instruction:

LUCKY NAME UNDER SEAL RECEIVES THIS original Barbeque Fireplace Ash Tray. . . .

No. 1 pays 1¢ No. 5 pay 5¢ No. 9 pays 9¢ No. 12 pays 12¢ No. 16 pays 16¢
All other pay 24¢ NONE HIGHER.

In the center of the said push card is the said master seal. Printed thereon is the following:

Do Not Remove Seal Until Entire Card is Sold.

No. 18 Receives Smooth Writing Ball Pen. . . .

Sales and distribution of respondents' merchandise by means of said push cards are made in accordance with the above described legends or instructions and said prizes or premiums are allotted to the customers or purchasers from said card 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. Many if not all of the articles of merchandise have a value substantially greater than the price paid for each chance or push.

PAR. 5. Many of the persons to whom respondents furnish and have furnished said push cards use the same in selling and distributing 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 or distribution of their merchandise in accordance with the aforesaid sales plans.

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

The use by respondents of the aforesaid sales plans in the sale or distribution of their merchandise by and through the use thereof and by the aid of the aforesaid plans is a practice which is contrary to the 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, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair acts and practices in

commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. Roy B. Pope and *Mr. Mario V. Mirabelli* for the Commission.
Mr. Charles Rowan and *Mr. Willis Hagen*, Milwaukee, Wis.,
Attorneys for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

JUNE 30, 1969

Respondents, in a complaint issued by the Commission on November 27, 1968 (mailed December 10, 1968), are charged with unfair acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act, through the use of lottery methods in the sale and distribution of their merchandise. Respondents filed an answer to the complaint, and on January 30, 1969, complaint counsel and counsel for respondents participated with the hearing examiner in a telephonic conference and an order was issued reciting the results thereof. Pursuant to the provisions of the order, counsel for the parties submitted trial briefs setting forth anticipated issues and disclosing, among other things, the names of witnesses and the documentary exhibits which each planned to introduce. Hearings were held and completed at Chicago, Illinois, on April 15 and 16, 1969. On the first day, complaint counsel called ten witnesses (respondent Marvin O. Baer and nine so-called consumer witnesses) and put in their case-in-chief. Respondents' defense was put in on the following day by the use of two witnesses. Complaint counsel offered no rebuttal, and the record was closed for the receipt of evidence. Thereafter proposed findings and conclusions were submitted by counsel for the parties. The hearing examiner has given full consideration thereto, and all proposed findings and conclusions not hereinafter specifically found and concluded are herewith rejected. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

Respondent Marco Sales Company 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 30 West Washington Street, in the city of Chicago, State of Illinois (CX 1-A).

Respondent Marvin O. Baer is now and has been president of the corporate respondent since its inception on June 1, 1966, and he formulates, directs and controls the acts and practices of the corpo-

Initial Decision

78 F.T.C.

rate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent (CX 1-A; Tr. 15).

Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale or distribution, through others, of numerous articles of merchandise to the public by means of a lottery scheme, game of chance or gift enterprise (Answer, Par. 2; Tr. 17-18).

In the course and conduct of their business, respondents cause, and for some time last past have caused, their said products and devices, when sold, to be shipped from their place of business in the State of Illinois 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. The volume of such commerce by the corporate respondent for the year 1968 was in excess of \$150,000 (CX 1-G; Tr. 4).

In the course and conduct of their business, respondents sell or 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 members of the public, certain materials, literature and instructions including, among other things, push cards, 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 for its prizes to the operators of such push cards; and as prizes to members of the purchasing and consuming public who purchase chances or pushes on said card.

Among and typical, but not all inclusive, of such push cards (CX 65) are those which bear 23 masculine and feminine names with columns on the back of said card for writing on the name of the purchaser of the push corresponding to the masculine or feminine name selected. Each such push card has 23 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 discs from the card. The push card 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

camera or other stated prizes. The push card depicts a camera or other prizes, discusses the camera's features, and bears the following legend or instruction:

Lucky name under seal gets this AUTOMATIC FLASH CAMERA

* * * * *
No. 1 pays 1¢, No. 7 pays 7¢, No. 9 pays 9¢, No. 11 pays 11¢, No. 25 pays 25¢
All others pay only 39¢. NONE HIGHER.
LUCKY NUMBERS 4, 12, 17, 22 PAY NOTHING.

On the right of said push card 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 operator of the push card sells the chances among his friends and coworkers. After all the chances have been sold and the money collected, he remits the total amount to respondents and respondents ship him two of the cameras, one to be delivered to the person punching the lucky disc and the other to be retained by the operator in return for his services. (See testimony of nine consumer witnesses, Tr. 35-94.)

The respondents make no inquiry or check as to the age of the persons to whom they distribute their push cards and sales plans through the mails. As a result, the aforesaid push cards and sales plans are mailed to minors and thus supply to minors the means of conducting games of chance, gift enterprises or lottery schemes. Respondent Baer testified (Tr. 19-20) that the respondents obtain the names of prospective customers from list brokers, and that these lists of prospective customers to whom the respondents send their push cards and sales plans are not checked as to age or economic background. Witness Bobby Heflin testified (Tr. 74) that he was 20 years old when he took a chance on one of respondents' push cards and won a doll. When the doll was sent to him by the respondents, included in the box were other punch cards (Tr. 71). Heflin also testified that he sold some chances on one of respondents' cards to his wife's sister who was somewhere around 13 years of age (Tr. 76). Witness Jean Heflin testified (Tr. 78) that she obtained a push card from her husband similar to CX 46 and used it when she was 19 or 20 years old. She also testified that she sold some of the chances on some of respondents' push cards to minors (Tr. 81). Witness Connie Sue Alexander, a minor, testified (Tr. 56) that when she was 15 years old she obtained from her sister one of respondents' push cards which had been sent to her sister, age 13, by the respond-

Initial Decision

78 F.T.C.

ents. She stated (Tr. 57-58) that she used the push card and sold chances to other minors and that she received more push cards from the respondents (Tr. 60). She further testified that her brother, age 14, also used one of the respondents' push cards and sold chances to minors (Tr. 60-62).

The foregoing findings of fact hereinbefore set forth are not disputed by the parties. During the outset of the hearings, respondents' counsel stated, "... we have stipulated to or through our answer admitted ... all of the allegations of the complaint [ex]cept the allegation that respondents' practices are unfair or contrary to public policy" (Tr. 19). In support of this defense, respondents showed through the testimony of two expert witnesses, Dr. Clifford E. Larson, associate dean of the School of Business Administration (Tr. 110-146) and Professor David H. Strother, a lecturer (Tr. 147), both at the University of Wisconsin at Milwaukee, Wisconsin, and through documentary exhibits (RX 1-65; RX 74-77) that a number of the country's leading business concerns, in advertising and marketing their products, employ games, contests and various methods where prizes are awarded and in which there is an element of chance. Among these business organizations, but not limited thereto, are: Mobil Oil Corporation ("\$434,025 'BE A WINNER' SWEEPSTAKES" [RX 18A-D]); Columbia Record Club ("\$250,000 SWEEPSTAKES!" [RX 36A-D]); 3M Company ("SIX THOUSAND SEVEN HUNDRED AND EIGHTY-SIX ... PRIZES" [RX 49]); Reader's Digest ("\$990,000 SWEEPSTAKES" [RX 60]); and Phillips Petroleum Company ("28,794 PRIZES—\$250,000 HARVEST OF PRICES" [RX 63A-D]). According to the witnesses, the nationwide popularity and overwhelming success of promotional plans involving the use of prizes and chance, as well as legislation in most states extending the perimeters of legal gaming, reflects an evolving attitude on the part of the public of the United States of America which recognizes and accepts, as legitimate, the needs and wants of a large segment of such public of what they regard as the innovating, interesting activity and enjoyment provided by plans, devices and games involving prizes, chance and benefits and detriments to the parties concerned.

It is respondents' position that the complaint should be dismissed for the following reasons:

1. The acts and practices of respondents are consistent with prevailing practices in industry, enjoy public acceptance and approval and stimulate the economy, and do not injure the public nor constitute unfair acts or practices; and for the further reason that the

Commission failed to prove its cause of action in that it introduced no evidence to prove the allegations contained in Paragraphs 5 and 6 of the complaint.

2. This proceeding constitutes an unreasonably discriminatory application of the Federal Trade Commission Act, as amended, against respondents and seeks to deprive them of their liberty and property without due process of law, all in violation of the Fifth and Ninth Amendments of the Constitution of the United States of America.

3. The acts and practices of respondents are consistent with public behavioral norms and do not come within the scope of the Federal Trade Commission Act, as amended, and the proposed order, accompanying the complaint on file herein, would constitute an arbitrary and invalid exercise of police power by the Commission, all in violation of the Fifth, Ninth and Tenth Amendments of the Constitution of the United States of America.

The hearing examiner finds that there is no merit to the position taken by the respondents.

In the Matter of Bear Sales Co.,¹ Docket No. 8627 [68 F.T.C. 37, 42-43], the most recent case involving similar facts and an identical defense as stated herein, the hearing examiner said in part:

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

¹ It should be noted that the attorneys, who represent the respondents in this proceeding, represented the respondents in the *Bear Sales Co.* and *Dandy Products* cases.

Initial Decision

78 F.T.C.

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*."

In the opinion of the Commission on appeal, it said:

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 744 (7th Cir. 1958).

The Court of Appeals of the Seventh Circuit stated in *Bear Sales Company v. F.T.C.*, 362 F. 2d 96 (1966), *cert. den.*, 385 U.S. 933:

The record establishes that petitioners are engaged in a typical "push card" merchandising operation such as that recently considered by this Court in *Dandy Products, Inc. v. Federal Trade Commission*, 7 Cir., 332 F. 2d 985, and found to constitute an unfair method of competition which violated the Federal Trade Commission Act. In *Dandy Products* we rejected as unpersuasive the contention that *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 54 S.Ct. 423, 17 L.Ed. 814, should no longer be considered an authoritative precedent because of what was represented to be "a change in the 'moral' climate of the business community." We find equally unconvincing petitioners' attempt to now distinguish *Dandy Products* on the basis that the prize contests etc. there alluded to as furnishing the predicate for a change in the standards by which to measure the fairness of merchandising methods were not, as here, the subject matter of proof contained in the record.

We adhere to our reliance upon *Keppel* and we regard *Dandy Products* as a dispositive of the refurbished and embellished contentions made by the petitioners.

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 respondents Marco Sales Company, a corporation, and its officers, and Marvin O. 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 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, 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.

FINAL ORDER

This matter is before the Commission upon the cross-appeals of complaint counsel and respondents from the hearing examiner's initial decision; and

The Commission having considered the entire record herein, including the reargument of the appeals on February 3, 1971, and having determined that it will not in the circumstances and posture of this proceeding grant the modification of the order sought by complaint counsel on his appeal; and having further determined that the hearing examiner, in his initial decision, considered and disposed of the same arguments as those made to the Commission by respondents in their appeal briefs and on reargument and that his initial decision constitutes an adequate and proper disposition of this proceeding in all respects and therefore should be adopted by the Commission as its own:

It is ordered, That complaint counsel's appeal be, and it hereby is, denied.

It is further ordered, That respondents' appeal be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision herein, filed July 1, 1969, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents Marco Sales Company, a corporation, and Marvin O. Baer, individually and as an officer of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the adopted initial decision.

Complaint

78 F.T.C.

IN THE MATTER OF

H. MYERSON SONS, ET AL.

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

Docket 8808. Complaint, Feb. 25, 1970—Decision, Feb. 25, 1971

Order requiring Philadelphia, Pa., importers, retailers and wholesalers of fabrics to cease misbranding its textile fiber products and wool products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification 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 H. Myerson Sons, a partnership, and Windsor Fabrics, a partnership, and Morris Myerson and Isadore Myerson, individually and as copartners trading as H. Myerson Sons and as Windsor Fabrics, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification 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 H. Myerson Sons is a partnership with its office and principal place of business located at 770 South Fourth Street, Philadelphia, Pennsylvania.

Respondent Windsor Fabrics is a partnership with its office and principal place of business located at 405 Catherine Street, Philadelphia, Pennsylvania.

Respondents Morris Myerson and Isadore Myerson are individuals and copartners trading as H. Myerson Sons and Windsor Fabrics. They formulate, direct and control the acts, practices and policies of said respondent partnerships. Their addresses are the same as those of the said partnerships.

Respondents are importers, wholesalers and retailers of textile fiber products and wool products.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the trans-