

Order

IN THE MATTER OF

BENJAMIN MALTZ AND MARSHALL MALTZ TRADING
AS BENMAR SALES COMPANYORDER, OPINION ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6128. Complaint, Oct. 26, 1953—Decision, Dec. 17, 1954.

Order requiring an individual in Chicago to cease supplying push cards or other lottery devices designed for use in the sale of watches and other merchandise to the public, and selling merchandise by means of a game of chance, etc.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. J. W. Brookfield, Jr. for the Commission.

Mr. Asher Feren, of Chicago, Ill., for Marshall Maltz.

ORDERS AND DECISION OF THE COMMISSION

Order modifying initial decision and adopting such decision as modified and order to file report of compliance, Docket 6128, December 17, 1954, follows:

This case having come on for hearing before the Commission upon the appeal filed by respondent Marshall Maltz from the initial decision of the hearing examiner; and

The Commission having determined that the contentions urged by that respondent in support of the appeal are without merit and that the appeal should be denied; and

The Commission, for reasons stated in its opinion which is separately issuing herein, having additionally determined that the findings as to the facts and conclusion contained in the initial decision are free from substantial error and should be adopted but that the provisions of the order to cease and desist as contained in the initial decision are inappropriate and that the record requires that they be modified:

It is ordered, That the appeal from the initial decision be, and it hereby is, denied.

It is further ordered, That the prohibitory language of the order to cease and desist as contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondent Marshall Maltz, individually and trading under the name of Benmar Sales Company, or under any other name or names, and his representatives, agents and employees, directly

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or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches or other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards, punchboards, or other lottery devices, either with other merchandise or separately, which said push card, punchboards, or other lottery devices are designed or intended to be used in the sale or distribution of said merchandise to the public.

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

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

It is further ordered, That the respondent Marshall Maltz, shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order contained in the initial decision as modified herein.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 26, 1953, issued and subsequently served its complaint upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. Respondents filed their answer in due course whereupon hearings were held at which testimony and other evidence in support of, and in opposition to, the allegations of said complaint were received by the above-named Hearing Examiner theretofore designated by the Commission, said testimony and evidence being duly recorded and filed in the office of the Commission.

Thereafter the proceeding came on for final consideration by the Hearing Examiner on the complaint, the answer, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested; and the Hearing Examiner, having duly considered the record herein, finds that this proceeding is in the public interest and makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDING AS TO THE FACTS

PARAGRAPH 1. Respondent, Marshall Maltz, is an individual trading as Benmar Sales Company, having his principal place of business

at 633 South Plymouth Court, Chicago, Illinois, and is now, and for more than six months prior to issuance of the complaint has been, engaged in the sale of watches and clocks, causing said merchandise when sold to be transported from his place of business aforesaid to purchasers located in the various states of the United States other than the State of Illinois, and in the District of Columbia, in the doing of which respondent has engaged in a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent, Benjamin Maltz, (who is the father of Marshall Maltz), is named and charged as a co-partner with his said son but the record wholly fails to substantiate this allegation of co-partnership, or his participation as a principal in the business, the testimony concerning which is hereinafter reviewed in Paragraph *Four*, and on the basis of such review and finding thereon the complaint as to Benjamin Maltz will be dismissed.

The Business Activities

PAR. 2. In the conduct of his aforesaid business respondent Marshall Maltz, to effect and facilitate sale of his merchandise, furnishes various plans of merchandising which involve operation of games of chance, gift enterprise or lottery schemes typical of which is the following:

Respondent has distributed to operators and members of the public certain literature and instructions including so-called "push cards," order blanks and circulars containing illustrations and descriptions of the merchandise, as also respondent's plan of selling and distributing same and allotting certain premiums or prizes to the operators of the push cards; the literature and plan also describes the prizes to members of the purchasing public who pay for chances or "pushes" on said cards. As example: One of said push cards bears eighty-eight proper names, singly imprinted on a partially perforated disc, with ruled columns on the reverse side of the card for recording the name of the purchaser of the "push" corresponding to the name selected. Concealed within each disc is the number which determines the price of the chance (none higher than 49¢) and which is disclosed only after the purchaser pushes and separates the disc from the card. The card also has a larger master seal concealed wherein is one of the names appearing on the disc and the purchaser selecting the name corresponding with the one under the master disc receives, as a prize, a watch. Said card bears the following printed matter or instructions:

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LUCKY NAME UNDER SEAL RECEIVES CHOICE OF
EITHER THE LADIES' OR GENTS'

BENRUS WATCH

Official watch of famous airlines

FOR AS LITTLE AS 5¢
and Not More Than 49¢

17 Jewels. Handsome 10K Natural
Gold Rolled Plate Case Raised
Unbreakable Crystal. Gold Applied
Dial. Matching Expansion Band
Beautiful Gift Box

Every Watch has the World Famous
Benrus Guarantee

Nos. 1-2 FREE. No. 3 Pays 5¢ (Master
All Other Nos. Pay 49¢-None Higher Seal)

Push Out with Pencil—Do not Open Seal Until
Entire Card Is Sold.

Sales of respondent's merchandise by means of said push cards are made in accordance with the foregoing scheme, and whether the purchaser receives an article of merchandise, or nothing, for the money he paid, as well also the amount he is required to pay, are thus determined by lot or chance. The articles of merchandise thus awarded by chance have a value substantially greater than the price paid for the chance or push.

PAR. 3. The persons to whom respondent furnishes said push cards use the same in selling and distributing respondent's merchandise in accordance with his sales plan and respondent thus supplies and places in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of merchandise, a practice contrary to the established policy of the Government of the United States. Many persons are attracted by said sales plans and the element of chance involved therein and are thus induced to buy and sell respondent's merchandise.

Aside from the direct admission of sales by the respondent, there was stipulated into the record by counsel a specific instance of an interstate sale by respondent to an individual resident in Culver, Indiana, who disposed of merchandise according to the push card sales plan of respondent; that he, the purchaser, upon collecting the sum prescribed on the card remitted same to the respondent and in

return received from respondent two watches, one of which he delivered to the purchaser who drew the "lucky number" on the push card, and the other watch he retained for himself as compensation for selling and disposing of the chances on the card.

As to Respondent Benjamin Maltz

PAR. 4. The testimony of Benjamin Maltz concerning his connection with the enterprise, fully corroborated by Marshall Maltz and unquestioned and uncontradicted by anything of record discloses:

Benjamin Maltz is engaged in the printing business at No. 940 Winona Street, Chicago, Illinois, and in his capacity as a printer produced the push cards which are the subject of this inquiry; that it was originally contemplated, (in the Fall of 1952), he and his son Marshall Maltz would form a co-partnership to engage in this business but it eventuated that he, Benjamin, was unable to make the necessary contribution toward capital requirements whereupon Marshall Maltz raised the necessary capital, had his own bank account and proceeded with operations on his own and separate account; Benjamin Maltz is, however, familiar with the operation of the business, he, as well also his wife, assisting their son Marshall in the daily operation of the business but only in the capacity of hired assistants; he testified concerning the details of operations; the extent of the mailings, (several of 100,000 each and in one instance over half a million); the method of operation of the push cards; related how some of the card purchasers disposed of merchandise by use of the cards and that although the business had been in operation but a comparatively short while it had sold \$50,000.00 of merchandise; that he printed and produced the push cards used by respondent Marshall Maltz but did not have other customers for push cards, nor did he sell or ship cards to others, his dealings therein being limited to filling the requirements of respondent Marshall Maltz, they both operating their respective businesses in the City of Chicago; he was emphatic in stating that he has no financial interest in the business, never having "put any money into it"; that he does not share in the profits but is paid for whatever assistance he renders. Upon conclusion of the foregoing testimony of Benjamin Maltz counsel supporting the complaint called as a witness respondent Marshall Maltz who testified that the answers he would make to all of the questions propounded to his father would be substantially the same if such questions were propounded to him.

The Hearing Examiner, observing the demeanor, attitude, appearance and frankness of the two witnesses was sufficiently impressed with their truthfulness which, coupled with the circumstance of complete

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absence of contradictory evidence, real or inferential, compels him to find, as a fact, that Benjamin Maltz is not, and never was, a co-partner as alleged; that co-partnership is never inferred nor arises by operation of law but must be a voluntary act of the parties and that all of the legal elements and indicia necessary to constitute such must be present, none of which exists under the facts disclosed by this record, wherefore the complaint as to Benjamin Maltz will be dismissed.

CONCLUSIONS

The aforesaid acts and practices of the respondent, Marshall Maltz, as hereinabove found, are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

On the basis of the facts above found, there has been a total failure of proof to sustain the allegations of the complaint as to respondent Benjamin Maltz, wherefore, as to him, the complaint will be dismissed.

ORDERS

It is ordered, That respondent Marshall Maltz, individually and trading under the name of Benmar Sales Company, or under any other name or names, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches or other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards, punchboards, or other lottery devices, either with other merchandise or separately, which said push cards, punchboards, or other lottery devices are designed or intended to be used in the sale or distribution of said merchandise to the public.

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

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to respondent Benjamin Maltz.

OPINION OF THE COMMISSION

By MEAD, Commissioner:

The initial decision of the hearing examiner held that respondent Marshall Maltz, hereinafter referred to as the respondent, has engaged in unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act, and this matter

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comes before the Commission upon the appeal filed by that respondent from the initial decision.

The complaint under which this proceeding was instituted, alleges that the foregoing respondent and another individual have engaged as co-partners in soliciting the sale of and selling watches and other merchandise, and, in such connection, furnished plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when such merchandise is sold and distributed to the purchasing public. Distributed and furnished by the parties named, the complaint additionally charges, has been advertising literature comprising order blanks, push cards and circulars containing instructions for distributing the merchandise by means of allotting it as premiums to the operators of the cards and as prizes to members of the public purchasing chances or pushes thereon. After the filing of answer, testimony and other evidence were received into the record during the course of a hearing before the hearing examiner.

The initial decision held that the evidence received in the proceeding fully sustained the allegations of the complaint as they refer to the respondent Marshall Maltz, the appellant here, and concluded, as noted previously, that the acts and practices engaged in by him were in violation of law. We mention in passing, too, that it was found below that the charges insofar as they related to the party additionally joined in the proceeding lacked adequate support particularly in reference to the nature of his participation in the practices. Provision, accordingly, was made for dismissal of the complaint as to him and there being no appeal from that ruling, further reference to this aspect of the proceeding is not warranted.

It was held additionally in the initial decision that persons to whom the respondent has furnished push cards have used them in selling his merchandise in accordance with the sales plan, and that the respondent thus supplies and places in the hands of others the means of conducting games of chance, gift enterprises, and lottery schemes in the sale of merchandise, which is a practice contrary to the established policy of the Government of the United States. The appeal contends that the foregoing conclusions lack adequate support in the record for the reason that no evidence was presented showing how many persons have been attracted by this plan and method and that there was no evidence that the sales plan has constituted a lottery or scheme which was contrary to established public policy. Challenged and excepted to as likewise unsupported by the record and assertedly based on conjecture and guess are related conclusions appearing in the initial decision to the effect that, under the program, the articles are awarded by chance and the amounts paid for pushes or chances

