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-

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 Kaslow [2] 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 court [3] 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.