

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

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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-

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-

