

Syllabus

IN THE MATTER OF
THINSHELL CANDIES, INCORPORATEDCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 1852. Complaint, June 26, 1930—Decision, Nov. 26, 1934*

Where a corporation engaged in manufacture and sale of candy, including a 17-jar assortment, with which it furnished 200-hole punch boards for use in merchandising said assortments under a plan by which the purchaser of a punch, at 5 cents each, who punched one of twelve preannounced numbers, secured one of the twelve 50-cent jars, included, purchaser of last punch in each of the four sections into which the board was divided, received one of the four 75-cent jars, and purchaser of the last punch on the board received the \$2 jar, and other purchasers nothing;

Sold said assortments to wholesalers and jobbers, and furnished therewith said punch boards, upon which was set forth aforesaid plan (and also a sticker stating "This sales board is free. It is not necessary to use the board"), to increase sale of its candy and assist the retailer in so doing, and with knowledge that such candy, so assembled and packed that the assortments and boards were displayed and used by the retailers for sale and distribution to purchasing public, as suggested, would be resold to the public by chance or lot in many cases; and in so selling competed with concerns who regard such a method of sale and distribution as morally bad and one which encourages gambling and especially among children, and as injurious to the industry in merchandising a chance or lottery rather than candy, and as providing retailers, who sell candy by such methods, with the means of violating the laws of the several States, and therefore refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance, and to furnish punch boards for use in the sale and distribution thereof;

With the result that some of its competitors, who can compete on even terms only through following such practices to meet the demand for candy thus sold, principally from small retailers, many of whose stores are near schools, and in response to the preference of the largest class of purchasers and consumers of such candy, i. e., the children, were put to a disadvantage by reason of their refusal so to do and others felt constrained to adopt the same, trade was diverted from the former to the latter, gambling among children was taught and encouraged, freedom of fair and legitimate competition in the industry concerned was restrained, and sales of goods sold without any gambling or lottery features connected therewith were decreased by the competition, principally, of said feature in the other, use of which in sale and distribution of candy by lot or chance is against the public policy of many of the States, and some of which make lotteries and gambling devices penal offenses:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and competitors, and constituted unfair methods of competition.

Mr. Henry C. Lank for the Commission.

Mr. John A. Nash, of Chicago, Ill., for respondent.

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COMPLAINT

Acting in the public interest, pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission charges that Thinshell Candies, Incorporated, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, in violation of the provisions of Section 5 of the said Act, and states its charges in that respect as follows:

PARAGRAPH 1. The respondent is a corporation organized under the laws of the State of Illinois with its principal office and place of business located in the city of Chicago, State of Illinois. Respondent is engaged in the manufacture of candies and in the sale and distribution of candy specialties and punch-board devices for use in the sale of its candy products. It sells its product to wholesale dealers and jobbers located at points in the various States of the United States, and causes said products when so sold to be transported from its said principal place of business in the city of Chicago, State of Illinois, into and through other States of the United States to said purchasers at their respective points of location. In the course and conduct of its said business respondent is in competition with other individuals, partnerships, and corporations engaged in the manufacture of candies and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, the respondent sells to wholesalers and jobbers a certain package or assortment of candies consisting of seventeen jars of candy, one of said jars of candy of a size which ordinarily retails at \$2 each, four of said jars of candy being of a size which ordinarily retails at a price of 75 cents each, and twelve of said jars of candy being of a size which ordinarily retails at 50 cents each, and furnishes with said package or assortment a punch board containing 200 holes and divided into 4 sections. Into each of the holes has been inserted a small slip of paper bearing a printed number. The printed slips bear numbers from 1 to 200, inclusive, and are so placed and secreted in said punch board that they cannot be seen by the customer except when they are punched from the board. The board bears the following legends: "5 cents per sale. Thinshell Easy Pickings. Nos. 10, 20, 30, 40, 50, 60, 70, 80, 90, 100, 110, and 120 receive a 50-cent jar. Last punch in each section receives a 75-cent jar. Last sale on the board receives a \$2 jar." Every customer pays 5 cents for each punch from the board and the purchasers of

punches who receive numbers other than those above enumerated or who do not qualify by purchasing the last punch in each section or by purchasing the last punch on the board receive nothing for their money. The purchasing public are thus induced and persuaded into purchasing punches from the said board in the hope that they may obtain one of the prize winning numbers above referred to and thus obtain one of the prizes called for by the said numbers. The jars of candy contained in said assortment are thus distributed to the purchasers of punches from the board wholly by lot or chance.

PAR. 3. Aforesaid wholesale dealers of respondent resell said packages to retail dealers in various States of the United States, and said retail dealers expose said candies in connection with the aforesaid punch board and sell punches to the purchasing public in accordance with the aforesaid plan, whereby the said jars of candy are distributed to the purchasers of punches from said board wholly by lot or chance. Respondent thus supplies to and places in the hands of others the means of conducting a lottery in the sale of its products in accordance with the respondent's sales plan hereinabove set forth.

PAR. 4. The above alleged acts and practices of respondent are all to the prejudice of the public and respondent's competitors, and constitute an unfair method of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission issued and served a complaint upon the respondent, Thinshell Candies, Incorporated, charging it with the use of unfair methods of competition in interstate commerce in violation of the provisions of said act.

Respondent filed its answer to the complaint, the case was set down for the taking of testimony before an examiner of the Commission and evidence was offered by counsel for the Commission and by counsel for the respondent.

Thereupon, this proceeding came on for final hearing on the briefs and oral arguments of counsel for the Commission and for the respondent and the Commission, now having considered the matter and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PAR. 1. Respondent, Thinshell Candies, Incorporated, is a corporation organized under the laws of the State of Illinois with its principal office and place of business in the city of Chicago, State of Illinois. Respondent is now, and for more than five years last past, has been engaged in the manufacture of candy in Chicago, Ill., and in the sale and distribution of said candy to wholesale dealers and jobbers in the State of Illinois and other States of the United States. It causes the said candy when sold to be shipped or transported from its principal place of business in the State of Illinois to purchasers thereof in Illinois and in the States of the United States other than the State of Illinois. In so carrying on said business, respondent is and has been engaged in interstate commerce, and is and has been in active competition with other corporations, partnerships, and individuals engaged in the manufacture of candy, and in the sale and distribution of the same in interstate commerce.

PAR. 2. Among the candies manufactured and sold by respondent is an assortment of candies consisting of seventeen jars of candy, one of said jars of candy of a size which ordinarily retails at \$2 each; four of said jars of candy of a size which ordinarily retails at a price of 75 cents each, and twelve of said jars of candy of a size which ordinarily retails at 50 cents each. Respondent furnishes with said assortment a punch board containing 200 holes and divided into 4 sections. Into each of the holes has been inserted a small slip of paper bearing a printed number. The printed slips bear numbers from 1 to 200, inclusive, and are so placed and secreted in said punch-board that they cannot be seen by the customer except when they are punched from the board. The board bears the following legends: "5 cents per sale. Thinshell Easy Pickings. Nos. 10, 20, 30, 40, 50, 60, 70, 80, 90, 100, 110, and 120 receive a 50-cent jar. Last punch in each section receives a 75-cent jar. Last sale on the board receives a \$2 jar." Every customer pays 5 cents for each punch from the board and the purchasers of punches who receive numbers other than those above enumerated or who do not qualify by purchasing the last punch in each section or by purchasing the last punch on the board receive nothing for their money. The purchasing public are thus induced and persuaded into purchasing punches from the said board in the hope that they may obtain one of the prize winning numbers above referred to and thus obtain one of the prizes called for by the said numbers. The jars of candy contained in said assortment are thus distributed to the purchasers of punches from the board wholly by lot or chance.

PAR. 3. Numerous retail dealers purchase the assortment described in paragraph 2 above from wholesale dealers or jobbers who have purchased said assortment from respondent and such retail dealers display said assortment for sale to the public under the sales plan described by the respondent and with the punch board furnished by the respondent and the jars of candy in said assortment are sold and distributed to the consuming public by means of said punch board and in the manner suggested by the respondent.

PAR. 4. All sales made by respondent are absolute sales and respondent retains no control over the goods after they are delivered to the wholesale dealer or jobber or to the retail dealer. The assortments are assembled and packed with the said punch board and can be, and in many cases are, displayed by the retail dealer for sale and distribution to the purchasing public as suggested by the respondent.

On the back of the punch board is a sticker bearing the following language: "This sales board is free. It is not necessary to use the board with the sale of Thinshell Candy." The punch board, however, is furnished by respondent for the purpose of increasing its sales of candy and to assist the retail dealers in increasing the sale of its candy. In the sale and distribution to jobbers and wholesale dealers for resale to retail dealers, respondent has knowledge that said candy will be resold in many cases to the purchasing public by retail dealers by lot or chance and it furnishes said punchboard so that its candy may and shall be resold to the purchasing public by said retail dealers by lot or chance and as suggested on said punch board.

PAR. 5. The sale and distribution of candy by retail dealers by the method described in paragraph 2 hereof is a sale and distribution of candy by lot or chance and constitutes a lottery or gaming device.

Competitors of respondent appeared as witnesses in this proceeding and testified and the Commission finds as a fact that 1-cent and 5-cent candy sales are in competition with each other and that many competitors and candy dealers regard the sale and distribution of candy by punch boards as morally bad and encouraging gambling, especially among children; as injurious to the candy industry because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several States. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance and refuse to furnish punch boards for use in the sale and distribution of their candy.

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These competitors are therefore put to a disadvantage in competing. Certain retailers who find that they can dispose of more candy by the lot or chance method buy respondent's products and the products of others employing the same methods of sale and thereby trade is diverted to respondent and others using similar methods from said competitors. Said competitors can compete on even terms only by giving the same or similar devices to retailers. This they are unwilling to do and their sales of candy without any lot or chance feature connected therewith show a continued decrease.

In order to meet the competition of manufacturers who sell and distribute candy which is sold by such methods, some competitors of respondent have begun the sale and distribution of candy for resale to the public by lot or chance. The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 6. The principal demand in the trade for the candy with a lot of chance feature in connection therewith comes from the small retailers. The stores of these small retailers are in many instances located near schools and attract the trade of the school children. The consumers or purchasers of the lottery or prize package candy are principally children, and because of the lottery or gambling feature connected with these packages, and the possibility of becoming a winner, it has been observed that the children purchase them in preference to the candy without such a feature when the two types of packages are displayed side by side.

Witnesses from several branches of the candy industry testified in this proceeding to the effect that children prefer to purchase the lottery or prize package candy because of the gambling feature connected with its sale. The sale and distribution of such packages or assortments of candy or of candy which has connected with its sale to the public the means or opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children, who comprise by far the largest class of purchasers and consumers of this type of candy.

PAR. 7. There are in the United States many manufacturers of candy who do not furnish with their assortments of candy any punch boards and who sell their candy without any lot or chance feature in connection therewith in interstate commerce in competition with the candy having a lot or chance feature and manufacturers of such candy without a lottery feature in connection therewith have

noted a marked decrease in the sales of their products whenever and wherever the lottery or prize candy has appeared in their markets, and this decrease is principally due to the gambling or lottery feature connected with the last-mentioned type of assortment.

PAR. 8. The sale and distribution of candy by lot or chance is against the public policy of many of the States of the United States and some of the said States have laws making lotteries and gambling devices penal offenses.

CONCLUSION

The aforesaid acts and practices of respondent, Thinshell Candies, Incorporated, under the conditions and circumstances set forth in the foregoing findings as to the facts are all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in commerce and a violation of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, the testimony taken and the briefs filed herein and the oral arguments of counsel, and the Commission having made its findings as to the facts and conclusion that the respondent has violated the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes"—

It is now ordered, That the respondent, Thinshell Candies, Incorporated, its officers, agents, representatives, and employees in the manufacture, sale and distribution in interstate commerce of candy and candy products do cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers or to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are to be made or may be made by means of a lottery, gaming device or gift enterprise.

(2) Supplying to or placing in the hands of wholesale dealers and jobbers, or retail dealers, assortments of candy together with a device commonly referred to as a punch board for use or which may be used in distributing or selling said candy to the public at retail.

(3) Furnishing to wholesale dealers, jobbers, or retail dealers devices commonly referred to as punch boards either with packages

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or assortments of candy or candy products, or separately, bearing a legend or legends or statements informing the purchaser that the candy or candy products are being sold to the public by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device or gift enterprise.

(4) Furnishing to wholesale dealers, jobbers, and retail dealers devices commonly referred to as punch boards, having printed thereon legends informing the purchasers and purchasing public that certain jars of candy will be obtained by the purchaser purchasing a punch from said punch board and precuring thereby one of several specified numbers.

It is further ordered, That the respondent, Thinshell Candies, Incorporated, within 30 days after the service upon it of this order shall file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth.

Complaint

IN THE MATTER OF

MILTON E. MOSS AND E. MOSS, COPARTNERS, TRADING
UNDER THE NAMES AND STYLE OF M. E. MOSS MANU-
FACTURING CO., AND E. MOSS CO.COMPLAINT AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5
OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2228. Complaint, Aug. 31, 1934—Order, Nov. 26, 1934*

Consent order requiring respondents, in connection with the sale and offer in interstate commerce of ladies' hosiery, to cease and desist forthwith from falsely representing in their advertisements, circulars, and catalogs distributed generally through the mails, or in any other way, that—

- (a) Said hosiery so dealt in by them is not sold in stores;
- (b) They are the originators of "Run Stop" hosiery, or of "Run Stop Insured Full-Fashioned Silk Hosiery", or created this "New Type" hosiery, or they are sole distributors of such "Run Proof" hosiery;
- (c) Such hosiery is of real high quality and offered and sold at "one third regular price" or at "greatly reduced prices", or is of "a combination weight made only in silk hosiery which retails at \$1.75 per pair";
- (d) They make a free gift of a "Pearl necklace—\$6 genuine Parisian—diamond clasp—clear white, genuine, indestructible", with every three pairs purchased, until they do in fact furnish, without any additional cost, a genuine pearl necklace, costing \$6 at reputable retail stores, and conforming in all respects to the aforesaid description; and
- (e) They guarantee their hosiery against runs from actual wear, and will replace, free of charge, any pair bought from them which runs from actual wear; and

Ordered further, That said respondents, their agents, etc., in connection with the sale of ladies' hosiery in interstate commerce and the offer thereof, also forthwith cease and desist from refusing and neglecting to abide by and adhere to any guarantee made by them in their advertisements, circulars, and catalogs, or otherwise, and from refusing or neglecting, more particularly, to abide by any guarantee to furnish to purchasers, free of charge, a pair of hosiery, for any pair purchased from them, in which runs from actual wear occur.

Mr. James M. Brinson for the Commission.

Mr. Harold Zinman, of Hartford, Conn., for respondents.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission, having reason to believe that Milton E. Moss and E. Moss, doing business under the trade names and style of M. E. Moss Manufacturing Company and E. Moss Company,