

IN THE MATTER OF

BOYD HOUSER, TRADING AS BOYD HOUSER CANDY
COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3506. Complaint, July 22, 1938—Decision, Jan. 25, 1939*

Where an individual engaged in sale and distribution of certain assortments of candy so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and which were composed of (a) number of small bars of candy, number of quarter-pound bars, and number of half-pound bars, together with push card, for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser received, for 5 cents paid, 5-cent candy bar and right to make push and, dependent on success or failure in securing thereby one of certain numbers, privilege of exchanging said bar for one of the quarter- or half-pound bars, as case might be, and also, in case of person pushing last number in each of four sections into which card was divided, half-pound bar; and of (b) other assortments and cards varying only in size and detail—

Sold, to wholesale and retail jobbers, for display and resale to purchasing public in accordance with aforesaid sales plans, such assortments, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of his said candy, contrary to an established public policy of the United States Government and in violation of the criminal laws, and in competition with many who sell and ship such product into States other than their respective points of location and are unwilling to sell their products by methods used by said individual and above described, or any other method involving game of chance or lottery, and refrain therefrom;

With result that many persons were attracted by his said sales plan or method of distribution of his candy and by element of chance involved, and were thereby induced to buy and sell such products in preference to those offered and sold by competitors who do not use same or similar method of distribution, and trade was unfairly diverted from such competitors to him;

Held, That such practices were all to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Charles F. Diggs*, trial examiner.

Mr. D. C. Daniel for the Commission.

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 Boyd Houser, individually and trading as Boyd Houser Candy Co. has violated the provisions of said act and it appearing to said 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 Boyd Houser is an individual doing business under the trade name of Boyd Houser Candy Co. with his principal office and place of business located at 307 Washington Avenue North, Minneapolis, Minn. He is now and for some time last past has been engaged in the sale and distribution of candy to wholesale and retail dealers and jobbers in commerce between and among the various States of the United States. Respondent causes and has caused said candy when sold to be transported from his principal place of business aforesaid to purchasers thereof located in the various States of the United States at their respective points of location. There is now and for some time last past has been a course of trade by said respondent in such candy in commerce between and among the various States of the United States. In the course and conduct of his business respondent is in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of candy in commerce between and among the various States of the United States.

PAR. 2. Respondent in the course and conduct of his said business as described in paragraph 1 hereof sells and has sold to wholesale and retail dealers and jobbers certain assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One of said assortments consists of a number of small bars of candy, a number of one-fourth-pound bars of candy and a number of one-half-pound bars of candy together with a device commonly called a push card. Said bars of candy are distributed to the purchasing public by means of said push card in the following manner. The said push card has 100 partially perforated disks marked "Push" divided into four sections. Sales are 5 cents each and each purchaser is entitled to push one disk from said card. Concealed within each disk is a number. The board bears statements or legends informing purchasers and prospective purchasers that each purchaser receives a 5-cent bar of candy; that persons pushing certain specified numbers can exchange said 5-cent bar of candy without additional cost for a one-fourth-pound bar of candy; and that persons pushing certain other specified numbers or the last number in each section can exchange said 5-cent bar of candy without additional cost for a one-half-pound bar of candy. The numbers are effectively concealed from purchasers and prospective purchasers until a selection has been made and the disk selected pushed or separated from said card. The one-fourth and one-half-pound bars of candy are thus distributed to the purchasing public

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wholly by lot or chance. Respondent furnishes and has furnished various push cards for use in the sale and distribution of candy by means of a game of chance, gift enterprise, or lottery scheme. Said push cards involve the same lot or chance feature as the one hereinabove described but vary in size and detail.

PAR. 3. Retail dealers who purchase respondent's said assortments of candy expose and sell the same to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting a lottery in the sale of his candy in accordance with the sales plan hereinabove set forth. Said sales plan has a tendency and capacity to induce purchasers of candy to purchase respondent's candy in preference to candy offered for sale and sold by his competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure larger bars of candy. The use by respondent of said method in the sale of candy and the sale of candy by and through the use thereof and by the aid of said method is a practice of the sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws. The use by respondent of said method has a tendency unduly to hinder competition or to create a monopoly in this to wit: That the use thereof has a tendency and capacity to exclude from the candy trade competitors who do not adopt and use the same method or an equivalent or similar method involving the same or equivalent elements of chance or lottery. Many persons, firms, and corporations who make and sell candy in competition with the respondent as above alleged are unwilling to offer for sale or to sell their product by the method above described or by any other method involving a game of chance or lottery and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said sales plan or method and by the element of chance involved in the sale thereof in the manner above alleged and are thereby induced to purchase said assortment of candy from respondent in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or an equivalent or similar method. The use of said method by respondent has a capacity and tendency because of said game of chance to divert to respondent trade and custom from his competitors who do not use the same or an equivalent or similar method, to exclude from the candy trade all competitors who are unwilling to and who do not use the same or an equivalent or similar method because the same

is against public policy and unlawful, to lessen competition in the candy trade, to create a monopoly of said candy trade in respondent and in such other distributors of candy as use the same or an equivalent or similar method, and to deprive the purchasing public of free competition. The use of said method by respondent has the tendency and capacity to eliminate from said candy trade all actual competitors and to exclude therefrom all potential competitors who do not adopt and use the same or an equivalent or similar method.

PAR. 6. The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on the 22d day of July, A. D., 1938, issued and served its complaint in this proceeding upon the respondent, Boyd Houser, trading as Boyd Houser Candy Co., charging him with the use of unfair methods of competition in commerce, in violation of the provisions of said act.

After the issuance of said complaint, respondent filed his answer thereto, admitting all the material allegations of fact set forth in said complaint and waiving hearing and all intervening procedure.

Thereafter, the proceedings regularly came on for final hearing before the Commission on the said complaint and the answer thereto, and the Commission having duly considered the same and being now 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

PARAGRAPH 1. The respondent, Boyd Houser, is an individual doing business under the trade name Boyd Houser Candy Co., and having his principal place of business at 307 Washington Avenue, North, Minneapolis, Minn. Respondent is now, and for some time past has been, engaged in the sale and distribution of candy to wholesale and retail dealers and jobbers. Respondent causes and has caused said candy when sold to be transported from his principal place of business to the purchasers thereof located in the various States of the United States at their respective points of location. In the course and conduct of his business respondent is in competition with other

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individuals, partnerships, and corporations likewise engaged in the sale and distribution of candy in commerce between and among the various States of the United States.

PAR. 2. Respondent in the course and conduct of his said business sells and has sold to wholesale and retail dealers and jobbers certain assortments of candy accompanied by "push cards," the said candy being so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. The different assortments of candy and "push cards" vary only in size and detail. One of respondent's assortments of candy consists of a number of small bars of candy, a number of one-fourth pound bars of candy, and a number of one-half pound bars of candy. This assortment is distributed to the purchasing public by means of a "push card," which has 100 partially perforated disks marked "Push" divided into 4 sections. Within each disk is a number effectively concealed until the disk is punched or separated from the card. In accordance with the statements appearing upon the "push card" the purchaser upon the payment of 5 cents receives a 5-cent bar of candy and is entitled to push one of the disks from said card; and if a certain specified number is contained within the disk the purchaser can, without additional cost, exchange the 5-cent bar for a one-fourth pound bar of candy. If one of certain other specified numbers is contained within the disk the purchaser can, without additional cost, exchange the 5-cent bar for a one-half pound bar of candy; and the person pushing the last number in each section can, without additional charge, exchange the 5-cent bar for a one-half pound bar of candy.

PAR. 3. Retail dealers who purchase respondent's said assortment of candy expose and sell the same to the purchasing public in accordance with the aforesaid sales plan.

PAR. 4. Respondent, by means of his hereinbefore described sales plan, places in the hands of others the means of conducting lotteries in the sale of his said candy, and the said method of sale and distribution of his candy is contrary to the established public policy of the Government of the United States and is in violation of the criminal laws.

PAR. 5. Many persons are attracted by respondent's sales plan or method of distribution of his candy by the element of chance involved herein and are thereby induced to buy and sell respondent's candy in preference to that offered for sale and sold by respondent's competitors who do not use the same or similar method of distribution.

PAR. 6. Many of respondent's competitors who sell and ship candy into States other than their respective points of location are unwilling

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to sell their products by the methods used by the respondent and hereinbefore described or by any other method involving a game of chance or lottery, and such competitors refrain from using said method, and as a result trade is unfairly diverted from such competitors to the respondent.

CONCLUSION

The practices of the respondent as set forth in the aforesaid findings of facts are all to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that he waives all the intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent Boyd Houser, individually and trading as Boyd Houser Candy Co. or trading under any other name, his representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of candy in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Selling and distributing 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 dealers assortments of candy which are used or which may be used without alteration or rearrangement of the contents of such assortments to conduct a lottery, gaming device, or gift enterprise in the sale or distribution to the public of such candy contained in said assortments.

3. Supplying to or placing in the hands of dealers assortments of candy, or other merchandise, together with a push or pull card, punchboard or other lottery device for use or which may be used in the sale or distribution of such candy or other merchandise to the public at retail.

4. Supplying to or placing in the hands of dealers a push or pull card, punchboard, or other lottery device, either with assortments of

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candy or separately, which push or pull card, punchboard or other lottery device is to be used or may be used in distributing or selling such candy or other merchandise to the public.

It is further ordered, That the respondent shall, within 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 this order.

ACE PREMIUM COMPANY

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Syllabus