

IN THE MATTER OF
PHILIP MORRIS & CO., LTD., INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3398. Complaint, May 4, 1938—Decision, Jan. 31, 1939

Where a corporation engaged in manufacture of cigarettes, and in sale and distribution thereof to dealers in the various States and in the District of Columbia, and in selling certain assortments thereof which were so packed and assembled as to involve use of lottery scheme when sold and distributed to consumers thereof, and which (1) were composed of number of packages of cigarettes and number of tins thereof, together with 12-section punchboard, for sale under a plan, and in accordance with said board's explanatory legend, pursuant to which (a) purchaser received for penny paid two tins, or one tin, or package of cigarettes, or nothing other than privilege of punch, in accordance with success or failure in securing one of numbers thus announced, and (b) purchaser of last punch in each of board's sections received package, or which (2) involved plans or methods varying in detail from that described aforesaid, but of principle of which plan or method above described was illustrative, and under which it furnished various punchboards and push cards with its various assortments for use in sale and distribution of its said product—

Sold to dealers, for distribution and resale to purchasing public by retailer-dealer purchasers thereof in accordance with such plan, said assortments, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its said product in accordance with sales plan above set forth, contrary to public policy as long recognized in the common law and criminal statutes, and to an established public policy of the United States Government, and in competition with many who are unwilling to offer or sell cigarettes so packed and assembled as above described, or otherwise arranged and packed for sale to purchasing public so as to involve game of chance or any other method of sale contrary to public policy, and refrain therefrom;

With tendency and capacity to induce purchasers of cigarettes to buy its said product in preference to those and tobaccos offered and sold by its competitors, and with result that many dealers in and ultimate purchasers of cigarettes were attracted by its said method and manner of packing same and by element of chance involved in sale thereof as above described, and were thereby induced to purchase substantial quantities of such cigarettes thus packed and sold by it, in preference to those offered and sold by said competitors who do not use same or equivalent methods, and with tendency and capacity, because of said game of chance, unfairly to divert to it trade and custom from its competitors aforesaid, to exclude from said cigarette trade all competitors who are unwilling to and do not use such or equivalent methods as unlawful, to lessen competition in said trade and create a monopoly thereof in it and in such other distributors of cigarettes as do use same or equivalent methods, to deprive purchasing

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public of benefit of free competition in such trade, and to eliminate from said trade all actual, and exclude therefrom all potential, competitors who do not adopt and use said or equivalent methods:

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

Before *Mr. Randolph Preston*, trial examiner.

Mr. D. C. Daniel for the Commission.

Mr. George P. Brauburger, of New York City, for respondent.

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 Philip Morris & Co., Ltd., Inc., a corporation, hereinafter referred to as respondent, 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. The respondent is a corporation organized, existing, and doing business under the laws of the State of Virginia, with its principal office and place of business located at 119 Fifth Avenue, New York City, N. Y., and a manufacturing plant at Richmond, Va. Respondent has branch offices and warehouses located in various States of the United States. Respondent is now, and for some time last past has been, engaged in the manufacture of cigarettes and in the sale and distribution thereof to dealers located in the various States of the United States and in the District of Columbia. It causes and has caused said merchandise when sold to be shipped or transported from its places of business aforesaid, into and through the various States of the United States other than the State of origin of such shipment and into the District of Columbia, to the purchasers thereof at their respective points of location. There is now, and has been for some time last past, a course of trade and commerce by said respondent in such merchandise between and among the various States of the United States and in the District of Columbia. In the course and conduct of its business, respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of cigarettes in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to dealers certain assortments of cigarettes so packed and assembled as to involve the

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use of a lottery scheme when sold and distributed to the consumers thereof. One of respondent's assortments substantially illustrates the sales plan or method used in the sale and distribution of its products to the purchasing public, and is as follows:

This assortment consists of a number of packages of cigarettes and a number of tins of cigarettes, together with a device commonly called a punchboard. The punchboard is divided into 12 sections. Sales are 1 cent each and each purchaser is entitled to one punch from said board. When a punch is made from said board, a number is disclosed. The board bears statements informing prospective purchasers that a certain number entitles the purchaser thereof to two tins of cigarettes; that certain other numbers entitle the purchasers thereof to one tin of cigarettes; that certain other numbers entitle the purchasers hereof to one package of cigarettes; and that the purchaser of the last number in each section is entitled to one package of cigarettes. A purchaser who does not qualify by obtaining one of the numbers calling for a tin or tins or a package of cigarettes, or the last number in one of the sections, receives nothing for his money other than the privilege of punching a number from the board. The numbers are effectively concealed from purchasers and prospective purchasers until a punch has been made and the particular punch separated from the board. The retail value of said tins and packages of cigarettes is greater than the designated price of said punches. The said packages and tins of cigarettes are thus distributed to the purchasers of said punches from said board wholly by lot or chance.

Respondent sells and distributes various assortments of its cigarettes and furnishes various punchboards and push cards for use in the sale and distribution of such cigarettes by means of a game of chance, gift enterprise, or lottery scheme. Such plan or method varies in detail, but the above-described plan or method is illustrative of the principle involved.

PAR. 3. Retail dealers who purchase respondent's said cigarettes, directly or indirectly, 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 a means of conducting lotteries in the sale of its products in accordance with the sales plan hereinabove set forth. Said sales plan has the tendency and capacity to induce purchasers thereof to purchase respondent's said products in preference to cigarettes and tobaccos offered for sale and sold by its competitors.

PAR. 4. The sale of said products to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance

to procure a package or a tin or tins of cigarettes. The use by respondent of said method in the sale of cigarettes and the sale of said cigarettes by and through the use thereof and by the aid of said method is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has a tendency unduly to hinder competition or create a monopoly in this, to wit: That the use thereof has a tendency and capacity to exclude from the cigarette trade competitors who do not adopt and use the same method or equivalent or similar methods involving the same or an equivalent or similar element of chance or lottery scheme. Many persons, firms, and corporations who make and sell cigarettes in competition with the respondent, as above alleged, are unwilling to offer for sale or sell cigarettes so packed and assembled as above described or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, or any other method of sale that is contrary to public policy, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of cigarettes are attracted by respondent's said method and manner of packing said cigarettes and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said cigarettes so packed and sold by respondent in preference to cigarettes offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent has the tendency and capacity, because of said game of chance, to unfairly divert to respondent trade and custom from its said competitors who do not use the same or equivalent methods, to exclude from said cigarette trade all competitors who are unwilling to, and who do not, use the same or equivalent methods because the same are unlawful, to lessen competition in said cigarette trade, to create a monopoly of said cigarette trade in respondent and such other distributors of cigarettes as use the same or equivalent methods, and to deprive the purchasing public of the benefit of free competition in said cigarette trade. The use of said method by respondent has a tendency and capacity to eliminate from said trade all actual competitors and to exclude therefrom all potential competitors who do not adopt and use said methods or equivalent methods.

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 May 4, 1938, issued, and on May 5, 1938, served, its complaint in this proceeding upon respondent, Philip Morris & Co., Ltd., Inc., a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and substitute answer, and the Commission having duly considered the matter 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 is a corporation organized, existing, and doing business under the laws of the State of Virginia, with its principal office and place of business located at 119 Fifth Avenue, New York City, N. Y., and a manufacturing plant at Richmond, Va. Respondent has branch offices and warehouses located in various States of the United States. Respondent is now, and for some time last past has been, engaged in the manufacture of cigarettes and in the sale and distribution thereof to dealers located in the various States of the United States and in the District of Columbia. It causes and has caused said merchandise when sold to be shipped or transported from its places of business aforesaid, into and through the various States of the United States other than the State of origin of such shipment and into the District of Columbia, to the purchasers thereof at their respective points of location. There is now, and has been for some time last past, a course of trade and commerce by said respondent in such merchandise between and among the various States of the United States and in the District of Columbia. In the course and conduct of its business, respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of cigarettes in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to dealers certain assortments of cigarettes so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One of respondent's assortments substantially illustrates the sales plan or method used in the sale and distribution of its products to the purchasing public, and is as follows:

This assortment consists of a number of packages of cigarettes and a number of tins of cigarettes, together with a device commonly called a punchboard. The punchboard is divided into 12 sections. Sales are 1 cent each and each purchaser is entitled to one punch from said board. When a punch is made from said board, a number is disclosed. The board bears statements informing prospective purchasers that a certain number entitles the purchaser thereof to two tins of cigarettes; that certain other numbers entitle the purchasers thereof to one tin of cigarettes; that certain other numbers entitle the purchasers thereof to one package of cigarettes; and that the purchasers of the last number in each section is entitled to one package of cigarettes. A purchaser who does not qualify by obtaining one of the numbers calling for a tin or tins or a package of cigarettes, or the last number in one of the sections, receives nothing for his money other than the privilege of punching a number from the board. The numbers are effectively concealed from purchasers and prospective purchasers until a punch has been made and the particular punch separated from the board. The retail value of said tins and packages of cigarettes is greater than the designated price of said punches. The said packages and tins of cigarettes are thus distributed to the purchasers of said punches from said board wholly by lot or chance.

Respondent sells and distributes various assortments of its cigarettes and furnishes various punchboards and push cards for use in the sale and distribution of such cigarettes by means of a game of chance, gift enterprise, or lottery scheme. Such plan or method varies in detail, but the above-described plan or method is illustrative of the principle involved.

PAR. 3. Retail dealers who purchase respondent's said cigarettes, directly or indirectly, 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 a means of conducting lotteries in the sale of its products in accordance with the sales plan hereinabove set forth. Said sales plan has the tendency and capacity to induce purchasers of cigarettes to purchase respondent's said products in preference to cigarettes and tobaccos offered for sale and sold by its competitors.

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PAR. 4. The sale of said products to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure a package or a tin or tins of cigarettes. The use by respondent of said method in the sale of cigarettes and the sale of said cigarettes by and through the use thereof and by the aid of said method is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has a tendency unduly to hinder competition or create a monopoly in this, to wit: That the use thereof has a tendency and capacity to exclude from the cigarette trade competitors who do not adopt and use the same method or equivalent or similar methods involving the same or an equivalent or similar element of chance or lottery scheme. Many persons, firms, and corporations who make and sell cigarettes in competition with the respondent, as above found, are unwilling to offer for sale or sell cigarettes so packed and assembled as above described or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, or any other method of sale that is contrary to public policy, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of cigarettes are attracted by respondent's said method and manner of packing said cigarettes and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase substantial amounts of said cigarettes so packed and sold by respondent in preference to cigarettes offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent has the tendency and capacity, because of said game of chance, to unfairly divert to respondent trade and custom from its said competitors who do not use the same or equivalent methods, to exclude from said cigarette trade all competitors who are unwilling to, and who do not, use the same or equivalent methods because the same are unlawful, to lessen competition in said cigarette trade, to create a monopoly of said cigarette trade in respondent and such other distributors of cigarettes as use the same or equivalent methods, and to deprive the purchasing public of the benefit of free competition in said cigarette trade. The use of said method by respondent has a tendency and capacity to eliminate from said trade all actual competitors and to exclude therefrom all potential competitors who do not adopt and use said methods or equivalent methods.

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CONCLUSION

The aforesaid acts and practices of the respondent, as herein found, are all to the injury and 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.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the substitute answer of respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that it waives all 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, Philip Morris & Co., Ltd., Inc., a corporation, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of cigarettes or any other articles of merchandise in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling and distributing cigarettes or any other merchandise so packed and assembled that sales of such cigarettes or any other merchandise to the general public are to be made or may be made by means of a game of chance, gift enterprise, or lottery scheme.
2. Supplying to, or placing in the hands of dealers, assortments of said cigarettes or other merchandise together with punchboards or other lottery devices which said punchboards or other lottery devices are to be used or may be used in selling or distributing cigarettes or other merchandise to the public.
3. Supplying to, or placing in the hands of dealers, punchboards or other lottery devices either with assortments of said products or separately, which punchboards or other lottery devices are to be used or may be used in selling or distributing cigarettes or other merchandise to the public.
4. Selling, or otherwise disposing of, cigarettes or other merchandise by the use of punchboards, or other lottery devices.

It is further ordered, That within 60 days from the date of the service of this order upon said respondent, it shall file with the Commission a report in writing setting forth in detail the manner and form in which this order has been complied with.

IN THE MATTER OF
THE ENDURA CORPORATION

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3419. Complaint, May 12, 1938—Decision, Jan. 31, 1939

Where a corporation engaged in sale of its "Endura" or "Endura Permanent Wave" beauty preparation to purchasers in other States and in the District of Columbia; in issuing, publishing, and circulating advertisements thereof among the various States through printed matter, radio broadcasts, and other ways—

(a) Represented that said cosmetic preparation had been tested in the world's foremost laboratories, and that it was used in Hollywood's major movie studios and by the screen's smartest stars; and

(b) Represented that it was actually good for the hair and would benefit bleached, dyed, gray, or naturally colored hair;

Facts being it contained nothing which was actually good for the hair or which would accomplish results aforesaid, and had not been tested and was not used as above claimed, and said representations were grossly exaggerated, false, misleading, and untrue;

With effect of misleading and deceiving substantial portion of purchasing public into belief that all said representations were true, and with result, as direct consequence of mistaken and erroneous belief induced by said advertising and misrepresentation, that consuming public was caused by it to purchase substantial volume of said preparation, and trade was unfairly diverted to it from others engaged in sale of like or similar preparations intended for like and similar purposes, and who truthfully advertise their products; to the injury of competition in commerce;

Held, That such false and misleading representations, claims, and statements made as aforesaid were all to the prejudice and injury of the public and competitors and constituted unfair methods of competition in commerce.

Before *Mr. Charles P. Vicini*, trial examiner.

Mr. Joseph C. Fehr for the Commission.

Mr. Don F. Tyler, of Los Angeles, Calif., for respondent.

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 The Endura Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of the 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: