

Syllabus

IN THE MATTER OF

FERRARA PANNED CANDY COMPANY, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 3542. Complaint, Aug. 17, 1938—Decision, Feb. 15, 1939

Where a corporation engaged in the manufacture, sale, and distribution of candy, including assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof and which (1) were composed of a number of pieces of candy, together with push cards for sale and distribution of said pieces under a plan and in accordance with card's explanatory legend by which purchaser received, in accordance with particular basket ball legend disclosed by disk selected to be pushed by chance, pieces of candy ranging from 1 to 20, and (2) involved various push cards similar to that above described and varying therefrom in detail only, for sale and distribution of its candy by means of a game of chance, gift enterprise, or lottery scheme—

Sold and distributed to dealers such assortments for display and resale to purchasing public in accordance with aforesaid sales plan and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its candy in accordance with such sales plan involving game of chance or sale of a chance to procure additional pieces of candy without additional cost, contrary to an established public policy of the United States Government and in violation of the criminal laws and in competition with many who are unwilling to offer and sell their products so packed and assembled as above described or otherwise arranged and packed for sale to purchasing public so as to involve a game of chance or any other method contrary to public policy, and refrain therefrom;

With tendency and capacity to induce purchasers of its said candy to buy same in preference to that offered and sold by its competitors and with result that many dealers in and ultimate consumers of candy 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 amounts of such candy thus packed and sold by it in preference to that offered and sold by its said competitors, who do not use such or equivalent sales plan or method, and with tendency and capacity, because of said game of chance, unfairly to divert trade and custom to it from its competitors who do not use such or equivalent methods, exclude from candy trade all competitors who are unwilling to and do not use such or equivalent method as unlawful, lessen competition in said trade, create a monopoly thereof in it and in such other distributors of candy as do use same or equivalent sales plan or method, deprive purchasing public of benefit of free competition, and eliminate from said trade all actual and exclude therefrom all potential competitors who do not adopt and use such plan or method:

Held, that such acts and practices were all to the prejudice and injury 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

28 F. T. C.

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 Ferrara Panned Candy Co., 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. Respondent, Ferrara Panned Candy Co., Inc., is a corporation, organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 2200-10 West Taylor Street, Chicago, Ill. Respondent is now, and for some time last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to dealers. Respondent causes, and has caused, its products, when sold, to be transported from its place of business aforesaid to purchasers thereof in the various States of the United States and in the District of Columbia. 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 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 candy 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 candy so packed and assembled as to involve the use of a lottery scheme when distributed to the consumers thereof. One of said assortments is, and has been, sold and distributed to the consuming public in the following manner:

This assortment consists of a number of pieces of candy, together with a device commonly called a push card. The push card contains a number of partially perforated discs which are divided into four sections. On the face of each disk is printed the word "Push." Within each of said discs is printed one of a number of basketball terms, which lend themselves to legend use for the awarding of prizes. Sales are 1 cent each, and each purchaser is entitled to one push from said card. The said card bears statements or legends as follows:

Complaint

BASKETBALL 1¢

Field Goal receives-----	20 Pieces
Free Throw receives-----	10 Pieces
Dribble receives-----	8 Pieces
Pass receives-----	6 Pieces
Tip Off receives-----	4 Pieces
Personal receives-----	4 Pieces
Pivot receives-----	2 Pieces
Guard receives-----	2 Pieces
Foul receives-----	1 Piece
Last sale in each section receives-----	10 Pieces

Sales of respondent's candy are made in accordance with the above legends. The said terms or words printed within the said disks are effectively concealed from purchasers and prospective purchasers until a purchase has been made and a disk separated or removed from said card. The said pieces of candy are thus distributed to the purchasing public wholly by lot or chance.

Respondent sells and distributes, and has sold and distributed, various push cards for use in the sale and distribution of its candy by means of a game of chance, gift enterprise, or lottery scheme. Such cards are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's candy, 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, the means of conducting lotteries in the sale of its candy, in accordance with the sales plan hereinabove set forth. Said sales plan has a tendency and capacity to induce purchasers of said candy to purchase respondent's candy in preference to candy offered for sale and sold by its 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 additional pieces of candy without additional cost. 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 the said method has a tendency unduly to hinder competition, or to create a monopoly in 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 method involving the same or an equivalent element of chance or lottery. Many persons, firms, and corporations

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who make and sell candy in competition with the respondent, as above alleged, are unwilling to offer for sale, or to sell, their products 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 which is contrary to public policy, and such competitors refrain therefrom.

PAR. 5. Many dealers in, and ultimate consumers of, candy are attracted by respondent's said method and manner of packing said candy and by the element of chance involved in the sale thereof, in the manner above described, and thereby are induced to purchase said candy so packed and sold by respondent in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or an equivalent sales plan or method. The use of said method by respondent has a tendency and capacity, because of said game of chance, to unfairly divert to respondent, trade and custom from its competitors who do not use the same or an equivalent method; to exclude from the candy trade all competitors who are unwilling to, and who do not use the same or an equivalent method because the same is 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 sales plan or method, and to deprive the purchasing public of the benefit of free competition. The use of said sales plan or 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 sales plan or method.

PAR. 6. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury 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 August 17, 1938, issued, and on August 18, 1938, served its complaint in this proceeding upon respondent Ferrara Panned Candy Co., Inc., 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 alle-

gations 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. Respondent, Ferrara Panned Candy Co., Inc., is a corporation, organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 2200-10 West Taylor Street, Chicago, Ill. Respondent is now, and for some time last past has been engaged in the manufacture of candy and in the sale and distribution thereof to dealers. Respondent causes, and has caused, its products, when sold, to be transported from its place of business aforesaid to purchasers thereof in the various States of the United States and in the District of Columbia. 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 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 candy 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 candy so packed and assembled as to involve the use of a lottery scheme when distributed to the consumers thereof. One of said assortments is, and has been, sold and distributed to the consuming public in the following manner:

This assortment consists of a number of pieces of candy, together with a device commonly called a push card. The push card contains a number of partially perforated disks which are divided into four sections. On the face of each disk is printed the word "Push." Within each of said disks is printed one of a number of basketball terms, which lend themselves to legend use for the awarding of prizes. Sales are 1 cent each, and each purchaser is entitled to one push from said card. The said card bears statements or legends as follows:

Findings

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Sales of respondent's candy are made in accordance with the above legends. The said terms or words printed within the said disks are effectively concealed from purchasers and prospective purchasers until a purchase has been made and a disk separated or removed from said card. The said pieces of candy are thus distributed to the purchasing public wholly by lot or chance.

Respondent sells and distributes, and has sold and distributed, various push cards for use in the sale and distribution of its candy by means of a game of chance, gift enterprise, or lottery scheme. Such cards are similar to the one hereinabove described and vary only in detail.

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

PAR. 4. The sale of said candy to the purchasing public, in the manner above found, involves a game of chance, or the sale of a chance to procure additional pieces of candy without additional cost. 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 the said method has a tendency unduly to hinder competition, or to create a monopoly in 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 method involving the same or an equivalent element of chance or lottery. Many persons, firms, and corporations who make and sell candy in competition with the

respondent, as above found, are unwilling to offer for sale, or to sell, their products 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 which is contrary to public policy, and such competitors refrain therefrom.

PAR. 5. Many dealers in, and ultimate consumers of, candy are attracted by respondent's said method and manner of packing said candy and by the element of chance involved in the sale thereof, in the manner above described, and thereby are induced to purchase substantial amounts of said candy so packed and sold by respondent in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or an equivalent sales plan or method. The use of said method by respondent has a tendency and capacity, because of said game of chance, to unfairly divert to respondent, trade and custom from its competitors who do not use the same or an equivalent method; to exclude from the candy trade all competitors who are unwilling to, and who do not use the same or an equivalent method because the same is 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 sales plan or method, and to deprive the purchasing public of the benefit of free competition. The use of said sales plan or 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 sales plan or method.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, are all to the prejudice and injury 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 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 fact and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

Order

28 F. T. C

It is ordered, That the respondent Ferrara Panned Candy Co., Inc., 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 candy or any other merchandise in commerce, as commerce is defined in the Federal Trade Commission Act, 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 or others, packages or assortments of candy which are to be or may be used to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of candy or any other article of merchandise to the public.

3. Supplying to or placing in the hands of dealers or others, assortments of candy or any other merchandise together with punchboards, push or pull cards or other lottery devices, which lottery devices are to be used or may be used in selling or distributing such candy or other merchandise to the public.

4. Supplying to or placing in the hands of dealers or others a lottery device either with assortments of candy or other merchandise or separately, which lottery device is to be used or may be used in selling or distributing such candy or other merchandise to the public.

5. Selling or otherwise disposing of any merchandise by the use of lottery devices.

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

Syllabus

IN THE MATTER OF

D. A. SCHULTE, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3676. Complaint, Dec. 23, 1938—Decision, Feb. 15, 1939*

Where a corporation engaged in sale and distribution of certain assortments of candy and other articles of merchandise which were (1) so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, and for use with which (2) it shipped to its wholesaler, jobber, and retailer customers punchboards, and one of which (3) consisted of a number of boxes of assorted candy and additional articles of merchandise, together with punchboards for disposition of said candy and merchandise to consuming public under a plan in accordance with which, and board's explanatory legend, certain specified numbers entitled purchaser to a box of candy or other articles, and purchaser of last punch in each of three sections into which board was arranged received a pound box of candy, and purchaser of last punch on board received article of merchandise, and purchaser who failed thus to qualify and thereby secure one of said boxes of candy or articles, value of which was in excess of the 5 cents or 10 cents charged for punch, received nothing for such 5 cents or 10 cents other than privilege of making punch;

Sold to wholesalers, jobbers, and retailers such assortments and furnished punchboards as aforesaid to such assortments' purchasers, by whom such boards were made use of in sale and distribution of its candy and merchandise in accordance with aforesaid sales plan, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its candy and other merchandise in accordance with such sales plan involving game of chance or sale of a chance to procure candy or article of merchandise at price much less than normal retail price thereof, contrary to an established public policy of the United States Government and in violation of the criminal laws, and in competition with many who are unwilling to adopt and use such or any method involving game of chance or sale of a chance to win by chance or any other method contrary to public policy and refrain therefrom;

With result that many persons were attracted by said sales plan or method employed by it in sale and distribution of its candy and other articles and element of chance involved therein and were thereby induced to buy and sell such candy and other articles in preference to such merchandise offered and sold by said competitors who do not use such or equivalent method, and of unfairly diverting trade because of said game of chance to it from its competitors who do not use such method, to the substantial injury of competition in commerce:

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

Mr. D. C. Daniel for the Commission.

Mr. Jerome Eisner, of New York City, for respondent.