

IN THE MATTER OF
FASCINATION CANDY COMPANY

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

Docket 3321. Complaint, Feb. 1, 1938—Decision, Apr. 30, 1940

Where a corporation engaged in manufacture and sale of packaged chocolate candy, including assortments which were suitable for distribution by use of punchboards and push cards packed by it in the containers of such candy and assortments in connection with which, on request, it had shipped to the customer by the manufacturer of said devices such boards or cards designed and intended for use in distribution of candies in question wholly by lot or chance, and which included, among others, card and plan by which ultimate purchaser or consumer received package of assorted chocolates in accordance with success or failure in selecting from list of 30 girls' names that corresponding with name concealed under card's large disk as disclosed after sale of all chances, and paid for chance from 1 to 5 cents in accordance with girls' names and accompanying disk selected, and included various other cards and boards designed and intended for use in distribution of products involved, wholly by lot or chance, and of same general nature and operated in substantially same manner as cards above described—

Sold to jobbers its said candies and articles of merchandise for use as special prizes in operation of said push cards and punchboards through resale by retail dealer purchasers of said jobbers of such candy and articles by use of said devices and in accordance with sales plans as above set forth, and thereby supplied to and placed in the hands of others means by which games of chance, gift enterprises, and lotteries involving game of chance or sale of a chance in resale of candies and articles in question were conducted, contrary to the established public policy of the United States Government and in violation of the laws of several of the States, and in competition with many who were unwilling to employ in sale and distribution of their candies and articles of merchandise dealt in by them, any method or sales plan involving games of chance, gift enterprises, or lottery schemes, and refrained from the use thereof, to their competitive disadvantage;

With the result that many purchasers of candy and articles of merchandise from it were attracted by element of chance involved in sale and distribution of such products through use of push cards and punchboards furnished by it and were thereby induced to purchase such candies and merchandise offered by it, in preference to similar candies and articles offered by its competitors who do not furnish therewith such or similar devices, and with result that jobbers purchased substantial amount of such candies and articles from it, and trade was thereby diverted unfairly to it from competitors aforesaid:

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

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Complaint

Before *Mr. William C. Reeves, Mr. Arthur F. Thomas and Mr. Miles J. Furnas*, trial examiners.

Mr. Henry C. Lank, Mr. D. C. Daniel, Mr. George F. Foulkes and Mr. L. P. Allen, Jr., for the Commission.

Mr. Harry M. Kroon, of Chicago, Ill., for respondent.

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 Fascination Candy Co., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce as "commerce" is defined in 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, Fascination Candy Co., is a corporation organized and doing business under the laws of the State of Illinois, with its principal place of business located at 1137 North Wood 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 wholesale and retail dealers and jobbers. Respondent causes and has caused its products when sold to be transported from its principal place of business in the city of Chicago, Ill., to purchasers thereof in the State of Illinois and in other States of the United States and in the District of Columbia, at their respective places of business. There is now, and has been for some time last past, a course of trade and commerce by said respondent in such candy between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business respondent is in competition with other corporations, and with partnerships and individuals engaged in the sale and distribution of candy and candy products, 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 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 respondent's assortments illustrates the sales plan or method used in the sale and distribution of its products to the purchasing public, and is as follows:

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This assortment consists of a 1-pound basket of assorted candy and a device commonly called a push card. The card contains a number of partially perforated disks and a master seal. On each disk is printed a girl's name, and concealed within each disk is printed a number. Concealed within the master seal there is a name corresponding to the name on one of the disks. The numbers begin with one and continue to the number of pushes there are on the card, but are not arranged in numerical sequence. Persons selecting numbers 1 to 5 pay in cents the amount of such numbers, and for all numbers over five pay 5 cents for the privilege of selecting one of the names. Space is provided on the card for recording the name of each purchaser opposite the name selected. The person selecting the name which corresponds to the name under the master seal receives the basket of candy. The basket of candy is worth more than the amount paid for the lucky push. The numbers are effectively concealed from purchasers and prospective purchasers until a push or selection has been made and the selected disk removed or separated from the card. The name under the master seal is concealed until all the sales have been made and the said master seal has been removed from the card. Thus the amount to be paid by the customer is determined wholly by lot or chance, and the said basket of candy is distributed to the purchasing public wholly by lot or chance.

The respondent manufactures, sells, and distributes various assortments of candy involving a lot or chance feature, but such assortments are similar to the one hereinabove described, and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's said 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 products in accordance with the sales plan hereinabove set forth; and said sales plan has a capacity and tendency to induce purchasers thereof to purchase respondent's candy in preference to candy and similar products 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 a basket of candy of far greater value than the amount to be paid therefor. 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 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 to create a monopoly in this, to wit: That the use thereof has a tendency and capacity to exclude from the candy and candy products trade competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery. Many persons, firms, and corporations who make and sell candy and candy products in competition with respondent, as above alleged, are unwilling to offer for sale or sell their said products so packed and assembled as above alleged 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, 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 are thereby induced to purchase said candy so packed and sold by respondent in preference to candy and candy products 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 the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from its competitors who do not use the same or an equivalent or similar method, to exclude from said trade all competitors who are unwilling to and who do not use the same or an equivalent or similar method because the same is unlawful, to lessen competition in said trade, to tend to create a monopoly of said trade in respondent and in such other distributors as use the same or an equivalent or similar method, and to deprive the purchasing public of the benefit of free competition in said trade. The use of said method by the respondent has a tendency and capacity to eliminate from the said trade all actual competitors and to exclude therefrom all potential competitors who do not adopt and use said method or an equivalent or similar method.

PAR. 6. The aforementioned method, acts, and practices of respondent are all to the prejudice and injury of the public and of respondent's competitors, as above alleged, and constitute unfair methods of competition in commerce within the intent and meaning 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."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 1, 1938, issued its complaint in this proceeding and caused same to be served upon the respondent, Fascination Candy Co., 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 an answer thereto by said respondent, testimony and other evidence in support of the allegations of said complaint were introduced by Henry C. Lank, D. C. Daniel, George F. Foulkes, and L. P. Allen, Jr., and testimony on behalf of said respondent was introduced by Harry M. Kroon, its attorney, before William C. Reeves, Arthur F. Thomas, and Miles J. Furnas, examiners for said Commission theretofore duly designated by it, which testimony was reduced to writing and filed in the office of the Commission, together with numerous pieces of documentary evidence received as exhibits. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, the testimony, and other evidence and briefs in support of the complaint; no briefs were filed by on on behalf of said respondent and oral argument was waived by it, 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, Fascination Candy Co., is a corporation organized under the laws of the State of Illinois, with its principal place of business at Chicago in said State; it is engaged in the business of the manufacture and sale of candy; it causes quantities of the candy manufactured by it to be transported, when sold, from its place of business in Chicago, in the State of Illinois, through and into, or into, other States of the United States to respective purchasers thereof, and in the course and conduct of its said business said respondent has been, and is now, in active competition with various persons and partnerships and other corporations also engaged in the manufacture and sale, or the sale, of candy in commerce among several of the States of the United States.

PAR. 2. The respondent, Fascination Candy Co., manufactures packaged chocolate candy exclusively; its annual sales aggregate between \$260,000 and \$300,000; approximately one-half of such sales have been made to jobbers in States other than the State of Illinois; in 1936 and

1937 it sold assortments of candy suitable for distribution by the use of a device sometimes described as punch boards and push cards; with some of these assortments, push cards were packed by respondent in the containers along with the candy and with other such assortments the candy was sold by respondent without the cards, but when requested by the customer respondent had the cards or punchboards sent direct to the customer from the manufacturer of such cards and boards; the sales by respondent with which such cards or boards were furnished aggregated between \$2,000 and \$3,000 annually. One of the cards so furnished by respondent had printed thereon 30 girls' names, each immediately above a disk which concealed a number and in the upper right-hand corner was a larger disk in the form of a seal which concealed a name which was the same as the name above 1 of the smaller disks, with the following printed matter on each of said cards:

Take home this fancy package
of delicious assorted
chocolates; name under seal
wins; 1¢ to 5¢; no higher

These cards were used by retail dealers in the distribution of such assortments of candy as follows: Members of the public were solicited to select one or more of the names on one of the cards and to pay the number of cents indicated by the number concealed by each of the disks below each of the names selected, except that persons who obtained numbers higher than five paid only 5 cents. When all names on one of the cards were selected and collections made, the larger disk was then opened and the name concealed thereby disclosed, and the prize, which consisted of a basket filled with candy, was then given to the person who had selected the name which was the same as that concealed by the seal. In the use of one of these cards, as stated, the selection of a name which would entitle the selector to a basket of candy or whether the charge for each selection made was 1 cent, 2 cents, 3 cents, 4 cents, or 5 cents was wholly a matter of chance. With other assortments of candies sold by it, respondent has furnished push cards of various types and designs and with still other such assortments respondent has furnished devices sometimes known as punchboards with various articles of merchandise given as prizes, but all such cards and boards so furnished by respondent were designed and intended for use in the distribution of candies wholly by lot or chance and were of the same general nature and operated in substantially the same manner as were the push cards described herein.

PAR. 3. The Commission finds that the candies and articles of merchandise intended for use as special prizes in the operation of the push cards and punchboards as described in paragraph 2 hereof, were

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sold by respondent to jobbers and with such sales it furnished push cards or punchboards, or both, and such candies and articles of merchandise so sold to jobbers were resold by them with the accompanying push cards or punchboards to retail dealers, and such candies and articles of merchandise were resold by the retail dealers to the purchasing public by the use of one or the other of the devices and in the manner and by the sales plan described in paragraph 2 hereof. The Commission further finds that respondent by furnishing such cards and boards, or either type of said devices, with the candies and articles of merchandise sold by it, thereby supplied to and placed in the hands of others the means by which games of chance, gift enterprises, and lotteries have been conducted. The Commission further finds that the use of such cards and boards, or either of such devices, in the resale and distribution by retail dealers of the candies and articles of merchandise sold by respondent, involved a game of chance or the sale of a chance and that the use of such methods in the sale and distribution of such candies and articles of merchandise was a practice of the sort which is contrary to the established public policy of the Government of the United States and is in violation of the laws of several of the States of the United States.

PAR. 4. There are among the competitors of respondent persons, partnerships, and corporations engaged in the manufacture and sale, or the sale, of candies and articles of merchandise of the same general nature as those sold by respondent and in commerce between and among various States of the United States, which competitors were unwilling to employ in the sale and distribution of candies and articles of merchandise dealt in by them, any method or sales plan which involved games of chance, gift enterprises, or lottery schemes, and refrained from the use of such practices, and as a result were placed at a disadvantage in competition. Many purchasers of candies and articles of merchandise from respondent were attracted by the element of chance involved in the sale and distribution of such candies and articles of merchandise by the use of push cards and punchboards furnished by respondent, and were thereby induced to purchase such candies and articles of merchandise offered for sale by respondent, in preference to similar candies and articles of merchandise offered for sale by competitors of respondent who did not furnish with candies and articles of merchandise sold by them similar push cards and punch cards or similar devices, and as a result jobbers purchased a substantial amount of candies and articles of merchandise from respondent with the result that trade was thereby diverted unfairly to respondent from said competitors.

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CONCLUSION

The acts and practices of 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 provisions 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, the answer of respondent, testimony, and other evidence taken before Arthur F. Thomas, William C. Reeves, and Miles J. Furnas, examiners of the Commission theretofore duly designated by it, in support of the allegations of the complaint and in opposition thereto, brief of counsel for the Commission filed herein (respondent having filed no brief and oral argument not having been requested), and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Fascination Candy Co., 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 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 or distributing candy or any other merchandise so packed and assembled that sales of said candy or other merchandise 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 others, packages or assortments of candy or other merchandise together with push or pull cards, punchboards or any other lottery devices, which said push or pull cards, punchboards or other lottery devices are to be used, or may be used, in selling or distributing said candy or other merchandise to the general public.

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

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4. Selling or otherwise distributing any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

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.

Order

IN THE MATTER OF

C. R. ANTHONY COMPANY, BURRELL-BERGER, INC., MISS PLAZA, INC., SAMUEL R. PARNES, INC., AND GORGEOUS FROCKS, INC.

MODIFIED CEASE AND DESIST ORDER

Docket 3834. Order, Apr. 30, 1940

Order modifying prior order of September 12, 1939, 29 F. T. C. 922, 928, so as to require the four corporate respondent sellers of merchandise, and their officers, etc., in connection with sale, etc., of any merchandise or commodities in interstate commerce, to forthwith cease and desist from paying or granting, etc., to respondent C. R. Anthony Co., directly or indirectly, as below specified, any fee or commission, or brokerage or allowance in lieu thereof, upon purchases made by said last-named respondent in its own or any other name, and to require said C. R. Anthony Co., its officers, etc., in connection with purchase by it of merchandise, etc., as above set forth, to cease and desist from receiving or accepting any fee or commission as brokerage, or any allowance in lieu thereof, in its own name, in that of the Anco Co., or in any other name.

Mr. Frank Hier for the Commission.

Cantrell, Savage & McCloud, of Oklahoma City, Okla., for C. R. Anthony Co.

Mr. Meyer Halpern, of New York City, for Burrell-Berger, Inc.

Mr. Samuel M. Reiss, of New York City, for Miss Plaza, Inc.

Mr. Maxwell Parnes, of New York City, for Samuel R. Parnes, Inc.

Goldberg & Hatterer, of New York City, for Gorgeous Frocks, Inc.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the motion of W. T. Kelley, chief counsel, to modify the order to cease and desist heretofore issued on September 12, 1939, in this cause, and all respondents having failed to show cause within 10 days from the service of a true copy of said motion upon them by registered mail at their principal offices and places of business why said motion should not be granted and said order to cease and desist not be modified as prayed for:

It is ordered, That respondents Burrell-Berger, Inc., Miss Plaza, Inc., Samuel R. Parnes, Inc., Gorgeous Frocks, Inc., and their officers, representatives, agents, and employees, in connection with the sale and distribution of any merchandise or commodities in interstate commerce, do forthwith cease and desist from paying or granting or causing or permitting to be paid or granted to the C. R. Anthony Co., directly or under the name of The Anco Co., or in or under any other