

IN THE MATTER OF
**ROBERT V. BIERHAUS AND EDWARD G. BIERHAUS,
TRADING AS E. BIERHAUS & SONS**

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

Docket 4377. Complaint, Nov. 14, 1940—Decision, Dec. 28, 1940

Where two individuals engaged in sale and distribution of candy and other confectionery products, including assortments which were so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to consumers thereof, and included, as illustrative of various kinds of such assortments sold by them—

- (1) assortment consisting of number of candy bars of uniform size and shape, and box of candy, together with push card for use in sale and distribution of said products to public under a plan, and in accordance with said card's explanatory legend, by which purchasers secured right to exchange bar obtained, for 5 cents paid, for 2, 3, or 4, of such bars in accordance with success or failure in securing by chance from board one of lucky numbers there announced, and person making last punch received the box of candy, and other assortments, with which they distributed push cards involving lot or chance feature similar to that above described, from which they varied in detail only; and
- (2) assortment consisting of 12 boxes of candy, value of each of which was in excess of 5 cents, together with three-section punchboard, for use in sale and distribution of said products under plan, and in accordance with said board's explanatory legend, by which purchaser or customer secured for 5 cents paid, and in accordance with success or failure in securing one of lucky numbers, or in making last punch in each of said three sections into which board was divided, one of said boxes of candy, and under which those who did not qualify by obtaining one of said numbers or making one of said last punches received nothing for their money other than privilege of punching number from board;

Sold said assortments, along with such punchboards for sale and distribution of their candy to consuming public by means of games of chance, gift enterprises, or lottery schemes as aforesaid, to wholesalers, jobbers, and retailers by whom, as direct or indirect purchasers thereof, they were sold to purchasing public, in accordance with aforesaid sales plans involving game of chance, or sale of a chance to procure additional pieces of candy without additional cost, or boxes of candy at price which was much less than normal retail price thereof, and thereby supplied to and placed in the hands of others means of conducting lotteries in sale of their candy in accordance with sales plans hereinabove set forth, 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 said methods or any method involving game of chance or sale of a chance to win something by chance, or any other method contrary to public policy, and refrain therefrom;

With result that many persons were attracted by said sales plans or methods employed by them in sale and distribution of their candy, and by element of chance involved therein, and were thereby induced to buy and sell their candy in preference to that of their said competitors, who do not use same or equivalent methods, and with result, through use of said methods by them and because of said games of chance, of diverting trade unfairly in commerce to them from their said competitors who do not use same or equivalent methods; to the substantial injury of competition in commerce: *Held*, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Mr. L. P. Allen, Jr. for the Commission.

Kessinger, Hill & Arterburn, of Vincennes, Ind., for respondents.

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 Robert V. Bierhaus and Edward G. Bierhaus, individually and trading as E. Bierhaus & Sons, hereinafter referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Robert V. Bierhaus and Edward G. Bierhaus are individuals trading as E. Bierhaus & Sons, with their principal office and place of business located at Second and Perry Streets, Vincennes, Ind. Respondents are now, and for more than 9 years last past have been, engaged in the sale and distribution of candy and other confectionery products to wholesale dealers, jobbers, and retail dealers. The respondents cause and have caused said products, when sold, to be transported from their principal place of business in the city of Vincennes, Ind., to purchasers thereof, at their respective points of location, in the various States of the United States other than Indiana and in the District of Columbia. There is now, and for more than 9 years last past has been, a course of trade by respondents 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 said business, respondents are and have been 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 and in the District of Columbia.

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PAR. 2. In the course and conduct of their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesale dealers, jobbers, and retail dealers certain assortments of candy so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when sold and distributed to the consumers thereof. Respondents distribute and have distributed various push cards and punchboards for use in the sale and distribution of their candy to the consuming public by means of a game of chance, gift enterprise, or lottery scheme. Certain of said assortments are hereinafter described for the purpose of showing the methods used by respondents but this is not all inclusive of the various assortments nor does it include all of the details of the several plans which respondents have been or are using in the sale and distribution of candy by lot or chance.

(a) One assortment consists of a number of bars of candy of uniform size and shape and a box of candy together with a device commonly called a push card. The push card contains 60 partially perforated disks and on the face of each of said disks is printed the word "push." Concealed within the said disks are numbers which are effectively concealed from purchasers and prospective purchasers until a push or selection has been made and the selected disk pushed or separated from the card. Sales are 5 cents each. The following legend appears on the face of said card:

VALOMILK DIPS
ADVERTISING 5¢
MEDIUM PER SALE
YOU BUY A FIVE CENT VALOMILK DIP
AND GET ONE PUSH FREE
If you push out One of the Following Numbers or Last Push you can exchange
(without extra cost) The 5¢ VALOMILK DIP for the MERCHANDISE INDICATED
No. 13, Four 5¢ VALOMILK DIPS
No. 23, Three 5¢ VALOMILK DIPS
Numbers 5-10-20-25-30-40-50-60
Two 5¢ VALOMILK DIPS
LAST PUSH, LARGE BOX HAND ROLLED
CHOCOLATES

The sales of respondents' candy by means of said push card are made in accordance with the above described legend or instructions. Said bars and boxes of candy are allotted to the customers or purchasers in accordance with the above legend or instructions. The fact as to whether a purchaser receives one or more bars of candy or a box of candy for the amount of money paid is thus determined wholly by lot or chance.

Respondents sell and distribute and have sold and distributed various assortments of candy along with push cards involving a lot or chance feature, but such assortments are similar to the one hereinabove described and vary only in detail.

(b) Another of said assortments consists of 12 boxes of candy together with a device commonly called a punchboard. Said boxes of candy are sold and distributed to the consuming public by means of said punchboard in the following manner: Sales are 5 cents each and when a punch is made from the board a number is disclosed. The numbers begin with one and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears a statement or statements informing prospective purchasers that certain specified numbers entitle the purchasers thereof to receive without additional cost, one of said boxes of candy. The board is also divided into three sections and the person punching the last number in each of the three sections receives one of said boxes of candy. A purchaser who does not qualify by obtaining one of the lucky numbers or the last punch in one of said sections receives nothing for his money other than the privilege of punching a number from the board. The said boxes of candy are worth more than 5 cents each and a purchaser who obtains one of the numbers calling for one of the boxes of candy or the last punch in one of said sections receives the same for the price of 5 cents. The numbers are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the said punch separated from the board. The said candy is thus distributed to purchasers of punches from the board wholly by lot or chance.

Respondents sell and distribute and have sold and distributed various assortments of candy, along with punchboards 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 directly or indirectly purchase respondents' said candy, expose and sell the same to the purchasing public, in accordance with the sales plans aforesaid. Respondents thus supply to, and place in the hands of, others the means of conducting lotteries in the sale of their candy in accordance with the sales plans hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their candy and the sale of said candy by and through the use thereof and by the aid of said sales plans or methods is a practice of a sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws.

PAR. 4. The sale of candy to the purchasing public by the methods and plans hereinabove set forth involves a game of chance or the sale of a chance to procure additional pieces of candy without additional cost or boxes of candy at prices which are much less than the normal retail price thereof. Many persons, firms, and corporations who sell and distribute candy in competition with respondents, as above alleged, are unwilling to adopt and use said methods or any method involving a game of chance or the sale of a chance to win something by chance or any other method contrary to public policy and such competitors refrain therefrom. Many persons are attracted by said sales plans or methods employed by respondents in the sale and distribution of their candy and the element of chance involved therein and are thereby induced to buy and sell respondents' candy in preference to candy of said competitors of respondents who do not use the same or equivalent methods. The use of said methods by respondents, because of said game of chance has a tendency and capacity to and does unfairly divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondents from their said competitors who do not use the same or equivalent methods. As a result thereof, substantial injury is being done and has been done by respondents to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 November 14, 1940, issued and on November 16, 1940, served its complaint in this proceeding upon respondents, Robert V. Bierhaus and Edward G. Bierhaus, individually and trading as E. Bierhaus & Sons, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answer, the Commission by order entered herein granted respondents' 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 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. Robert V. Bierhaus and Edward G. Bierhaus are individuals trading as E. Bierhaus & Sons, with their principal office and place of business located at Second and Perry Streets, Vincennes, Ind. Respondents are now, and for more than 9 years last past have been, engaged in the sale and distribution of candy and other confectionery products to wholesale dealers, jobbers, and retail dealers. The respondents cause and have caused said products, when sold, to be transported from their principal place of business in the city of Vincennes, Ind., to purchasers thereof, at their respective points of location, in the various States of the United States other than Indiana and in the District of Columbia. There is now, and for more than 9 years last past has been, a course of trade by respondents 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 said business, respondents are and have been 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 and in the District of Columbia.

PAR. 2. In the course and conduct of their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesale dealers, jobbers, and retail dealers certain assortments of candy so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when sold and distributed to the consumers thereof. Respondents distribute and have distributed various push cards and punchboards for use in the sale and distribution of their candy to the consuming public by means of a game of chance, gift enterprise, or lottery scheme. Certain of said assortments are hereinafter described for the purpose of showing the methods used by respondents but this is not all inclusive of the various assortments nor does it include all of the details of the several plans which

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respondents have been or are using in the sale and distribution of candy by lot or chance.

(a) One assortment consists of a number of bars of candy of uniform size and shape and a box of candy together with a device commonly called a push card. The push card contains 60 partially perforated disks and on the face of each of said disks is printed the word "push." Concealed within the said disks are numbers which are effectively concealed from purchasers and prospective purchasers until a push or selection has been made and the selected disk pushed or separated from the card. Sales are 5¢ each. The following legend appears on the face of said card:

VALOMILK DIPS
ADVERTISING 5¢
MEDIUM Per Sale
YOU BUY A FIVE CENT VALOMILK DIP AND GET ONE PUSH FREE

If you push out One of the Following Numbers or Last Push you can exchange (without extra cost) The 5¢ VALOMILK DIP for the MERCHANDISE INDICATED.

No. 13, Four 5¢ VALOMILK DIPS
No. 23, Three 5¢ VALOMILK DIPS
Numbers 5-10-20-25-30-40-50-60
Two 5¢ VALOMILK DIPS
LAST PUSH, LARGE BOX HAND ROLLED
CHOCOLATES

The sales of respondents' candy by means of said push card are made in accordance with the above-described legend or instructions. Said bars and boxes of candy are allotted to the customers or purchasers in accordance with the above legend or instructions. The fact as to whether a purchaser receives one or more bars of candy or a box of candy for the amount of money paid is thus determined wholly by lot or chance.

Respondents sell and distribute and have sold and distributed various assortments of candy along with push cards involving a lot or chance feature, but such assortments are similar to the one hereinabove described and vary only in detail.

(b) Another of said assortments consists of 12 boxes of candy, together with a device commonly called a punchboard. Said boxes of candy are sold and distributed to the consuming public by means of said punchboard in the following manner: Sales are 5 cents each and when a punch is made from the board a number is disclosed. The numbers begin with one and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears a statement or statements informing prospective purchasers that certain specified numbers entitle the

purchasers thereof to receive without additional cost, one of said boxes of candy. The board is also divided into three sections and the person punching the last number in each of the three sections receives one of said boxes of candy. A purchaser who does not qualify by obtaining one of the lucky numbers or the last punch in one of said sections receives nothing for his money other than the privilege of punching a number from the board. The said boxes of candy are worth more than 5 cents each and a purchaser who obtains one of the numbers calling for one of the boxes of candy or the last punch in one of said sections receives the same for the price of 5 cents. The numbers are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the said punch separated from the board. The said candy is thus distributed to purchasers of punches from the board wholly by lot or chance.

Respondents sell and distribute and have sold and distributed various assortments of candy, along with punchboards 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 directly or indirectly purchase respondents' said candy, expose and sell the same to the purchasing public in accordance with the sales plans aforesaid. Respondents thus supply to, and place in the hands of, others the means of conducting lotteries in the sale of their candy in accordance with the sales plans hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their candy and the sale of said candy by and through the use thereof and by the aid of said sales plans or methods is a practice of a sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws.

PAR. 4. The sale of candy to the purchasing public by the methods and plans hereinabove set forth involves a game of chance or the sale of a chance to procure additional pieces of candy without additional cost or boxes of candy at prices which are much less than the normal retail price thereof. Many persons, firms, and corporations who sell and distribute candy in competition with respondents, as above found, are unwilling to adopt and use said methods or any method involving a game of chance or the sale of a chance to win something by chance or any other method contrary to public policy and such competitors refrain therefrom. Many persons are attracted by said sales plans or methods employed by respondents in the sale and distribution of their candy and the element of chance involved therein and are thereby induced to buy and sell respondents' candy

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in preference to candy of said competitors of respondents who do not use the same or equivalent methods. The use of said methods by respondents, because of said games of chance has a tendency and capacity to and does unfairly divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondents from their said competitors who do not use the same or equivalent methods. As a result thereof, substantial injury is being done and has been done by respondents to competition in commerce between and among the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 respondents, in which answer respondents admit all the material allegations of fact set forth in said complaint and state that they waive 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 respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, Robert V. Bierhaus and Edward G. Bierhaus, individually and trading as E. Bierhaus & Sons, or trading under any other name or names, their 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 any merchandise so packed and assembled that sales of such merchandise to the 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 others assortments of any merchandise together with push or pull cards, punchboards, or other lottery devices, or separately, which said push or pull cards,

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punchboards or other lottery devices are to be used or may be used in selling or distributing said merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

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

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

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

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

Docket 3865. Complaint, Aug. 5, 1939—Decision, Dec. 31, 1940

Where a domestic corporation engaged, in the United States, in manufacturing, distributing, and selling, among others, its "Philip Morris," "English Ovals," "Marlboro," and "Player's Navy Cut" cigarettes, under corporate name similar to that under which English commercial enterprise involving manufacture and sale of such products had long been carried on by intermediate owners, and as successor to said enterprise, and with wholly owned English subsidiary engaged in business concerned in that country—

- (a) Featured and emphasized upon the containers of its "Philip Morris" and "English Ovals" that part of its corporate name concluding with abbreviation "Ltd.," and deemphasized and set forth in relatively small type final and concluding word "Incorporated" therein, and set forth also upon containers thereof depictions which closely resembled the British Royal Arms, together with words, as case might be, "Special" and "Selection," or "By Special" and "Appointment," and words "London, W." and words, respectively, "English Blend" and "English Ovals," notwithstanding fact corporation in question was not English, but organized under laws of Virginia, products in question were not of English manufacture, but made in the United States, and it did not hold warrant entitling it to display British Royal Arms, with capacity and tendency, through such under-emphasis of words "Incorporated" or "Inc." in corporate title as set forth on containers in question, and enhanced through use of devices above described and such expressions as "English Blend," "English Ovals," "London, W.," and "By Special Appointment," to induce belief that it was an English corporation, and with capacity and tendency further, through use on packages in question of depiction closely resembling British Royal Arms, accompanied by other things indicative of English origin or manufacture, or of an English manufacturer, and including use of such expression as "By Special Appointment," to induce belief that it held royal warrant entitling it to display said Royal Arms, and that cigarettes contained in packages upon which expression appeared were of English manufacture;
- (b) Made use of expression "English Blend" in referring to its said "Philip Morris" cigarettes, ingredients of which included Latakia tobacco, much used by English manufacturers of pipe smoking mixtures in England and not used to any appreciable extent by other American manufacturers in their popular priced cigarettes, and of expression "English Ovals" in designating its brand, shaped in oval form, as customarily are shaped in England the better or more expensive cigarettes, and set forth upon containers of both, as aforesaid noted, expression "London, W.," notwithstanding fact both brands were made by it in Richmond, Va., and it had no connection with "London, W" district of London, England, other than place of business there of its wholly owned English subsidiary, with capacity and tendency,