

IN THE MATTER OF

PAUL BOTWIN AND EAULA LOUISE BOTWIN, DOING
BUSINESS AS EAULA CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914*Docket 3249. Complaint, Oct. 21, 1937—Decision, Feb. 11, 1941*

Where two partners engaged in sale and distribution of candy and other merchandise to operators of and concessionaires with moving picture and burlesque theatres and tent shows, and to other persons at different points in various States, and including, in the course and conduct of their said business, certain assortments which consisted of number of packages or boxes of candy, each of which contained another article of merchandise or prize of varying value, and in the case of some of such prizes, having normal retail values in excess of the retail prices of the packages or boxes in question, prices of which were uniform and not dependent upon cost of merchandise or prize contained or to be contained therein, as case might be, and ascertainment of which was impossible for prospective purchaser until after package in question had been purchased and contents removed therefrom—

Sold and distributed such packages or boxes of candy, containing articles of merchandise to be secured as prizes, as aforesaid, directly to consuming public at points in other States through partner member to whom same were shipped for such sale, and through and to retailers by whom said assortments were resold to purchasing public in accordance with aforesaid sales plan or method, which constituted game of chance or sale of a chance to procure article of merchandise at price much less than normal retail price thereof, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale and distribution of their merchandise in accordance with such sales plan or method, contrary to an established public policy of the United States Government and in violation of criminal laws, and in competition with others who sell and distribute like or similar merchandise in commerce among the various States, but who are unwilling to use said or any other sales plan or method involving game of chance or sale of a chance to win something thereby, or any other sales plan or method which is contrary to public policy, and refrain therefrom;

With the result that many persons, because of said element of chance involved in said sales plan or method, were induced to buy and sell their said merchandise in preference to that offered and sold by said competitors, and with consequence, through use of said sales plan or method, of unfairly diverting substantial trade to them from their said competitors; to their substantial injury:

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.

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Complaint

Before *Mr. E. J. Hornibrook*, *Mr. Miles J. Furnas*, and *Mr. Randolph Preston*, trial examiners.

Mr. Henry C. Lank, *Mr. P. C. Kolinski*, and *Mr. D. C. Daniel* for the Commission.

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 Paul Botwin and Eaula Louise Botwin, individually and as copartners doing business under the trade name and style of Eaula Candy Co., hereinafter referred to as respondents, have been and are using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, 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. Respondents, Paul Botwin and Eaula Louise Botwin, are individuals doing business as a copartnership under the trade name and style of Eaula Candy Co., with their principal office and place of business located at 1203 Calhoun Street, Columbia, S. C. They are now, and for some time last past have been, engaged in the sale and distribution of candy and other merchandise to operators of and concessionnaires with moving picture and burlesque theatres and tent shows, medicine shows, and repertoire companies, located at points in the various States of the United States. Respondents also sell their merchandise direct to the consuming public in theatres located in several States of the United States. They cause their said products when sold to be transported from their principal place of business in the city of Columbia, State of South Carolina, to purchasers thereof in South Carolina and in other States of the United States 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 respondents in such candy and other merchandise between and among the States of the United States. In the course and conduct of said business, respondents are in competition with other partnerships and with corporations and individuals engaged in the sale and distribution of candy or assortments of candy and other merchandise in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of their business, as described in paragraph 1 hereof, respondents sell and have sold to operators of and concessionnaires with moving picture and burlesque theatres,

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and medicine shows, tent shows, and repertoire companies, assortments of candy and other merchandise so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. The said assortments are composed of a number of packages containing pieces of candy and another article of merchandise. The said packages of candy each have approximately the same number of pieces of candy therein, but the other articles of merchandise contained in said packages are of varying value. The said packages are identical in appearance, and purchasers and prospective purchasers cannot ascertain what the other article of merchandise contained therein is or the value thereof until after a purchase has been made and the package broken open. The sale of the said packages of candy and other articles of merchandise in the manner just above described thus constitutes the operation of a lottery scheme, a game of chance, or a gift enterprise.

PAR. 3. The customers of respondents resell said assortments to the consuming public in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their products in accordance with the sales plan hereinabove set forth.

Respondents also have what is commonly referred to as the candy concession in various theatres in several States of the United States, and offer for sale and sell their said merchandise in accordance with the above described sales plan direct to the consuming public in such theatres; and respondents' merchandise is shipped or transported from their principal place of business to such theatres at their various points of location for resale to the consuming public.

PAR. 4. The sale of candy and other merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure packages of candy and other articles of merchandise of varying value. The use by respondents 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 respondents of said method has the tendency unduly to hinder competition or to create monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the candy trade competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme. Many persons, firms, and cor-

porations who sell and distribute candy in competition with the respondents, as above alleged, are unwilling to offer for sale or sell candy 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, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondents' 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 respondents in preference to candy offered for sale and sold by said competitors of respondents who do not use the same or an equivalent method. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert to respondents trade and custom from their said competitors who do not use the same or an equivalent method; to exclude from said 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 said candy trade and to tend to create a monopoly of said candy trade in respondents and in such other distributors of candy as use the same or an equivalent method; and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by respondents 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 said method or an equivalent method.

PAR. 6. The aforementioned method, acts and practices of respondents are all to the prejudice of the public and of respondents' competitors, as hereinabove alleged. Said method, acts and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on the 21st day of October 1937 issued and thereafter served its complaint in this proceeding upon respondents Paul Botwin and Eaula Louise Botwin, individually and as copartners doing business under the trade name and style of Eaula Candy Co., charging them with the use of unfair methods of

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competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by attorneys for the Commission (respondents having offered no proof in opposition to the allegations of the complaint) before examiners of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the complaint, the answer thereto, testimony and other evidence, brief in support of the complaint (respondents having filed no brief in opposition to the complaint and oral argument not having been requested), 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 conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents Paul Botwin and Eaula Louise Botwin are individuals who have been, and are, doing business under the trade name and style of Eaula Candy Co. with their principal office and place of business located in Columbia, S. C. They are now, and for more than 5 years last past have been, engaged in the sale and distribution of candy and other merchandise to operators of, and concessionnaires with, moving picture and burlesque theatres and tent shows and to other persons located at different points in various States of the United States.

PAR. 2. Respondents cause their said products, when sold, to be transported from their principal place of business in Columbia, S. C., to purchasers thereof at their said respective places of business in various States of the United States other than the State of South Carolina. There is now, and has been for more than 5 years last past, a course of trade by respondents in such candy and other merchandise in commerce between and among various States of the United States. In the course and conduct of said business respondents are in competition with other partnerships, corporations, and individuals engaged in the sale and distribution of like or similar merchandise in commerce between and among the various States of the United States.

PAR. 3. In the course and conduct of their said business respondents have sold and distributed assortments of candy known as "Dixie Dainties" and "Carolina Candies." These assortments consists of a

number of packages or boxes of candy each of which also contains another article of merchandise or prize which other articles of merchandise vary in value. The candy and the said other articles of merchandise to be used and inserted in the candy boxes as such prizes were sometimes sold and shipped separately by respondents to the purchasers thereof and respondents, in some instances, sold prizes to be given in addition to the prizes contained in said packages or boxes of candy. The retail prices of respondents' prize packages are not dependent upon the cost of the merchandise or prizes to be contained in said packages. The "Dixie Dainties" package retails for 10 cents each but the said individual packages contain prizes of different values. Some of said prizes have normal retail values in excess of 10 cents. It was, and is, impossible for prospective purchasers to ascertain what additional article of merchandise or prize is contained in any of said packages of respondents until and after same has been purchased and the contents thereof removed therefrom. The said prizes are thus distributed to the purchasers thereof wholly by lot or chance. In some instances, the respondents have caused the assortments of candy containing other articles of merchandise as prizes as hereinabove described to be shipped or transported to respondent Paul Botwin at points in States other than the State of South Carolina and thereafter said candy so shipped was personally sold by said Paul Botwin to members of the consuming public. Other sales of said prize packages were made by respondents to dealers located in States other than the State of South Carolina; said dealers thereafter sold same to the consuming public. Such merchandise was always shipped to said dealers from respondents' place of business in Columbia, S. C.

PAR. 4. Retail dealers to whom respondents sell and distribute and have sold and distributed their said assortments of merchandise, resell and have resold the same to the purchasing public in accordance with the aforesaid sales plan or method. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale and distribution of their merchandise in accordance with the sales plan and method as hereinabove described. The use by respondents of said sales plan or method in the sale and distribution of their said assortments of merchandise and the sale of said assortments by and through the use thereof and by the aid of said sales plan or method 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 criminal laws.

PAR. 5. The Commission finds that the sale of said merchandise in the manner described hereinbefore constitutes a game of chance or

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sale of a chance to procure an article of merchandise at a price much less than the normal retail price thereof. Respondents have competitors who sell and distribute like or similar merchandise in commerce between and among various States of the United States but who are unwilling to use said sales plan or method in the sale of their said merchandise or any other sales plan or method involving a game of chance or the sale of a chance to win something thereby, or any other sales plan or method which is contrary to public policy and such competitors refrain therefrom. Because of said element of chance involved in said sales plan or method employed by respondents as herein described many persons have been induced to buy and sell respondents' merchandise in preference to the merchandise offered for sale and sold by their said competitors.

PAR. 6. The Commission finds that as a result of the use of said sales plan or method described, substantial trade is being, and has been, unfairly diverted to respondents from their said competitors and substantial injury is being, and has been, done to said competitors by respondents in commerce between and among various States of the United States.

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 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, the answer of respondents, testimony and other evidence taken before examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint (respondents having offered no evidence in opposition thereto), brief of counsel for the Commission (respondents 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 respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents Paul Botwin and Eaula Louise Botwin, individually and doing business under the name of Eaula Candy Co., or under any other name or names, their representatives, agents, and employees, directly or through any corporate or other

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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 thereof 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 individual packages or boxes of candy, together with other articles of merchandise of varying values, or separately, which said other articles of merchandise are to be distributed or may be distributed by means of a game of chance, gift enterprise, or lottery scheme to the members of the public who purchase said individual packages or boxes of candy.

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 the 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
YORK CONE COMPANY

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

Docket 3801. Complaint, Sept. 13, 1939—Decision, Feb. 11, 1941

Where a corporation engaged in manufacture of candy and in interstate sale and distribution of certain assortments thereof, together with push cards, including its "Hy-Timer" assortment composed of number of small pieces of candy of uniform size and shape, together with larger bars or pieces and peanut butter sandwiches and 160-disk two-section push card for use in sale and distribution of said products under a plan, and in accordance with said card's explanatory legend, by which purchaser received, for penny paid, one of the small pieces or larger bar or peanut butter sandwich, in accordance with success or failure in securing one of lucky numbers set out in card's legend, and purchaser of last punch in each of said two sections received, without additional cost, tray of malted milk candy—

Sold such assortments to wholesalers, jobbers, and retailers, by whom, as direct or indirect purchasers thereof, they were exposed and sold to purchasing public in accordance with aforesaid sales plan, under which fact as to whether purchaser received one of small pieces of uniform size and shape or larger bar, piece, or tray of candy, or peanut butter sandwich, was determined wholly by lot or chance, and involving game of chance or sale of a chance whereby purchaser might procure bars, pieces or trays of candy or peanut butter sandwiches at price which was much less than normal retail price thereof, and thereby supplied to and placed in the hands of others means by which games of chance, gift enterprises, or lottery schemes were conducted, contrary to an established public policy of the United States Government and in violation of criminal laws, and in competition with many who sell like and similar products between and among the various States, and who refrain from using any method involving game of chance or contrary to public policy;

With the result that use of such method by it, because of said game of chance, unfairly diverted trade in commerce to it from its said competitors who do not use same or equivalent methods; to substantial injury of said 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.

Before *Mr. Miles J. Furnas* and *Mr. Randolph Preston*, trial examiners.

Mr. Gerard A. Rault, *Mr. D. C. Daniel*, and *Mr. L. P. Allen, Jr.*, for the Commission.