

Complaint

33 F. T. C.

IN THE MATTER OF
CONTINENTAL BRIAR PIPE COMPANY, INC.

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

Docket 4293. Complaint, Aug. 30, 1940—Decision, Aug. 27, 1941

Where a corporation engaged in the manufacture of pipes and other articles, and in the competitive interstate sale and distribution of its merchandise, including certain assortments thereof so packed or assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to consumers, a typical assortment consisting of a number of pipes, together with a punchboard for use in their sale to consumers under a plan by which, as thereon explained, those securing certain numbers were entitled to a pipe, the value of which exceeded the 5 cents paid for a chance, and purchasers who did not thus qualify received nothing for their money other than the privilege of a punch—

Sold such assortments to wholesalers and jobbers and, directly or indirectly, to retailers, by whom they were exposed and sold to the purchasing public in accordance with aforesaid sales plan, involving game of chance to procure a pipe at much less than its normal price, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of its merchandise, contrary to an established public policy of the United States Government, and in competition with many who were unwilling to use a method involving chance or contrary to public policy, and refrained therefrom;

With the result that many persons were attracted by said sales plan and the element of chance involved therein, and were thereby induced to buy and sell its merchandise in preference to that of aforesaid competitors, and with the effect, through use of said method and because of said game of chance, of unfairly diverting trade in commerce to it from its said competitors, 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 acts and practices therein.

Before *Mr. Andrew B. Duvall*, trial examiner.

Mr. L. P. Allen, Jr. and *Mr. J. V. Mishou* for the Commission.

Mr. W. Lee Helms, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Continental Briar Pipe Co., Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the

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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. Respondent, Continental Briar Pipe Co., Inc., is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 80 York Street, Brooklyn, N. Y. Respondent is now and for more than 8 years last past has been engaged in the manufacture and in the sale and distribution of pipes and other articles of merchandise. Respondent causes and has caused said merchandise, when sold, to be transported from its place of business as aforesaid to purchasers thereof at their respective points of location in the various States of the United States other than the State of New York, and in the District of Columbia. There is now and for more than eight years last past has been a course of trade by said respondent in such merchandise 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 respondent is and has been in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of like or similar merchandise 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 dealers, jobbers and retail dealers certain assortments of merchandise so packed or assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to the consumers thereof. One of said assortments is hereinafter described for the purpose of showing the method used by respondent, and is as follows:

This assortment consists of a number of pipes, together with a device commonly called a punchboard. Said pipes 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 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears the statement or statements informing purchasers and prospective purchasers that certain specified numbers entitle the purchasers thereof to receive a pipe. Purchasers who do not qualify by obtaining one of the lucky numbers receive nothing for their money other than the privilege of punching a number from the board. The pipes are worth more than 5 cents each and the purchaser who obtains

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one of the numbers calling for one of the pipes 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 particular punch separated from the board. The said pipes are thus distributed to purchasers of punches from the board wholly by lot or chance.

Respondent sells and distributes and has sold and distributed various assortments of merchandise along with punchboards involving a lot or chance feature but such assortments are similar to the one hereinabove described and vary only in details.

PAR. 3. Retail dealers who directly or indirectly purchase respondent's said merchandise, expose and sell the same to the purchasing public in accordance with the sales plan aforesaid. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its merchandise in accordance with the sales plan hereinabove set forth. The use by respondent of said method in the sale of its merchandise and the sale of said merchandise by and through the use thereof, and by the aid of said 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. 4. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said pipes at a price much less than the normal retail price thereof. Many persons, firms, and corporations who sell or distribute merchandise in competition with the respondent, as above alleged, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance, or any method that is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of its merchandise and the element of chance involved therein, and are thereby induced to buy and sell respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent, who do not use the same or an equivalent method. The use of said method by respondent, 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 respondent from its said competitors who do not use the same or an equivalent method. As a result thereof, substantial injury is being and has been done by respondent 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 respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's 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 August 30, 1940, issued and thereafter served its complaint in this proceeding upon respondent, Continental Briar Pipe Co., Inc., a corporation, charging it with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. The respondent did not file an answer to the complaint. Thereafter, the case being regularly set down for the taking of testimony in the city of New York, State of New York, on June 26, 1941, during the course of such hearing, counsel for the Commission and counsel for the respondent entered into an agreement on the record wherein the respondent stipulated the material facts set forth in the complaint and waived all intervening procedure and further hearing as to the facts. Thereafter, this proceeding regularly came on for final hearing before the Commission on the complaint and stipulation as to the facts, and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the public interest and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Continental Briar Pipe Co., Inc., is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 80 York Street, Brooklyn, N. Y. For about one year prior to the fall of 1939, respondent was engaged in the manufacture and in the sale and distribution of pipes and other articles of merchandise. Respondent caused said merchandise when sold to be transported from its place of business as aforesaid to purchasers thereof at their respective points of location in the various States of the United States other than the State of New York. There was a course of

trade by said respondent in such merchandise in commerce between and among various States of the United States. In the course and conduct of said business, respondent has been in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of like or similar merchandise in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as heretofore described, respondent sold to wholesale dealers, jobbers and retail dealers certain assortments of merchandise so packed or assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to the consumers thereof. A representative assortment is hereinafter described for the purpose of showing the method used by the respondent, and is as follows: This assortment consists of a number of pipes, together with a device commonly called a punchboard. Said pipes 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 a number is disclosed. The numbers begin with 1 and continue to the number of punches that are on the board, but the numbers are not arranged in numerical sequence. The board bears the statement or statements informing purchasers and prospective purchasers that certain specified numbers entitle the purchasers thereof to receive a pipe. Purchasers who do not qualify by obtaining one of the lucky numbers generally receive nothing for their money other than the privilege of punching a number from the board. The pipes are worth considerably more than 5 cents each, and the purchaser who obtains one of the numbers calling for one of the pipes 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 particular punch separated from the board. The said pipes are thus distributed to purchasers of punches from the board wholly by lot or chance.

PAR. 3. Retail dealers who directly or indirectly purchased respondent's said merchandise exposed and sold the same to the purchasing public in accordance with the sales plan aforesaid. Respondent thus supplied to and placed in the hands of others the means of conducting lotteries in the sale of its merchandise in accordance with the sales plan hereinbefore set forth. The use by respondent of said method in the sale of its merchandise and the sale of said merchandise by and through the use thereof, and by the aid of said method, was a practice of a sort which was and is contrary to an established public policy of the Government of the United States.

PAR. 4. The sale of merchandise to the purchasing public, in the manner above found, involved a game of chance or the sale of a chance to procure one of the said pipes at a price much less than the normal retail price thereof. There were dealers in said merchandise who sold or distributed said merchandise in competition with the respondent, as above found, who were unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance, or any method that is contrary to public policy, and such competitors refrained therefrom. Many persons were attracted by said sales plan or method employed by respondent in the sale and distribution of its merchandise, and the element of chance involved therein, and were thereby induced to buy and sell respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent, who did not use the same or an equivalent method. The use of said method by respondent, because of said game of chance, had a tendency and capacity to, and did, unfairly divert trade in commerce between and among various States of the United States, to respondent from its said competitors who did not use the same or an equivalent method. As a result therefore, substantial injury was done by respondent to competition in commerce between and among various States of the United States.

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 and unfair 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 complaint of the Commission and a stipulation as to the facts entered into by and between counsel for the Commission and counsel for the respondent wherein it was agreed that the material facts alleged in the Commission's complaint are true, and all intervening procedure and further hearing as to said facts were waived, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Continental Briar Pipe Company, 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 pipes or any other articles of merchandise in commerce, as commerce is defined by the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or distributing pipes or any other merchandise so packed and assembled that sales thereof are to be made or may be made by means of a lottery, game device, or gift enterprise.

2. Supplying to or placing in the hands of others, assortments of pipes or any other merchandise together with push or pull cards, punchboards or other devices, which said push or pull cards, punchboards or other 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 to or placing in the hands of others, push or pull cards, punchboards or other devices, either with assortments of pipes or other merchandise, or separately, which said push or pull cards, punchboards or other devices are to be used, or may be used, in selling or distributing said pipes or other merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

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.

Syllabus

IN THE MATTER OF
DETROIT CANDY & TOBACCO JOBBERS ASSOCIATION,
INC., ET AL.

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

Docket 4321. Complaint, Sept. 19, 1940—Decision, Aug. 27, 1941

Where an association which had as its members most of the wholesalers or jobbers of candies, tobaccos, and groceries in Detroit and the surrounding area, consisting of about 30 "regular" members who bought direct from the manufacturers, and 125 "associate" members who bought from the "regular" members—

(a) Cooperatively coerced, induced, and persuaded jobbers, wholesalers, manufacturers, and suppliers of candies, tobaccos, and groceries located in States other than Michigan to refrain from selling or offering to sell direct to competitors or prospective competitors of its members, or upon the same terms and conditions as they sold to members, by indicating to said suppliers and their sales representatives that it disapproved of sales to such competitors and prospective competitors, and that its members were opposed to such sales, and by various other means and methods, for the purpose and with the effect of unduly suppressing competition; and

Where said members—

(b) Used said association, its officers and directors, as a vehicle and implement for the furtherance of their cooperative activities as above set forth; and

Where said association, its officers and directors—

(c) Cooperated with said members in the carrying out and furtherance of the aforesaid cooperative efforts, joint purposes and activities;

Dangerous tendency and effect of which acts and practices were to suppress and lessen competition between and among said members in the purchase of candies, tobaccos, and groceries in commerce, and to place in them the power to determine who in Detroit and the surrounding trade area should buy candies, tobaccos, and groceries direct from suppliers thereof located in States other than Michigan, and to unreasonably restrain interstate commerce in said products and deprive the purchasing public of the benefit of full and free competition between and among said members and their competitors:

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

Mr. Lynn C. Paulson for the Commission.

Mr. J. Thomas Smith, of Detroit, Mich., for respondents, with the exception of Jacob Starkstein, Morris Starkstein, and William Starkstein, who were represented by *Butzel, Eaman, Long, Gust & Bills*, of Detroit, Mich.