

Docket C-1585. Complaint, July 21, 1971—Decision, July 21, 1971

Consent order requiring a Brooklyn, N.Y., candy and bakery goods manufacturer and franchisor with outlets in more than 40 states to cease fixing the resale price of any of its products, accepting any payment or other advantage from a supplier of fixtures to any of respondent's customers, misrepresenting that any analysis has been made of any projected sales volume of any store; it is further ordered that respondent notify each of its franchisees of the existence and terms of this order.

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 Barton's Candy Corporation, a corporation, sometimes referred to hereinafter as respondent, has violated and is now violating the provisions of Section 5 of said Act (15 U.S.C. § 45), 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 respect thereto as follows:

PARAGRAPH 1. Respondent Barton's Candy Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. It maintains its principal offices and place of business at 80 DeKalb Avenue, Brooklyn, New York.

PAR. 2. Respondent has been and is now engaged in the manufacture, purchase, importation, offering for sale, sale, or distribution of chocolates, other candies and confections, baked goods, and nuts (hereinafter referred to as "products"). Respondent distributes, offers to sell, and sells its products to franchised "Barton's Bonbonniere" candy stores, to other franchised customers who maintain candy departments in department stores and drug stores, to wholesale distributors in some areas in which retailers cannot be serviced efficiently from the Brooklyn shipping point, and to consumers through company-owned stores in some areas. Total sales of respondent in its fiscal year ending June 30, 1969, exceeded \$16,000,000.

PAR. 3. Respondent ships products or causes products to be shipped to wholesale distributors and to nearly 3,000 retail stores or candy departments located in more than forty States of the United States. Respondent is now and has been at all times referred to herein engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent is engaged in competition in the distribution, offering for sale, and sale of its products with numerous other persons or firms handling similar types of products, except to the extent that such competition has been hampered, restricted, lessened and restrained by the acts, practices, and methods of competition hereinafter alleged.

COUNT ONE

PAR. 5. Respondent has sought prospects for investment in franchised Barton's retail outlets through newspaper advertisements, promotional brochures, and the personal effort of its agents or employees responsible for the establishment of new franchise operators.

In this connection, respondent has made the following representa-

tions to some prospective franchise operators through oral statements and some of its published materials:

1. A specific site has been selected by respondent for establishment of a franchise outlet. A survey has been conducted and the results electronically analyzed. According to such analysis, the volume of sales by such outlet should be approximately that amount which, in each specific instance, has been stated to the prospective franchisee.

2. An average Barton's department will have annual candy sales of up to as much as \$49,000, depending upon the size and location of the store.

PAR. 6. The representations aforesaid, each of which has been made for the purpose and with the effect of inducing prospects to enter into a franchise agreement, are false and misleading in that:

1. Information respecting selected sites has not been analyzed electronically or by other means. The volume of sales projected for each such site has been based solely upon opinion of respondent, its authorized agent or employee.

2. The annual retail sales volume of candy for the average franchised Bartons candy department such as those located in drug stores has been in all recent years and is now substantially less than \$49,000. No significant number of Barton's candy departments such as those located in drug stores have achieved a sales volume of as much as \$49,000, as represented by respondent.

PAR. 7. Respondent's false and misleading representations aforesaid are to the prejudice of the public; they have induced or helped to induce persons or firms to enter into franchise agreements with respondent and to purchase its products; and they constitute unfair or deceptive acts or practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT TWO

PAR. 8. Respondent, in accordance with the provisions of its franchise agreements, has reserved the right of approval of the plans and layout of Barton's franchised candy stores and candy departments. In this connection, respondent has recommended an on occasions has required directly or by implication, that its franchise operators purchase store fixtures and signs from manufacturers or fabricators designated by respondent.

PAR. 9. Respondent has failed to disclose to the franchise operators aforesaid that in some instances it has contracts, agreements, or understandings with the designated persons or firms supplying such fixtures and signs providing for payment to respondent of commissions, overrides, or service charges as compensation for engineering

or store planning services or "finder's fees" based upon a percentage of the purchase price of such fixtures or signs.

PAR. 10. Respondent's contracts, agreements, understandings, acts, practices, and methods of competition, including its failure to disclose the existence of its arrangements for compensation by suppliers designated by it, as aforesaid, have had and may continue to have the following effects, among others:

1. Some franchise operators have been led to believe, directly or by implication, that the recommendation or requirement by respondent to the purchase fixtures and signs from designated suppliers was based solely upon considerations of price, quality or service.

2. Some franchise operators have been deprived of the benefits of competition in their purchases of store fixtures and signs.

PAR. 11. Respondent's contracts, agreements understandings, acts, practices, and methods of competition aforesaid are to the prejudice of its franchise operators and the general public. They constitute unfair or deceptive acts or practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT THREE

PAR. 12. Respondent has entered into franchise agreements with numerous persons and firms which require that each retailer advertise, offer to sell, and sell respondent's products at not less than the retail prices established by respondent in accordance with the applicable "fair trade" laws. Respondent, directly or through corporate or other devices, is regularly engaged in the operation of retail outlets in some areas which are in competition with franchise operators who have signed agreements pursuant to which they are required to price products bearing respondent's trademarks in accordance with respondent's published "fair trade" prices.

PAR. 13. Respondent's acts, practices and methods of competition aforesaid which fix the resale prices of its products when sold by its franchised retail or wholesale competitors are to the prejudice of such competitors and of the public. They constitute unfair acts or practices or unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a

copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, and having considered all comments received from members of the public, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Barton's Candy Corporation is a corporation which has its general offices and principal place of business located at 80 DeKalb Avenue, Brooklyn, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Barton's Candy Corporation, a corporation, its officers, agents, representatives, employees, successors and assigns, directly or indirectly, through any corporate or other device, in or in connection with the advertising, distribution, offering for sale, or sale of chocolates, other candies and confections, baked goods, nuts, and the franchise rights to deal in or handle such products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Fixing, establishing, maintaining, or enforcing pursuant to or in connection with any fair trade program the resale price of any such product charged by any wholesaler or retailer who in

fact competes with Barton's either at wholesale or with retail stores or candy departments operated by the respondent.

2. Requesting, accepting, or entering into any contract, agreement or understanding providing for payment to respondent of anything of substantial value by the supplier of fixtures, signs, or other equipment and furnishings as a commission, override, "finder's fee," or other compensation for recommending or requiring any customer of respondent to deal with such supplier unless such customer of respondent is advised prior to entering into any franchise or other agreement of the fact that respondent will receive said compensation from such supplier and the approximate amount, percentage, or other means of computation thereof.

3. Representing, directly or by implication, that:

a. A survey has been made of store traffic patterns or that electronic or other means of analysis of projected sales volume has been performed, unless such is a fact.

b. Sales volume of a Barton's store or department is within a range, is a stated average amount, or may achieve a stated level, unless such is a fact with respect to a representative sample of outlets of comparable size, type and location.

II

It is further ordered, That respondent Barton's Candy Corporation furnish within sixty (60) days from the date hereof to all presently franchised retail outlets, wholesale distributors or other customers who in fact compete, or whose customers in fact compete, with Barton's or with retail stores or candy departments operated by respondent a letter or other notice, signed by a responsible official binding the respondent and on official Barton's Candy Corporation stationery or letterhead, which states in its first paragraph: "The Federal Trade Commission has entered an Order which, among other things, prohibits Barton's Candy Corporation from fixing resale prices of its customers as more fully set forth in the relevant provisions of the order which are [stated below/enclosed]." The relevant provisions of this order which shall be included in such letters are the opening paragraph and numbered Paragraph 1 of Section I thereof.

III

It is further ordered, That respondent Barton's Candy Corporation shall forthwith distribute a copy of this order to each of its

sales personnel and each of its other employees engaged in establishing and maintaining franchises.

IV

It is further ordered, That respondent Barton's Candy Corporation notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other change in the corporation.

V

It is further ordered, That respondent Barton's Candy Corporation shall, within sixty (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.

IN THE MATTER OF

BESTLINE PRODUCTS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT