

Syllabus

IN THE MATTER OF
WALTER A. VELLGUTH, INDIVIDUALLY AND TRADING
AS THE WALTER A. VELLGUTH COMPANY¹

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

Docket 1925. Complaint, Mar. 7, 1931—Decision, Apr. 16, 1934

Where an individual engaged in the manufacture and sale of candies, including four assortments composed of, (1) individually wrapped bars of uniform size, shape, and quality, within the wrappers of which there were concealed slips containing the figure 1¢, 2¢, or 3¢, as the case might be, as the price to be paid by the consumer to the retailer, depending on former's chance selection, (2) bars similarly wrapped, the concealed slips of which contained figures ranging from 1¢ to 5¢, as the case might be, as the price to be paid, determined as above set forth, (3) bars similarly wrapped, the concealed slips of which contained the figures 0¢ to 5¢, as the price to be paid, as aforesaid, and, (4) chocolate-covered penny candies of uniform size, etc., together with certain larger pieces or bars, acquisition of one of which, as a prize, was determined by purchaser's chance selection of one of a relatively few of said penny pieces, the color of the enclosed concealed centers of which differed from that of the majority, and acquisition of two of which was determined by similar chance selection of a still different color;

Sold said assortments, together with explanatory display cards for retailers' use in offering the same to the public, to wholesalers and jobbers, in competition with those who do not offer and place in the hands of others packages or assortments of candy to be distributed, or which may without rearrangement, be distributed by lot or chance, and in competition with candy, a substantial amount of which is sold by retailers without any such immoral scheme or device connected therewith, and sale of which is adversely affected by that of candy with the lottery or gaming feature;

With result that many of the consuming public were induced to purchase his candy in preference to that of competitors because of the chance of obtaining one of said bars for nothing, or for less than the particular assortment's maximum price, or of obtaining certain pieces free in accordance with color of center selected, many competitors who do not sell candy so packed and assembled that it can be resold to the public by lottery or chance, were put to a disadvantage and trade was diverted from them to him and to others using similar methods, gambling, and especially among children, was encouraged, a chance or lottery, instead of candy, was merchandised, retailers were provided with the means of violating the laws or public policy of many of the States in selling and distributing candy by lot or chance, the industry was injured and freedom of legitimate competition therein was restrained and impaired;

Held, That such practices, under the circumstances set forth, were to the injury and prejudice of competitors and the public and constituted unfair methods of competition.

Mr. Henry C. Lank and Mr. G. Ed. Rowland for the Commission.

¹ For descriptive summary of large group of candy lottery cases decided as of April 3, see *ante*, pp. 269, 276, 277.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, engaged in the manufacture of candy and sale and distribution thereof to wholesalers and jobbers in California and Hawaii, and with principal office and place of business in San Francisco, with using lottery scheme in merchandising, in that it sells to said wholesalers and jobbers, together with explanatory display cards for retailers' use in offering the candies to the public, four kinds or types of assortments, so arranged in the case of three that the particular price, if any, paid the retail merchant by the consumer, depends on latter's chance selection, and so arranged in the case of the fourth, that acquisition of a larger piece, without charge, depends upon such chance selection¹, with result of thereby supplying and placing directly in the hands of wholesalers, jobbers, and retailers the means of conducting lotteries in the sale of its candy in interstate commerce, in accordance with the sales plan described, and with effect of inducing many of the consuming public to purchase its candies in preference to those of competitors because of the chance of obtaining a piece of candy for nothing, or for less than the maximum price charged, or of obtaining certain pieces free of charge, and with the tendency so to induce; all to the prejudice of the public and competitors.

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

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 issued its complaint against the respondent, Walter A. Vellguth, individually and trading as The Walter A. Vellguth Co., charging him with the use of unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act.

Pursuant to the provisions of said act the Commission served its complaint upon the respondent on March 11, 1931, with notice of hearing on April 10, 1931, on the charges set forth in the complaint together with a copy of the rules of practice adopted by the Commis-

¹ The arrangement and working of the four assortments, as alleged in the complaint, may be found set forth in the findings, *infra*, pp. 388, 389.

sion with respect to the time within which answer is required to be made by a respondent after service of a complaint and with respect to failure of respondent to appear or to file answer thereto.

The time of the respondent to appear and file answer to the complaint in accordance with the said rules of practice, expired on April 10, 1931, and the respondent having failed to appear and to answer the complaint, and no extension to appear and to answer having been requested or granted, and the respondent being in default for want of appearance and answer, in accordance with the provisions of Section 3, Rule III, of the Rules of Practice of the Commission, and the Commission having duly considered the record and being 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. Respondent Walter A. Vellguth is an individual and trades under the name The Walter A. Vellguth Co. He has his principal office and place of business in the city of San Francisco, State of California. Respondent is now and for more than eight years last past has been engaged in the manufacture of candies and the sale and distribution thereof to wholesale dealers and jobbers located in the State of California and in the Territory of Hawaii, and respondent causes said products when so sold to be transported from his place of business in the city of San Francisco, State of California, to said wholesale dealers and jobbers in candy located in the State of California and in the Territory of Hawaii. The said wholesale dealers and jobbers located in the State of California are engaged in the sale and distribution of candy to the retail trade located throughout the State of California and throughout the States of the United States adjacent to the State of California. The said wholesale dealers and jobbers cause respondent's said products when so sold to be transported from their principal place of business in the State of California into and through other States of the United States to said retail dealers at their respective points of location.

The said wholesale dealers and jobbers in the Territory of Hawaii sell and distribute said candy to the retail trade located throughout the Territory of Hawaii. In so carrying on said business, respondent is and has been engaged in interstate commerce and is and has been in active competition with other individuals, partnerships, and corporations engaged in the manufacture of candy and in the sale and distribution of the same in interstate commerce. The said wholesale

dealers and jobbers located in the State of California and the Territory of Hawaii are in the course and conduct of their respective businesses engaged in active competition with individuals, partnerships, and corporations engaged in the sale and distribution of candy in commerce between and among the various States in the United States and between and among the various States of the United States and the Territory of Hawaii.

PAR. 2. In the course and conduct of his business as described in paragraph 1 hereof, the respondent sells to the said wholesale dealers and jobbers in candy mentioned and set forth in paragraph 1 hereof certain assortments of candy.

(a) Certain of said assortments of candy are composed of a number of bars of candy of uniform size, shape, and quality and each of said bars is contained within a wrapper. Also within each of said wrappers is a slip of paper which has printed thereon the retail price at which the said bars of candy are to be sold to the consuming public. Said printed slip is effectually concealed from the consumer until he has removed the said wrapper. The prices printed on said slip are 1¢, 2¢, or 3¢, and these are the prices which the consumer pays the retail merchant. The ultimate consumers thus procure bars of candy of uniform size, shape, and quality at a price of 1¢, 2¢, or 3¢, the same being determined wholly by lot or chance.

(b) Certain of said assortments of candy are composed of a number of bars of candy of uniform size, shape, and quality and each of said bars of candy is contained within a wrapper. Also within each of said wrappers is a slip of paper which has printed thereon the retail price at which the said bars of candy are to be sold to the consuming public. Said printed slip is effectually concealed from the consumer until he has removed the said wrapper. The prices printed on said slips are 1¢, 2¢, 3¢, 4¢, or 5¢, and these are the prices which the consumer pays the retail merchant. The ultimate consumers thus procure bars of candy of a uniform size, shape, and quality at a price of 1¢, 2¢, 3¢, 4¢, or 5¢, the same being determined wholly by lot or chance.

(c) Certain of said assortments of candy are composed of a number of bars of candy of uniform size, shape, and quality and each of said bars of candy is contained within a wrapper. Also within each of said wrappers is a slip of paper which has printed thereon the retail price at which said bars of candy are to be sold to the consuming public. Said printed slip is effectually concealed from the consumer until he has removed the said wrapper. The prices printed on said slips are 0¢, 1¢, 2¢, 3¢, 4¢, or 5¢, and these are the prices which the consumer pays the retail merchant. The ultimate consumers thus

procure bars of candy of a uniform size, shape, and quality free or at a price of 1¢, 2¢, 3¢, 4¢, or 5¢, the same being determined wholly by lot or chance.

(d) Certain of said assortments of candies are composed of a number of pieces of chocolate-covered candies of uniform size, shape, and quality together with a number of larger pieces or bars of candy, which larger pieces or bars of candy are to be given as prizes to purchasers of said chocolate-covered candies in the following manner:

The majority of said chocolate-covered candies in said assortment have centers of the same color (for example, white) but a small number of said chocolate-covered candies have centers of a different color (for example, chocolate or pink) and also a small number of said chocolate-covered candies have centers of a still different color (for example, green or red). The said candies of uniform size, shape, and quality in said assortment retail at the price of 1 cent each, but the purchasers who procure one of said candies having a center of a different color than the majority of said candies are entitled to receive and are to be given free of charge one or two of the said larger pieces or bars of candy hereinbefore referred to (for example, the purchaser procuring a piece of said candy of a uniform size, shape, and quality having a pink center is entitled to receive and will be given free of charge one of the said larger pieces or bars of candy, and a purchaser procuring a piece of said candy of a uniform size, shape, and quality having a green center is entitled to receive and will be given free of charge two larger pieces or bars of candy). The aforesaid purchasers of said candies of a uniform size, shape, and quality who procure a candy having a center colored differently from the majority of said pieces of candy are thus to procure one or two of the said larger pieces or bars of candy wholly by lot or chance.

Respondent furnishes to said wholesale dealers and jobbers with said assortments of candies display cards to be used by retailers in offering said candies for sale to the public, which display cards bear a legend or statement informing the prospective purchaser that the said assortment of candies are being sold in accordance with the sales plans above mentioned.

PAR. 3. The said retail dealers purchasing respondent's candy from said wholesale dealers and jobbers in candy expose said assortments of candy for sale in connection with the aforesaid display cards and sell said candy to the purchasing public in accordance with respondent's aforesaid sales plan. Respondent thus supplies and places directly in the hands of wholesale dealers and jobbers in candy and indirectly in the hands of retail dealers the means of

conducting lotteries in the sale of its candy in interstate commerce in accordance with the respondent's sales plan hereinabove set forth.

PAR. 4. Among the competitors of respondent referred to in paragraph 1 hereof and among the competitors of respondent's wholesale dealers and jobbers also referred to in paragraph 1 hereof are many who sell candies at wholesale and retail and who do not offer and place in the hands of others packages or assortments of candy which are to be distributed or which may, without rearrangement, be distributed by lot or chance. Respondent's aforesaid practices thus tend to and do induce many of the consuming public to purchase respondent's said candies in preference to the candies of respondent's said competitors, because of (a) the chance of obtaining one of the said bars of candy at a price of 1¢, or 2¢, rather than at the maximum price of 3¢, or (b) the chance of obtaining one of said bars of candy at a price of 1¢, 2¢, 3¢, or 4¢, rather than at the maximum price of 5¢, or (c) the chance of obtaining one of said bars of candy free or at a price of 1¢, 2¢, 3¢, or 4¢ rather than at the maximum price of 5¢, or (d) the chance of obtaining certain pieces or bars of candy free of charge. For about eight years last past respondent has engaged in the acts and practices under the conditions and circumstances and with the results all hereinbefore set out.

PAR. 5. The sale and distribution of candy by the retailers by the methods described herein is a sale and distribution of candy by lot or chance and constitutes a lottery or gaming device. A substantial amount of candy is sold by retailers without any feature of lot or chance and not as a lottery or gaming device, and the sale of candy by lot or chance, as used by the respondent, is in direct competition with candy which is sold without any lot or chance feature, and the sale of candy without a lottery or gaming feature in connection therewith is adversely affected by the sale of candy with the lottery or gaming feature.

PAR. 6. The Commission finds that the method of selling and distributing candy as above described is morally bad and encourages gambling, especially among children; is injurious to the candy industry because it results in the merchandising of a chance or lottery instead of candy; and provides retail merchants with the means of violating the laws of the several States. As stated above, many competitors of respondent do not sell candy so packed and assembled that it can be resold to the public by lot or chance. The Commission finds that these competitors are therefore put to a disadvantage in competing, and that trade is diverted to respondent and others using similar methods, from said competitors. The use of such

385

Order

methods by respondent in the sale and distribution of candy is prejudicial and injurious to the public and to his competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 7. The sale and distribution of candy by lot or chance is against the public policy of many of the several States of the United States, and some of said States have laws making lotteries and gaming devices penal offenses.

CONCLUSION

The aforesaid acts and practices of respondent, Walter A. Vellguth, individually and trading as The Walter A. Vellguth Co., under the conditions and circumstances set forth in the foregoing findings of facts, are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce, and constitute a violation 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard and considered by the Federal Trade Commission upon the record, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated 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";

It is now ordered, That the respondent, Walter A. Vellguth, individually and trading as The Walter A. Vellguth Co., his agents, representatives, and employees, in the manufacture, sale, and distribution in interstate commerce of candy and candy products do cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are by means of a lottery, gaming device, or gift enterprise.

(2) Supplying to or placing in the hands of wholesale dealers and jobbers, or retail dealers, packages or assortments of candy which are used without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said package or assortment to the public.

Order

18 F.T.C.

(3) Packing or assembling in the same package or assortment of candy for sale to the public at retail bars of candy of uniform size, shape, and quality containing within their wrappers tickets bearing different prices or tickets bearing the legend that the bar of candy is free.

(4) Packing or assembling in the same package or assortment of candy for sale to the public at retail pieces of chocolate-covered candy of uniform size, shape, and quality having centers of different color, together with larger pieces of candy, which said larger pieces of candy are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

(5) Furnishing to wholesale dealers, jobbers, and retail dealers, display cards, either with packages or assortments of candy or candy products, or separately, bearing a legend, or legends, or statements, informing the purchaser that the candy or candy products are being sold to the public by lot or chance, or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

(6) Furnishing to wholesale dealers, jobbers, and retail dealers display cards or other printed matter for use in connection with the sale of its candy or candy products which said advertising literature informs the purchasers and purchasing public—

(a) That certain bars of candy of uniform size, shape, and quality will be obtained for a price of 1¢, 2¢, or 3¢, depending upon the price ticket enclosed in the bar of candy selected by the purchaser.

(b) That certain bars of candy of uniform size, shape, and quality will be obtained for a price of 1¢, 2¢, 3¢, 4¢, or 5¢, depending upon the price ticket enclosed in the bar of candy selected by the purchaser.

(c) That certain bars of candy of uniform size, shape, and quality will be obtained free of charge or for a price of 1¢, 2¢, 3¢, 4¢, or 5¢, depending upon the ticket enclosed in the wrapper of the bar of candy selected by the purchaser.

(d) That, upon the obtaining by the ultimate purchaser of a piece of candy with a particular colored center, one or two larger pieces of candy will be given free to said purchaser.

It is further ordered, That the respondent above named within 30 days after the service upon him of this order shall file with the Commission a report in writing, setting forth in detail the manner in which this order has been complied with and conformed to.

Syllabus

IN THE MATTER OF
CARLTON MILLS, INCORPORATED

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 2085. Complaint, Jan. 17, 1933—Decision, Apr. 16, 1934

Where a corporation engaged in the sale and distribution, direct to user, C. O. D., through house to house canvassers, of (1) shirts, which it caused to be made for it, as specified, on a contract basis at a specified per dozen contract price, from cloth purchased by it in finished form, chiefly, cut into patterns in its own workrooms, and supplied, together with buttons and other fittings, to the manufacturer, who furnished the thread and carried on operations independently from such point with personnel engaged by him, (2) ties, similarly made and procured, (3) hosiery purchased in the finished form from the manufacturer, with no control over the making thereof, and, (4) underwear and outside jackets, some of which it similarly purchased,

- (a) Represented in specialty and general periodical advertising directed to securing such canvassers, that purchaser of three shirts, or other articles, would be given, free of charge, an additional garment, through such phrases as "One shirt free with every three", "One tie free with every three", "One suit of underwear free with every three", etc., facts being that cost of the alleged free article, together with profit on all those sold, was included in the price charged; with capacity and tendency to mislead and deceive the consuming public and with effect of so doing in the case of a substantial number thereof.
- (b) Used such words, phrases, and legends in sample books, and periodical and circular advertising, as "Mills", "Manufacturers", "Direct from mill to wearer", "Assumes full command over its supreme custom quality away back at the looms, * * * our gigantic resources and facilities control each stage in the designing and manufacture", "Nationally known men's wear manufacturers", "* * * 100 percent manufacturer, operating only one overhead and doing a nation-wide business", "* * * the bigger the organization the more economically it can merchandise * * *", and "When the organization happens to be the actual manufacturer * * *, this logic becomes even more significant", and thereby falsely represented that it was the manufacturer, weaver, or knitter of the products dealt in by it, and that it therefore sold at a better price direct to the consumer than did competitors, who reached him through retail channels; with capacity and tendency to mislead and deceive purchasers and prospective purchasers into buying its said products in the belief that it owned or operated mills and manufacturing establishments, and made the merchandise sold by it, and with the effect of so doing and of adversely affecting sales of dealers in men's furnishings, who make such merchandise and sell the same direct to the user or wearer, and sales of dealers therein who do not falsely represent themselves as the manufacturers thereof.
- (c) Described certain hosiery dealt in by it as "pure thread silk reinforced with art silk", and as "pure thread silk reinforced with lustrous synthetic