

IN THE MATTER OF
UCANCO CANDY 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 1795. Complaint, Apr. 29, 1930—Decision, Oct. 29, 1934

Where a corporation engaged in manufacture and sale of candy, including (a) three so-called "break and take" assortments with explanatory display cards, composed of (1) forty bars of uniform quality, size and shape, within the individual wrappers of which there was concealed a slip containing thereon "1¢", "2¢", "3¢", "4¢", or "5¢", as the case might be, as the price to be paid by the consumer to the retailer, depending on former's chance selection, (2) forty-eight bars of uniform quality, etc., within the individual wrappers of which there was concealed a slip containing the figure 1¢, 2¢ or 3¢, as the price to be paid, as above set forth, and (3) forty bars of candy, within the wrappers of ten of which there was concealed a slip bearing the word "free" and entitling the chance purchaser to such piece without payment of the 5 cents charged the purchasers of the other thirty bars; and, (b) two assortments with punch boards consisting of (1) forty bars of uniform size, shape and quality, the retail price of which was 1, 2, 3, 4, or 5 cents depending upon the figure contained upon the punch selected and pushed from the accompanying board, and, (2) forty bars of uniform size, etc., which were secured either without charge, or for payment of 5 cents, depending upon chance selection of a punch bearing the number "1" or "2" in the case of the former, or "3", "4", or "5" in the case of the latter;

Sold said various assortments, together with said display cards or punch boards, as the case might be, so packed and assembled that they might and would be resold through such lottery or gaming devices, and could not be sold otherwise, without unpacking, disassembling, and rearranging the same, with knowledge that they would thus be resold to the consuming public by lot or chance, to wholesalers, jobbers, and retailers, in competition with concerns who regard such a method of sale and distribution as morally bad and one which encourages gambling, and especially among children and as injurious to the industry in merchandising a chance or lottery rather than candy, and providing retailers, who sell candy by such methods, with the means of violating the laws of the several States, and who refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance;

With the result that some of its competitors, who can compete on even terms only through following such practices to meet the growing demand for candy thus sold from small retailers near schools, and the preference of largest class of purchasers and consumers of such candy, i. e., the children, were put to a disadvantage by reason of their refusal to make use thereof, and others felt constrained to adopt the same, trade was diverted from the

former, to their prejudice and injury and that of the public, freedom of fair and legitimate competition in the industry concerned was restrained and harmed, gambling among children was taught and encouraged, and sales of the so-called "straight goods" type with their larger pieces or better quality were decreased by the competition, principally, of the gambling or lottery feature connected with the other:

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

Mr. Henry C. Lank for the Commission.

Cook & Balluff, of Davenport, Iowa, for respondent.

COMPLAINT

Acting in the public interest, 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 charges that the Ucanco Candy Company, Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, in violation of the provisions of Section 5 of the said Act, and states its charges in that respect as follows:

PARAGRAPH 1. The respondent is a corporation organized under the laws of the State of Delaware, with its principal office and place of business located in the city of Davenport, State of Iowa. It is now and for more than five years last past has been engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers and jobbers located at points in the various States of the United States, and causes said products when so sold to be transported from its said principal place of business in the city of Davenport, State of Iowa, into and through other States of the United States to said purchasers at their respective points of location. In the course and conduct of its said business respondent is in competition with other individuals, partnerships, and corporations engaged in the manufacture of candies, and in the sale and distribution thereof in commerce between and among various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, the respondent sells to wholesalers and jobbers certain packages or assortments of candies—

(a) One of said assortments consists of forty candy bars of a uniform quality, size, and shape, and each of said pieces 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 piece of candy is to be sold to the consuming public. Said

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printed slip is effectually concealed from the consumer until he has removed the said wrapper. The retail prices printed on said slips are 1¢, 2¢, 3¢, 4¢, or 5¢, and these prices are those which the consumer pays the retail merchant. The ultimate consumers thus procure pieces of candy of a uniform quality, size, and shape at a price of 1¢, 2¢, 3¢, 4¢, or 5¢, the said price being determined wholly by lot or chance.

(b) Another of said assortments of candy consists of forty-eight candy bars of a uniform quality, size, and shape, and each of said pieces 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 piece of candy is to be sold to the consuming public. Said printed slip is effectually concealed from the consumer until he has removed the said wrapper. The retail prices printed on said slips are 1¢, 2¢, or 3¢, and these prices are those which the consumer pays the retail merchant. The ultimate consumers thus procure pieces of candy of a uniform quality, size, and shape at a price of 1¢, 2¢, or 3¢, the said price being determined wholly by lot or chance.

Respondent furnishes to said wholesale dealers and jobbers with each of said packages of said candy a display card to be used by the retailer in offering said candies for sale, which display card bears a legend or statement informing the prospective purchaser that he may procure said candies for from (a) 1¢ to 5¢, or (b) 1¢ to 3¢, in accordance with the sales plans above mentioned.

PAR. 3. Aforesaid wholesale dealers and jobbers of respondent resell said packages to retail dealers in various States of the United States, and said retail dealers expose said packages for sale in connection with the aforesaid display card and sell said candies to the purchasing public in accordance with the aforesaid plans, whereby the purchaser of said candies pays a price therefor of (a) 1¢, 2¢, 3¢, 4¢, or 5¢, or (b) 1¢, 2¢, or 3¢, said price in each case being determined wholly by lot or chance. Respondent thus supplies to and places in the hands of others the means of conducting lotteries, in accordance with respondent's said sales plans.

PAR. 4. 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 the chance of obtaining one of said pieces of candy at a price of (a) 1¢, 2¢, 3¢, or 4¢ rather than at the maximum price of 5¢, or (b) 1¢ or 2¢ rather than at the maximum price of 3¢, which said prices in each case as to the consuming public are determined wholly by lot or chance.

PAR. 5. The above alleged acts and practices of respondent are all to the prejudice of the public and respondent's competitors, and 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 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 and served a complaint upon the respondent, Ucanco Candy Company, Inc., charging it with the use of unfair methods of competition in interstate commerce in violation of the provisions of said act.

Respondent filed its answer, and the case was set down for the taking of testimony before an examiner of the Commission. Evidence was adduced in support of the charges of the complaint. No testimony was offered by the respondent.

Thereupon, this proceeding came on for hearing on the briefs of counsel for the Commission and for the respondent and upon the record. The Commission, now having considered the matter 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, Ucanco Candy Company, Inc., is a corporation organized under the laws of the State of Delaware, with its principal office and place of business in the city of Davenport, State of Iowa. Respondent is now, and for more than ten years last past, has been engaged in the manufacture of candy in Davenport, Iowa, and in the sale and distribution of said candy to wholesalers and jobbers in the State of Iowa and other States of the United States. It causes the said candy, when sold, to be shipped or transported from its principal place of business in the State of Iowa to purchasers thereof in the States of the United States other than the State of Iowa. 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 corporations, partnerships, and individuals engaged in the manufacture of candy, and in the sale and distribution of the same, in interstate commerce.

PAR. 2. Among the candies manufactured and sold by respondent at the time the complaint was issued in April 1930 and for several

years prior thereto and until February 1934 was an assortment of candy consisting of forty candy bars of a uniform quality, size, and shape, and with each of said candy bars contained within a wrapper. Also, within each of said wrappers was a slip of paper which had printed thereon the retail price at which said piece of candy was to be sold to the consuming public. Said printed slip was effectively concealed from the consumer until he had removed the said wrapper. The retail prices printed on said slips were 1¢, 2¢, 3¢, 4¢, or 5¢, and these were the prices which the consumer paid the retail merchant. The ultimate consumers thus procured pieces of candy of a uniform quality, size, and shape at a price of 1¢, 2¢, 3¢, 4¢, or 5¢, the said price being determined wholly by lot or chance.

PAR. 3. Another package of candy manufactured and sold by respondent, beginning several years prior to the issuance of the complaint and continuing until about February 1934 consisted of forty-eight candy bars of a uniform quality, size, and shape, and with each of said candy bars contained within a wrapper. Also, within each of said wrappers was a slip of paper which had printed thereon the retail price at which said piece of candy was to be sold to the consuming public. Said printed slip was effectively concealed from the consumer until he had removed the said wrapper. The retail prices printed on said slips were 1¢, 2¢, or 3¢, and these were the prices which the consumer paid the retail merchant. The ultimate consumers thus procured pieces of candy of a uniform quality, size, and shape at a price of 1¢, 2¢, or 3¢, the said price being determined wholly by lot or chance.

PAR. 4. During the period of time beginning several years before the complaint was issued and continuing until about February 1934 the respondent also manufactured and distributed an assortment of candy consisting of forty bars of candy with each of said bars of candy contained within a wrapper. Within the wrapper of ten of said bars of candy was a slip of paper stating that the bar of candy was *free*, the other thirty bars of candy to be retailed at a price of 5 cents each. The said slips of paper bearing the statement that the bar of candy was free were effectively concealed from the consumer until he had made his selection and removed the wrapper. Whether the ultimate consumers procured a bar of candy free or paid 5 cents for it was thus determined wholly by lot or chance.

PAR. 5. In each of said assortments, as described in paragraphs 2, 3, and 4 above, was fastened a display card bearing legends printed thereon stating that the bars of candy were being sold by the methods above described. (Commission's Exs. 2 and 4.)¹

¹ Not published.

PAR. 6. Since February 1934 respondent has been manufacturing and selling two assortments involving lot or chance in the distribution of candy to the ultimate consumer.

One of such assortments consists of forty bars of candy of uniform size, shape, and quality, and a device commonly referred to as a punch board. The board has forty punches (Com. Ex. 6) and when one of the punches is selected and pushed from the board the retail price at which said bar of candy is to be sold to the consuming public is disclosed. The said retail price is effectively concealed from the consumer until he has made his selection, the retail prices said punches are 1¢, 2¢, 3¢, 4¢, or 5¢, and these are the prices which the consumer pays the retail merchant. The punch board has a legend printed thereon stating that the bars of candy are being sold by the above described method. 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¢, said price being determined wholly by lot or chance.

The other assortment which respondent has been manufacturing and selling since February 1934 involving lot or chance in the distribution to the ultimate consumer, consists of forty bars of candy of uniform size, shape, and quality together with a punch board. The punch board is the same as above described but has a legend printed thereon stating that those procuring numbers 1 and 2 receive a bar of candy free and those procuring numbers 3, 4, and 5 pay 5 cents for a bar of candy, and this is the method by which said bars of candy are distributed to the consuming public. The ultimate consumers thus procure bars of candy of uniform size, shape, and quality free or for the price of 5 cents, the same being determined wholly by lot or chance.

PAR. 7. The lottery, prize, or draw packages described in paragraphs 2, 3, 4, and 5 above, are generally referred to in the candy trade of industry as "break and take" packages. The packages or assortments of candy without the lottery, prize, or draw features in connection with their resale to the public are generally referred to in the candy trade or industry as "straight goods." These terms will be used hereafter in these findings to describe these respective types of candy.

PAR. 8. Numerous retail dealers purchase the packages described in paragraphs 2, 3, 4, and 6 above either from respondent or from wholesale dealers or jobbers who in turn have purchased said packages from respondent, and such retail dealers display said packages for sale to the public as packed by the respondent, and with the display card furnished by the respondent, and the candy contained

in said packages is sold and distributed to the consuming public in the manner suggested by respondent.

PAR. 9. All sales made by respondent, whether to wholesalers and jobbers, or to retail dealers, are absolute sales, and respondent retains no control over the goods after they are delivered to the wholesale dealer or jobber, or retail dealer. The packages are assembled and packed in such manner that they can be displayed by the retail dealer for sale and distribution to the purchasing public as suggested by the display card enclosed in each package without alteration or rearrangement. An examination of the packages or assortments of candy described in paragraphs 2, 3, and 4 herein, as packed, assembled, and sold by respondent, shows that said packages or assortments cannot be resold to the public by the retail dealers except as a lottery or gaming device, unless said retail dealers unwrap, unpack, disassemble, or rearrange the said packages or assortments.

In the sale and distribution to jobbers and wholesale dealers, for resale to retail dealers, and to retail dealers direct, of packages and assortments of candy assembled and packed as described in paragraphs 2, 3, 4, and 6 herein, respondent has knowledge that said candy will be resold to the purchasing public by retail dealers by lot or chance, and it packs and assembles such candy in the way and manner described, so that it may and shall be resold to the public by lot or chance by said retail dealers.

PAR. 10. The sale and distribution of candy by the retailers by the methods described in the findings as to the facts herein, is a sale and distribution of candy by lot or chance, and constitutes a lottery or gaming device.

Competitors of respondent appeared as witnesses in this proceeding and testified, and the Commission finds as a fact, that many competitors regard such method of sale and distribution as morally bad and encouraging gambling, especially among children; as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several States. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. Certain retailers who find that they can dispose of more candy by the "break and take" method, buy from respondent, and others employing the same methods of sale, and thereby trade is diverted to respondent, and others using similar methods, from said competitors. Said competitors can compete on even terms

only by giving the same or similar devices to retailers. This they are unwilling to do, and their sale of "straight goods" candy show a continued decrease.

There is a constant and growing demand for candy which is sold by lot or chance, and in order to meet the competition of manufacturers who sell and distribute candy which is sold by such methods, some competitors of respondent have begun the sale and distribution of candy for resale to the public by lot or chance. The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its 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. 11. The principal demand in the trade for the "break and take" candy comes from the small retailers. The stores of these small retailers are in many instances located near schools and attract the trade of the school children. The consumers or purchasers of the lottery or prize package candy are principally children, and because of the lottery or gaming feature connected with the "break and take" package, and the possibility of becoming a winner, it has been observed that the children purchase them in preference to the "straight goods" candy when the two types of packages are displayed side by side.

Witnesses from several branches of the candy industry testified in this proceeding to the effect that children prefer to purchase the lottery or prize package candy because of the gambling feature connected with its sale. The sale and distribution of "break and take" packages or assortments of candy or of candy which has connected with its sale to the public the means or opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children, who comprise by far the largest class of purchasers and consumers of this type of candy.

PAR. 12. The pieces of candy in the "break and take" packages of all manufacturers of that type of candy are either smaller in size than the corresponding pieces of "straight goods" candy, or the quality of the candy in the "break and take" packages is poorer than that in the "straight goods" assortments. It is necessary to make this difference between either the size of the individual pieces of candy or the quality of the candy in order to compensate for the value of the prizes or premiums which are distributed with the "break and take" goods, or to compensate for the reduced price at which some of the pieces of candy are sold.

PAR. 13. There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize packages or assortments of candy and who sell their "straight goods" candy in interstate commerce in competition with the "break and take" candy, and manufacturers of the "straight goods" type of candy have noted a marked decrease in the sales of their products whenever and wherever the lottery or prize candy has appeared in their markets. This decrease in the sales of "straight goods" candy is principally due to the gambling or lottery feature indicated with the "break and take" candy.

PAR. 14. Respondent manufactures candy which it sells to wholesalers, jobbers, and retailers without any lottery or chance feature. It began the manufacture of candy with a lottery or chance feature about 1927. The candy with the lottery or chance feature connected therewith constitutes approximately 50 percent of respondent's total business. The entire manufacturing business of the respondent for the year 1930 amounted to approximately \$300,000.

PAR. 15. 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 the said States have laws making lotteries and gambling devices penal offenses.

CONCLUSION

The aforesaid acts and practices of respondent, Ucanco Candy Company, Inc., under the conditions and circumstances set forth in the foregoing findings of fact are all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in commerce and 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 by the Federal Trade Commission upon complaint of the Commission, the answer of the respondent, the testimony taken and the briefs filed, and the Commission having made its findings as to the facts and 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, Ucanco Candy Company, Inc., its officers, agents, representatives, and employees in the manu-

facture, 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 to be made or may be made 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.

(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.

(4) 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, some of which contain within their wrappers tickets bearing the price of 5 cents, and others containing within their wrappers tickets stating that the particular bar of candy is free.

(5) Supplying to or placing in the hands of wholesale dealers and jobbers or retail dealers, assortments of candy together with a device commonly referred to as a punch board, for use in distributing or selling said candy to the public at retail.

(6) 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.

(7) 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¢, 3¢, 4¢, or 5¢, respectively, depending upon the price tag enclosed in the wrapper of 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¢, or 3¢, respectively, depending

upon the price tag enclosed in the wrapper of the bar of candy selected by the purchaser.

(8) Furnishing to wholesale dealers, jobbers, and retail dealers, devices commonly referred to as punch boards, having printed thereon legends informing 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¢, 3¢, 4¢, or 5¢, respectively, depending upon the price stated on the punch slip which is selected by the purchaser from said punch board.

(b) That certain bars of candy of uniform size, shape, and quality will be obtained for a price of 5¢, or will be obtained free of charge depending upon the price stated on the punch slip which is selected by the purchaser from such punch board.

It is further ordered, That the respondent, Ucanco Candy Company, Inc., within 30 days after the service upon it 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
WALTER H. JOHNSON CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 1817. Complaint, June 20, 1934¹—Decision, Nov. 5, 1934*

Where a corporation engaged in manufacture and sale of candy, including four so-called "break and take" assortments, with explanatory display cards, composed of (1) forty bars of uniform quality, size, and shape, within the individual wrappers of which there was concealed a slip containing thereon "1¢", "2¢", "3¢", "4¢", or "5¢", as the case might be, as the price to be paid by the consumer to the retailer, depending on former's chance selection, (2) forty-eight bars of uniform quality, etc., within the individual wrappers of which there was concealed a slip containing the figure "1¢", "2¢", or "3¢", as the price to be paid, as above set forth, (3) forty bars of candy, within the wrappers of ten of which there was concealed a slip bearing the word "free" and entitling the chance purchaser to such piece without payment of the 5 cents charged the purchasers of the other thirty bars; and (4) one hundred and fifty individually wrapped penny caramels, together with larger pieces to be given as prizes to chance purchasers of fifty-five of said penny pieces, the concealed centers of which were white;

Sold said various assortments and display cards so packed and assembled that they might and would be resold through such lottery or gaming devices, and could not be sold otherwise, without unpacking, disassembling, and rearranging the same to wholesalers, jobbers, and retailers, with knowledge that they would thus be resold to the consuming public, by lot or chance, in competition with concerns who regard such a method of sale and distribution as morally bad and one which encourages gambling, and especially among children and as injurious to the industry in merchandising a chance or lottery rather than candy, and providing retailers, who sell candy by such methods, with the means of violating the laws of the several States, and who refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance;

With the result that some of its competitors, who can compete on even terms only through following such practices to meet the growing demand for candy thus sold from small retailers near schools, and the preference of the largest class of purchasers and consumers of such candy, i. e., the children, were put to a disadvantage by reason of their refusal to make use thereof, and others felt constrained to adopt the same, trade was diverted from the former, to their prejudice and injury and that of the public, freedom of fair and legitimate competition in the industry concerned was restrained and harmed, gambling by children was taught and encouraged, and sales of so-called "straight goods" type with their larger pieces or better quality were decreased by the competition, principally, of the gambling or lottery feature connected with the other:

¹Amended and supplemental.