

IN THE MATTER OF
GEORGE ZIEGLER COMPANY

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

Docket 1787. Complaint, Apr. 28, 1930—Decision, Nov. 20, 1934

Where a corporation engaged in the manufacture and sale of candy, including three so-called "break and take" assortments, with explanatory display cards, composed of (1) chocolate-covered penny candies of uniform size, shape, and quality, together with a number of larger pieces given as prizes to chance purchasers of a relatively few of said candies, the color of the concealed centers of which differed from that of the others, and also together with an article of merchandise given to the purchaser of the last penny piece in the assortment, (2) penny packages composed chiefly of three white candy wafers wrapped and concealed in tinfoil, together with a number of larger pieces given as prizes to chance purchasers of one of a relatively few of such packages, within which there was enclosed one pink along with two white wafers, (3) individually wrapped, penny, chocolate candies of uniform size, shape, and quality, together with larger pieces given as prizes to chance purchasers of one of a relatively few of said candies, within the wrappers of which a slip containing the word "winner" was enclosed and concealed—

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, 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 therefore refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance;

With result that some of its competitors, who can compete on even terms only through following such practice to meet the demand and preference for such candy from small retailers and the children of nearby schools, were put at 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" 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.

Mr. Herbert G. Ziegler, of Milwaukee, Wis., for respondent.

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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 George Ziegler Company, 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 Wisconsin, with its principal office and place of business located in the city of Milwaukee, State of Wisconsin. 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 Milwaukee, State of Wisconsin, into and through other States of the United States to said purchasers at their respective points of location. In the course and conduct of the 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 the various States of the United States.

PAR. 2. In the course of conduct of its business, as described in paragraph 1 hereof, the respondent sells to wholesalers and jobbers certain packages or assortments of candies. The 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 of candy and an article of merchandise. The larger pieces of candies and the article of merchandise are to be given as prizes to purchasers of said chocolate-covered candies of a uniform size, shape, and quality in the following manner:

The majority of the said chocolate-covered candies contained in said assortments have centers of the same color, but a small number of said chocolate-covered candies have centers of a different color. Said pieces of candy 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 pieces of candy 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 of the larger pieces of candy heretofore referred to. The purchaser of the last piece of the afore-

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said chocolate-covered candies of a uniform size, shape, and quality in said assortments, is entitled to receive and is to be given free of charge the article of merchandise heretofore referred to. The aforesaid purchasers of said candies who procure a candy having a center colored differently from the majority of said pieces of candy, and the purchaser of the last piece of candy in said assortments, thus procure one of the said larger pieces of candy or the article of merchandise wholly by lot or chance.

Respondent furnishes to said wholesale dealers and jobbers with each of said packages or assortments of candy heretofore referred to a display card to be used by the retailer in offering said candies for sale to the public, which display card bears a legend and statement informing the reader which color of the said colored center candies contained in said assortment entitle the purchaser to a prize, and that by purchasing the last piece of candy in said assortment the purchaser will receive the article of merchandise free of charge.

PAR. 3. Aforesaid wholesale dealers and jobbers of respondent resell said candy assortments to retail dealers in various States of the United States, and said retail dealers expose said assortments for sale together with aforesaid explanatory card and sell said candies to the purchasing public according to aforesaid plan, whereby the purchaser of said candies having colored centers different from the centers of the majority of the pieces of candy contained in said assortments and the purchaser of the last piece of candy in said assortments procure and receive free of charge one of said larger pieces of candy or the article of merchandise hereinbefore referred to. Respondent thus supplies to and places in the hands of others the means of conducting a lottery wherein said larger pieces of candy and the said article of merchandise are distributed to the purchasing public wholly by lot or chance in connection with respondent's said sales plan.

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 certain pieces of candy or the article of merchandise free of charge. For about five 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 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, George Ziegler Company, 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 to the complaint, the case was set down for the taking of testimony before an examiner of the Commission, and evidence was offered by counsel for the Commission. No testimony was offered for the respondent.

Thereupon, this proceeding came on for hearing on the briefs of counsel for the Commission 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, George Ziegler Company, is a corporation organized under the laws of the State of Wisconsin with its principal office and place of business in the city of Milwaukee, State of Wisconsin. Respondent is now, and for more than ten years last past, has been engaged in the manufacture of candy in Milwaukee, Wis., and in the sale and distribution of said candy to wholesale dealers and jobbers, and to retail dealers in the State of Wisconsin 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 Wisconsin and in the States of the United States other than the State of Wisconsin. 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 was an assortment of candy composed of a number of pieces of chocolate-covered candies of uniform size, shape, and quality, together with a number of larger pieces of candy and another article of merchandise. The larger pieces of candy and the other articles

of merchandise were given as prizes to purchasers of said chocolate-covered candies of a uniform size, shape, and quality, in the following manner:

The majority of the said chocolate-covered candies contained in said assortment had centers of the same color, but a small number of said chocolate-covered candies had centers of a different color. The said pieces of candy of uniform size, shape, and quality in said assortment retailed at the price of 1 cent each, but the purchaser who procured one of said pieces of candy having a center of a different color than the majority was entitled to receive and was given free of charge one of the larger pieces of candy above referred to. The purchaser of the last piece of the aforesaid chocolate-covered candies of a uniform size, shape, and quality was entitled to receive and was given free of charge the other article of merchandise above referred to. The aforesaid purchasers of said candies who procured candy having a center colored differently from the majority of said pieces of candy, and the purchaser of the last piece of candy in said assortment, thus procured one of the said larger pieces of candy or the other article of merchandise wholly by lot or chance.

PAR. 3. Subsequent to the issuance of the complaint in this case but prior to the taking of testimony, the respondent has been manufacturing and distributing assortments composed of a number of candy wafers together with a number of larger pieces of candy, which larger pieces of candy are to be given as prizes to purchasers of said candy wafers in the following manner:

The said candy wafers are wrapped with tinfoil in small bundles containing three of the said wafers. The majority of these small bundles contain three white wafers but a small number of the said bundles contain two white and one pink wafer. The said bundles containing three wafers in said assortment retail at the price of 1 cent each, but the purchasers who procure one of the said bundles with a pink wafer and two white wafers are entitled to receive and are given free of charge one of the said larger pieces of candy above referred to. The wafers are so wrapped with the tinfoil that the color thereof is effectively concealed from the prospective purchaser until after a selection has been made and the wrapper removed. The aforesaid purchaser of said candy wafers who procures a bundle containing a pink wafer thus procures one of the said larger pieces of candy wholly by lot or chance. The assortment as above described and which the respondent was distributing at the time of the taking of the testimony contained 160 bundles or packages of candy wafers retailing at 1 cent each, 30 of which contained a pink wafer and were prize winners.

PAR. 4. Subsequent to the issuance of the complaint but prior to the taking of testimony herein, the respondent has also been manufacturing and distributing an assortment of candy composed of a number of pieces of chocolate candy of uniform size, shape, and quality, together with a number of larger pieces of candy, which larger pieces of candy are given as prizes to purchasers of said chocolate candies in the following manner:

The said pieces of chocolate candy in said assortment are contained within a wrapper and a small number of these said pieces of chocolate candy also have within the wrapper a small printed slip bearing the word "winner". The said pieces of chocolate candy of uniform size, shape, and quality in said assortment retail at the price of 1 cent each, but the purchasers who procure one of the said pieces of chocolate candy with the printed slip bearing the word "winner" contained within the wrapper are entitled to receive and are given free of charge one of the said larger pieces of candy above referred to. The wrapper within which the piece of chocolate candy is contained effectively conceals from the prospective purchaser which of the pieces of candy have the printed slip within the wrapper until after a selection has been made and the wrapper removed. The aforesaid purchasers of said candy who procure a candy containing within the wrapper thereof a printed slip bearing the word "winner" thus procure one of the said larger pieces of candy wholly by lot or chance. The assortment as above described and which respondent was distributing at the time of the taking of testimony, contained 150 pieces of chocolate candy retailing at 1 cent each, 30 of which contained within the wrapper a printed slip and were prize winners.

PAR. 5. Subsequent to the issuance of the complaint herein but prior to the taking of testimony, the respondent discontinued the manufacture and distribution of the assortment of candy described in paragraph 2 of these findings. This Commission, however, has no assurance that the respondent will not again begin the distribution of this assortment.

PAR. 6. The respondent furnished with each of said assortments as described in paragraphs 2, 3, and 4 above a display card bearing a legend printed thereon stating that the candy was being sold by the methods described. (Com. Ex. 1, 2, and 3.)¹

PAR. 7. The lottery, prize or draw packages described in paragraphs 2, 3, and 4 above are generally referred to in the candy industry as "break and take" packages. The packages or assortments of

¹ Not published.

candy without the lottery prizes or draw features in connection with their resale to the public are generally referred to in the candy industry or trade 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, and 4 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 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, of packages and assortments of candy assembled and packed as described in paragraphs 2, 3, and 4 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 normally 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 is 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 respondent's products and the products of 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 sales of "straight goods" candy show a continued decrease.

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 gambling 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

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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.

The evidence in this case shows that in the respondent's "break and take" packages received by the individual purchasers that the pieces are smaller or the quantity less than in corresponding sales of "straight goods." The evidence disclosed that no distinction in quality was made.

PAR. 13. There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize packages of 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. In addition to the assortments described in paragraphs 2, 3, and 4 herein, the respondent manufactures candy which it sells to wholesale dealers and jobbers and to retail dealers without any lottery or chance features. It began the manufacture and distribution of the assortments as described in paragraphs 2, 3, and 4, due to the effect on its business of the sale of similar packages by its competitors. The annual volume of business of the respondent has, for the past several years, been in excess of \$1,000,000. The "break and take" business of the respondent represents approximately 5 percent of the total volume of its business.

PAR. 15. The sale and distribution of candy by lot or chance is against the public policy of many of the 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, George Ziegler Company, 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 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 the complaint of the Commission, the answer of the respondent, the testimony taken and brief filed by counsel for the Commission, 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, George Ziegler Company, its officers, 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 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 pieces of candy of uniform size, shape, and quality having centers of different colors, 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.

(4) Packing or assembling in the same package or assortment of candy for sale to the public at retail bundles or packages of candy wafers of uniform size, shape, and quality containing wafers of different colors, together with larger pieces of candy, which said larger pieces of candy are to be given as prizes to the purchaser procuring a bundle or package containing a wafer of a particular color.

(5) Packing or assembling in the same package or assortment of candy for sale to the public at retail pieces of candy of uniform size,

shape, and quality, some of which contain within their wrappers printed slips bearing the word "winner" together with larger pieces of candy, which said larger pieces of candy are to be given as prizes to purchasers procuring a piece of candy containing said printed slip within the wrapper thereof.

(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 upon the obtaining of the ultimate purchaser of a piece of candy with a particular colored center, a larger piece of candy will be given free to said purchaser.

(b) That upon the obtaining of the ultimate purchaser of a particular colored candy wafer, a larger piece of candy will be given free.

(c) That upon the obtaining by the ultimate purchaser of a piece of candy containing within the wrapper thereof a printed ticket, a larger piece of candy will be given free to said purchaser.

It is further ordered, That the respondent, George Ziegler Company, 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 and form in which it has complied with the order to cease and desist hereinabove set forth.

Syllabus

IN THE MATTER OF

BENJAMIN D. RITHOLZ TRADING AS CHICAGO DENTISTS
AND CHICAGO DENTAL HOUSE, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2140. Complaint, Dec. 21, 1933—Decision, Nov. 20, 1934*

Where an individual engaged in the manufacture and sale, by mail of dental plates, made by him from impressions taken by customers of their own mouths, in competition with dental laboratories, which make such products for dentists, from impressions taken by the dentist from the patient, and subject to adjustment, fitting, and return, where necessary; in advertising his said product in newspapers and magazines and advertisements in circulars and pamphlets—

- (a) Grossly misrepresented and exaggerated the value of said plates through such statements as "Amazing offer! Dental plates on 30-day trial Free! Was \$50 now \$7.50—100 percent satisfaction or no cost—Why pay \$50 to \$75 for plates?" and other statements of similar tenor, facts being he had never received said higher prices, the average cost of teeth used in his plates was from \$1 to \$1.60 a set, and said plates were regularly offered at the prices falsely stated as new or reduced;
- (b) Represented that each patient could take his own impression and that he could make therefrom teeth that satisfied and fitted perfectly, through such statements as "Our experiments proved that we could eliminate the personal contact between dentists and patient and make teeth that satisfy by the very simple process of having each patient take his or her own impression just exactly like any expert dentist does in his own office", through "adopting exactly the same scientific methods used by dentists everywhere", and that all his plates were "made of fine quality, selected materials, in a modern, completely equipped dental laboratory", with great care at every step, by expert dental technicians supervised by dental surgeons and falsely set forth the name of a certain dentist as "Chief of staff of Chicago dentists", and as purported signer of certain trade checks given by it, facts being it is impossible to manufacture satisfactory plates from self-taken impressions made by a person with whom a dentist has had no personal contact, and he was unable without the services of a dentist to adopt and use the scientific methods used by a dentist, the plates were poorly made and not adapted to the purposes for which sold or the use of the particular customer, did not fit, and were liable to cause difficulties of one sort or another, including such irritations as sometimes lead to cancer, his laboratory was not supervised by dental surgeons, and there were no dentists connected with that part of his business;
- (c) Represented that his methods were scientific and had the approval of dentists through such statements as "our scientific methods approved by dentists" and through purported testimonials in which the supposed dentist signers were made to give their unqualified approval to his system of fitting dental plates as thoroughly scientific and practicable and one capable of producing artificial teeth for patients which would give them full