

IN THE MATTER OF
PAUL F. BEICH COMPANY¹

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

Docket 2237. Complaint, Oct. 2, 1934.—Decision, Nov. 21, 1934

Where a corporation engaged in the manufacture and sale of candy, including such "break and take", "picks", or "draws" merchandise as assortments composed of, (1) penny packages, together with a number of larger pieces secured as prizes by chance purchasers of those of said packages, which contained and concealed within their wrappers pieces differing in color from that of the majority, and, (2) a number of small, individually wrapped penny candies of uniform size and shape, together with a number of larger pieces secured as prizes by chance purchasers of one of said individually wrapped pieces, the concealed color of which differed from that of the majority, and in both of which assortments purchaser of last package or piece also received one of the larger pieces,—

- (a) Sold said assortments, together with explanatory display cards for the retailer's use, or with advice as to their nature and plan through legends upon the containers thereof, and explanations of its salesmen, to wholesalers, jobbers, and retailers, in competition with concerns who were unwilling to offer and sell candies packed as above set forth or otherwise, so as to involve a game of chance contrary to the public policy of the States, the District of Columbia and the United States Government, and in violation of local criminal statutes of many States, and in competition with candy sold at retail without any such features connected therewith, and thereby placed in the hands of others the means of conducting lotteries in the sale of its products, as above set forth, as a means of inducing purchasers to buy its products in preference to those of its competitors'; and
- (b) Violated the code of fair competition for the candy manufacturing industry, in so selling such "break and take", "picks", or "draws";

With the tendency and capacity unfairly to divert trade and custom from such competitors to it, and to exclude from the trade all those who are unwilling to and do not use such methods, and all actual and potential competitors who do not use such methods or their equivalent for the reasons above set forth, or as detrimental to public morals or those of the purchasers, and to lessen competition in said trade and tend to create a monopoly thereof in it and such other distributors as use the same or equivalent methods, and with the result that gambling, especially among children, was taught and encouraged, the industry was injured through the merchandising of a chance or lottery instead of candy, retailers were provided with the means of violating the laws of the several States, competitors were put to a disadvantage and trade was diverted from them to it by reason of the preference of many dealers and ultimate purchasers for candy sold as aforesaid, sale of candy sold without the lottery or gambling feature was adversely affected by the competition of the other,

¹ On December 30, 1935, order in this case was rescinded, and amended complaint issued.

and freedom of fair and legitimate competition in said industry was restrained and impeded by such immoral method of sale and distribution:

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. Walter C. Hughes, of Chicago, Ill., for respondent.

COMPLAINT

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, having reason to believe that Paul F. Beich Company, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and in the Act of Congress approved June 16, 1933, known as the "National Industrial Recovery Act", and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Count I

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Illinois with its principal office and place of business in the city of Bloomington, State of Illinois, and with a branch selling office and branch manufacturing establishment in the city of Chicago, State of Illinois. Respondent for several years last past has been engaged in the manufacture of candy and in the distribution thereof to wholesale dealers and jobbers and retail dealers located at points in the various States of the United States, and causes said products when so sold to be transported from its principal place of business in the city of Bloomington, Ill., and from its branch establishment in the city of Chicago, Ill., into and through other States of the United States and the District of Columbia to said purchasers at their respective points of location in said several States and in the District of Columbia. In the course and conduct of the said business respondent is in competition with other corporations, partnerships, and individuals engaged in the manufacture of candy and in the like sale and distribution thereof in said commerce between and among the various States of the United States and the District of Columbia and within the District of Columbia.

PAR. 2. In the course and conduct of its business as described in paragraph 1 herein, respondent sells and has sold to wholesale dealers

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and jobbers and to retail dealers, certain packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

(a) One of the said assortments of candies is composed of a number of pieces of candy of uniform size and shape, together with a number of larger pieces of candy, which larger pieces of candy are to be given as prizes to said purchasers of said pieces of candy of uniform size and shape, in the following manner:

The said pieces of candy of uniform size and shape in said assortment are contained within wrappers, two pieces of said candy being contained within each wrapper. The majority of said pieces of candy are of the same color, but a small number of said pieces of candy are of a different color, the colors of said pieces of candy being effectively concealed from the prospective purchaser by the wrappers in which they are contained until a selection or purchase has been made and the wrapper removed. The pieces of candy of uniform size and shape in said assortment retail at the price of two for 1 cent, but the purchaser who procures two pieces of said candy of a different color than the majority is entitled to receive and is to be given free of charge one of the said larger pieces of candy heretofore referred to. The purchaser of the last piece of candy in said assortment is entitled to receive and is to be given free of charge one of the said larger pieces of candy. The aforesaid purchaser of said candies who procures a candy of a different color than the majority, is thus to procure one of the said larger pieces of candy wholly by lot or chance.

(b) Another assortment of candy consists of a number of small pieces of candy of uniform size and shape, together with a number of larger pieces of candy, which larger pieces of candy are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner:

The said pieces of candy of uniform size and shape are contained within wrappers and the majority of said pieces of candy are of the same color, but a small number of the said pieces of candy are of a different color but the color of the said pieces of candy is effectively concealed from the prospective purchaser by the wrappers in which they are contained, until a selection or purchase has been made and the wrapper removed. The pieces of candy of uniform size and shape in said assortment retail at the price of 1 cent each, but the purchaser who procures one of the said candies of a different color than the majority is entitled to receive and is to be given free of charge one of the said larger pieces of candy heretofore referred to and the purchaser of the

last piece of candy in the said assortment is also entitled to receive and is to be given free of charge one of the said larger pieces of candy. The aforesaid purchaser of said candies who procures a candy of a color different from the majority of said pieces of candy is thus to procure one of the said larger pieces of candy wholly by lot or chance.

Respondent in most instances furnishes the said wholesale dealers and jobbers and retail dealers a display card with said assortments of candy, to be used by retail dealers in offering said candies for sale, which display card bears a legend or legends informing the purchaser that said candy is being sold in accordance with the sales plan above mentioned. In cases where the display card is not furnished, the box within which the assortment is packed contains or bears a description of the contents thereof and respondent's salesmen advise the wholesale dealers and jobbers and retail dealers as to the manner in which the said assortment may be disposed of in order to carry out the sales plan above mentioned.

PAR. 3. Aforesaid wholesale dealers and jobbers resell said assortments of candy to retail dealers and said retail dealers and the retail dealers to whom respondent sells direct, expose said assortments for sale and sell said candies to the purchasing public in accordance with the aforesaid sales plans. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with respondent's sales plans hereinabove set forth, as a means of inducing purchasers thereof to purchase respondent's said product in preference to candies offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public as above alleged involves a game of chance, or the sale of a chance to procure such larger pieces of candy in the manner alleged. Such game of chance, and the sale along with the sale of such candy of such chance to procure such larger pieces of candy in the manner alleged, are contrary to the established public policy of the several States of the United States and the District of Columbia, and of the Government of the United States, and in many of the States of the United States are contrary to local criminal statutes.

By reason of said facts many persons, firms, associations, and corporations who make and sell candies in competition with respondent as above alleged are unwilling to offer for sale or sell candies so packed or assorted as above alleged, or otherwise arranged and packed, for sale to the purchasing public so as to involve a game of chance or the sale with such candy of a chance to procure larger pieces of candy by chance; and such competitors refrain therefrom.

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PAR. 5. Many dealers in, and ultimate purchasers of, candies are attracted by respondent's said method and manner of packing said candy, and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent in preference to candies offered for sale and sold by said competitors of the respondent who did not use the same or an equivalent method. Many dealers in candies are induced to purchase said candies so offered for sale and sold by respondent in preference to all others because said ultimate purchasers thereof give preference to respondent's said candies on account of said game of chance so involved in the sale thereof.

PAR. 6. The use of said method by respondent has the tendency and capacity unfairly, and because of said game of chance alone, to divert to respondent trade and custom from his said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and do not use the same or an equivalent method; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by respondent has the tendency and capacity unfairly to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or an equivalent method that is contrary to public policy and to criminal statutes as above alleged. Many of said competitors of respondent are unwilling to adopt and use said method, or any method involving a game of chance or the sale of a chance to win something by chance, because such method is contrary to public policy or to the criminal statutes of certain of the States of the United States, or because they are of the opinion that such a method is detrimental to public morals and to the morals of the purchasers of said candy, or because of any or all of such reasons.

PAR. 7. The aforementioned method, acts and practices of the respondent are all to the prejudice of the public and of respondent's competitors as hereinabove alleged. Said method, acts and practices 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.

Count II

PARAGRAPH 1. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things

set out in paragraph 1 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 1 of count 1 of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 1 of said count 1 were repeated verbatim.

PAR. 2. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 2 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 2 of count 1 of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 2 of said count 1 were repeated verbatim.

PAR. 3. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 3 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 3 of count 1 of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 3 of said count 1 were repeated verbatim.

PAR. 4. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 4 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 4 of count 1 of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 4 of said count 1 were repeated verbatim.

PAR. 5. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 5 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 5 of count 1 of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 5 of said count 1 were repeated verbatim.

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PAR. 6. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 6 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 6 of count 1 of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 6 of said count 1 were repeated verbatim.

PAR. 7. Under and pursuant to the provisions of Section 2 of said National Industrial Recovery Act, the President of the United States on the 16th day of June, 1933, by his executive order in writing appointed Hugh S. Johnson to be the administrator for Industrial Recovery under Title I of said act.

Under and pursuant to the provisions of said National Industrial Recovery Act, National Confectioners' Association of the United States, Inc., a corporation, as a representative of the Candy Manufacturing Industry, submitted to the President of the United States an application for the approval of a code of fair competition for the candy manufacturing industry.

Said application was duly referred to said Hugh S. Johnson, as such administrator, by and before whom such further action was taken and proceedings were had that on the 9th day of June, 1934, said Johnson, as such administrator, submitted a certain code of fair competition for the candy manufacturing industry to the President of the United States, together with his written report containing an analysis of said code of fair competition, and with his recommendations and findings with respect thereto, wherein said administrator found that the said code of fair competition complies in all respects with the pertinent provisions of Title I of the National Industrial Recovery Act, and that the requirements of classes (1) and (2) of subsection (a) of Section 3 of said Act had been met. The concluding paragraphs of said report are in the following words, to wit:

I find that:

(a) Said code is well designed to promote the policies and purposes of Title I of the National Industrial Recovery Act, including removal of obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof and will provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among the trade groups, by inducing and maintaining united action of labor and management under adequate governmental sanctions and supervision, by eliminating unfair competitive practices, by promoting the fullest possible utilization of the present productive capacity of industries, by avoiding undue restriction of production (except as may be temporarily required), by increasing the

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consumption of industrial and agricultural products through increasing purchasing power, by reducing and relieving unemployment, by improving standards of labor, and by otherwise rehabilitating industry.

(b) The code as approved complies in all respects with the pertinent provisions of said title of said act, including without limitation subsection (a) of section 3, subsection (a) of section 7, and subsection (b) of section 10 thereof; and that the applicant association is a trade association truly representative of the aforesaid industry; and that said association imposes no inequitable restrictions on admission to membership therein.

(c) The code is not designed to and will not permit monopolies or monopolistic practices.

(d) The code is not designed to and will not eliminate or oppress small enterprises and will not operate to discriminate against them.

(e) Those engaged in other steps of the economic process have not been deprived of the right to be heard prior to approval of said code.

It is recommended, therefore, that this code be approved.

Respectfully,

HUGH S. JOHNSON,
Administrator.

JUNE 9, 1934.

Thereafter, and on the 11th day of June, 1934, the President of the United States made and issued his certain written executive order wherein and whereby he adopted and approved the report, recommendations, and findings of said administrator, and ordered that the said code of fair competition be, and the same thereby was, approved, and by virtue of said National Industrial Recovery Act the provisions of said code became, and still are, the standard of fair competition for the candy manufacturing industry, and became and still are binding upon every member thereof, except that said code of fair competition when so approved was approved with a proviso that rule 19, article VIII thereof was stayed for a period of 10 days. Successive subsequent administrative orders were severally duly made and entered by which the provisions of said rule 19, article VIII, were stayed for fixed periods designated in said several orders, the latest date to which said rule 19 was stayed being July 30, 1934. On July 30, 1934, said rule 19, article VIII, became in full force and effect. On and since said July 30, 1934, the said code of fair competition, including said rule 19, article VIII, has been and is in full force and effect and became, and still is, binding upon every member of said industry.

Rule 19, article VIII, of said code provides as follows:

No member of the industry shall sell or distribute the type of merchandise commonly referred to as "break and take", "picks", or "draws", or merchandise of a like character, serving the same purpose.

Among persons engaged in said trade and among the purchasing public the language of said rule 19 is understood to refer to and

include candies offered for sale and sold by the method used by respondent as above alleged. The language of said rule 19 does refer to and include candies so offered for sale and sold. Candies offered for sale and sold by the method so used by respondent are of the type of merchandise commonly referred to as "break and take", "picks", or "draws", and are merchandise of a like character, serving the same purpose, within the intent and meaning of said rule 19, article VIII.

Notwithstanding said provisions of said rule 19, article VIII, of said code of fair competition, respondent has contained to, and does, use said method of competition hereinabove alleged and described, and has been and is offering for sale and selling to wholesale dealers, jobbers, and retail dealers certain packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, as hereinabove alleged and set forth.

PAR. 8. The above alleged method, acts, and practices of the respondent in violation of the standard of fair competition for the candy manufacturing industry of the United States constitute unfair methods of competition in commerce within the 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 its complaint against the respondent, Paul F. Beich Company, charging it 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 on the respondent on October 4, 1934, with notice of hearing on November 9, 1934, on the charges set forth in the complaint, together with a copy of the Rules of Practice adopted by the Commission 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 file answer to the complaint in accordance with the said Rules of Practice expired on October 24, 1934, and the respondent having failed to file answer to said complaint and

the respondent having further failed to appear at the time and place set for the hearing and no extension of time to answer and to appear having been requested or granted, and the respondent being in default for want of answer and appearance in accordance with the Rules of Practice of the Commission, and the Commission having duly considered the records 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, Paul F. Beich Company, is a corporation organized under the laws of the State of Illinois with its principal office and place of business in the city of Bloomington, State of Illinois, and with a branch selling office and branch manufacturing establishment in the city of Chicago, State of Illinois. Respondent for several years last past has been engaged in the manufacture of candy and in the distribution thereof to wholesale dealers and jobbers and retail dealers located at points in the various States of the United States, and causes said products when so sold to be transported from its principal place of business in the city of Bloomington, Ill., and from its branch establishment in the city of Chicago, Ill., into and through other States of the United States and the District of Columbia to said purchasers at their respective points of location in said several States and in the District of Columbia. In the course and conduct of the said business respondent is in competition with other corporations, partnerships, and individuals, engaged in the manufacture of candy and in the like sale and distribution thereof in said commerce between and among the various States of the United States and the District of Columbia and within the District of Columbia.

PAR. 2. In the course and conduct of its business as described in paragraph 1 herein, respondent sells and has sold to wholesale dealers and jobbers and to retail dealers, certain packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

(a) One of the said assortments of candies is composed of a number of pieces of candy of uniform size and shape, together with a number of larger pieces of candy, which larger pieces of candy are to be given as prizes to said purchasers of said pieces of candy of uniform size and shape, in the following manner:

The said pieces of candy of uniform size and shape in said assortment are contained within wrappers, two pieces of said candy being

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contained within each wrapper. The majority of said pieces of candy are of the same color, but a small number of said pieces of candy are of a different color, the colors of said pieces of candy being effectively concealed from the prospective purchaser by the wrappers in which they are contained until a selection or purchase has been made and the wrapper removed. The pieces of candy of uniform size and shape in said assortment retail at the price of two for 1 cent, but the purchaser who procures two pieces of said candy of a different color than the majority is entitled to receive and is to be given free of charge one of the said larger pieces of candy heretofore referred to. The purchaser of the last piece of candy in said assortment is entitled to receive and is to be given free of charge one of the said larger pieces of candy. The aforesaid purchaser of said candies who procures a candy of a different color than the majority, is thus to procure one of the said larger pieces of candy wholly by lot or chance.

(b) Another assortment of candy consists of a number of small pieces of candy of uniform size and shape, together with a number of larger pieces of candy, which larger pieces of candy are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner:

The said pieces of candy of uniform size and shape are contained within wrappers and the majority of said pieces of candy are of the same color, but a small number of the said pieces of candy are of a different color, but the color of the said pieces of candy is effectively concealed from the prospective purchaser by the wrappers in which they are contained, until a selection or purchase has been made and the wrapper removed. The pieces of candy of uniform size and shape in said assortment retail at the price of 1 cent each, but the purchaser who procures one of the said candies of a different color than the majority is entitled to receive and is to be given free of charge one of the said larger pieces of candy heretofore referred to and the purchaser of the last piece of candy in the said assortment is also entitled to receive and is to be given free of charge one of the said larger pieces of candy. The aforesaid purchaser of said candies who procures a candy of a color different from the majority of said pieces of candy is thus to procure one of the said larger pieces of candy wholly by lot or chance.

Respondent in most instances furnishes the said wholesale dealers and jobbers and retail dealers a display card with said assortments of candy, to be used by retail dealers in offering said candies for sale, which display card bears a legend or legends informing the purchaser that said candy is being sold in accordance with the sales

plan above mentioned. In cases where the display card is not furnished, the box within which the assortment is packed contains or bears a description of the contents thereof and respondent's salesmen advise the wholesale dealers and jobbers and retail dealers as to the manner in which the said assortment may be disposed of in order to carry out the sales plan above mentioned.

PAR. 3. Aforesaid wholesale dealers and jobbers resell said assortments of candy to retail dealers and said retail dealers and the retail dealers to whom respondent sells direct, expose said assortments for sale and sell said candies to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with respondent's sales plans hereinabove set forth, as a means of inducing purchasers thereof to purchase respondent's said product in preference to candies offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public as above alleged involves a game of chance, or the sale of a chance to procure such larger pieces of candy in the manner alleged. Such game of chance, and the sale along with the sale of such candy of such chance to procure such larger pieces of candy in the manner alleged, are contrary to the established public policy of the several States of the United States and the District of Columbia, and of the Government of the United States, and in many of the States of the United States are contrary to local criminal statutes.

By reason of said facts many persons, firms, associations and corporations who make and sell candies in competition with respondent as above alleged are unwilling to offer for sale or sell candies so packed or assorted as above alleged, or otherwise arranged and packed, for sale to the purchasing public so as to involve a game of chance or the sale with such candy of a chance to procure larger pieces of candy by chance; and such competitors refrain therefrom.

PAR. 5. Many dealers in, and ultimate purchasers of, candies are attracted by respondent's said method and manner of packing said candy, and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent in preference to candies offered for sale and sold by said competitors of the respondent who did not use the same or an equivalent method. Many dealers in candies are induced to purchase said candies so offered for sale and sold by respondent in preference to all others because said ultimate purchasers thereof give preference to respondent's said candies on account of said game of chance so involved in the sale thereof.

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PAR. 6. The use of said method by respondent has the tendency and capacity unfairly, and because of said game of chance alone, to divert to respondent trade and custom from his said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and do not use the same or an equivalent method; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by respondent has the tendency and capacity unfairly to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or an equivalent method that is contrary to public policy and to criminal statutes as above alleged. Many of said competitors of respondent are unwilling to adopt and use said method, or any method involving a game of chance or the sale of a chance to win something by chance, because such method is contrary to public policy or to the criminal statutes of certain of the States of the United States, or because they are of the opinion that such a method is detrimental to public morals and to the morals of the purchasers of said candy, or because of any or all of such reasons.

PAR. 7. 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. 8. 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. Many competitors of respondent do not sell candy so packed and assembled that it can be resold to the public by lot or chance, and 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 methods by re-

spondent in the sale and distribution of 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. 9. 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.

PAR. 10. Under and pursuant to the provisions of Section 2 of said National Industrial Recovery Act, the President of the United States on the 16th day of June, 1933, by his executive order in writing appointed Hugh S. Johnson to be the administrator for Industrial Recovery under title I of said act.

Under and pursuant to the provisions of said National Industrial Recovery Act, National Confectioners' Association of the United States, Inc., a corporation, as a representative of the candy manufacturing industry, submitted to the President of the United States an application for the approval of a code of fair competition for the candy manufacturing industry.

Said application was duly referred to said Hugh S. Johnson, as such administrator, by and before whom such further action was taken and proceedings were had that on the 9th day of June, 1934, said Johnson, as such administrator, submitted a certain code of fair competition for the candy manufacturing industry to the President of the United States, together with his written report containing an analysis of said code of fair competition, and with his recommendations and findings with respect thereto, wherein said administrator found that the said code of fair competition complies in all respects with the pertinent provisions of title I of the National Industrial Recovery Act, and that the requirements of classes (1) and (2) of subsection (a) of section 3 of the said act had been met. The concluding paragraphs of said report are in the following words, to wit:

I find that:

(a) Said code is well designed to promote the policies and purposes of title I of the National Industrial Recovery Act, including removal of obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof and will provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among the trade groups, by inducing and maintaining united action of labor and management under adequate governmental sanctions and supervision, by eliminating unfair competitive practices, by promoting the fullest possible utilization of the present productive capacity of industries, by avoiding undue restriction of production (except as may be temporarily required), by increasing the consumption

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of industrial and agricultural products through increasing purchasing power, by reducing and relieving unemployment, by improving standards of labor, and by otherwise rehabilitating industry.

(b) The code as approved complies in all respects with the pertinent provisions of said title of said act, including without limitation subsection (a) of section 2, subsection (a) of section 7, and subsection (b) of section 10 thereof; and that the applicant association is a trade association truly representative of the aforesaid industry; and that said association imposes no inequitable restrictions on admission to membership therein.

(c) The code is not designed to and will not permit monopolies or monopolistic practices.

(d) The code is not designed to and will not eliminate or oppress small enterprises and will not operate to discriminate against them.

(e) Those engaged in other steps of the economic process have not been deprived of the right to be heard prior to approval of said code.

It is recommended, therefore, that this code be approved.

Respectfully,

HUGH S. JOHNSON,
Administrator.

JUNE 9, 1934.

Thereafter, and on the 11th day of June 1934 the President of the United States made and issued his certain written executive order wherein and whereby he adopted and approved the report, recommendations, and findings of said administrator, and ordered that the said code of fair competition be, and the same thereby was, approved, and by virtue of said National Industrial Recovery Act the provisions of said code became, and still are, the standard of fair competition for the candy manufacturing industry, and became and still are binding upon every member thereof, except that said code of fair competition when so approved was approved with a proviso that rule 19, article VIII thereof was stayed for a period of 10 days. Successive subsequent administrative orders were severally duly made and entered by which the provisions of said rule 19, article VIII, were stayed for fixed periods designated in said several orders, the latest date to which said rule 19 was stayed being July 30, 1934. On July 30, 1934, said rule 19, article VIII, became in full force and effect. On and since said July 30, 1934, the said code of fair competition, including said rule 19, article VIII, has been and is in full force and effect and became, and still is, binding upon every member of said industry.

Rule 19, article VIII, of said code provides as follows:

No member of the industry shall sell or distribute the type of merchandise commonly referred to as "break and take", "picks", or "draws", or merchandise of a like character, serving the same purpose.

Among persons engaged in said trade and among the purchasing public the language of said rule 19 is understood to refer to and include candies offered for sale and sold by the method used by respondent as above set forth. The language of said rule 19 does refer to and include candies so offered for sale and sold. Candies offered for sale and sold by the method so used by respondent are of the type of merchandise commonly referred to as "break and take", "picks", or "draws", and are merchandise of a like character, serving the same purpose, within the intent and meaning of said rule 19, article VIII.

Notwithstanding said provisions of said rule 19, article VIII, of said code of fair competition, respondent has continued to, and does, use said method of competition hereinabove described, and has been and is offering for sale and selling to wholesale dealers, jobbers, and retail dealers certain packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, as hereinabove set forth and described.

CONCLUSION

The aforesaid acts and practices of respondent, Paul F. Beich 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 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, Paul F. Beich 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

Order

19 F. T. C.

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.

(3) Packing or assembling in the same package an assortment of candy for sale to the public at retail, pieces of candy of uniform size and shape but 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 of a particular color.

(4) 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.

(5) 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 that upon the obtaining by the ultimate purchaser of a piece of candy of a particular color that a larger piece of candy will be given free to said purchaser.

It is further ordered, That the respondent Paul F. Beich 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
THINSHELL CANDIES, INCORPORATEDCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 1852. Complaint, June 26, 1930—Decision, Nov. 26, 1934*

Where a corporation engaged in manufacture and sale of candy, including a 17-jar assortment, with which it furnished 200-hole punch boards for use in merchandising said assortments under a plan by which the purchaser of a punch, at 5 cents each, who punched one of twelve preannounced numbers, secured one of the twelve 50-cent jars, included, purchaser of last punch in each of the four sections into which the board was divided, received one of the four 75-cent jars, and purchaser of the last punch on the board received the \$2 jar, and other purchasers nothing;

Sold said assortments to wholesalers and jobbers, and furnished therewith said punch boards, upon which was set forth aforesaid plan (and also a sticker stating "This sales board is free. It is not necessary to use the board"), to increase sale of its candy and assist the retailer in so doing, and with knowledge that such candy, so assembled and packed that the assortments and boards were displayed and used by the retailers for sale and distribution to purchasing public, as suggested, would be resold to the public by chance or lot in many cases; and in so selling competed 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 as providing retailers, who sell candy by such methods, with the means of violating the laws of the several States, and therefore refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance, and to furnish punch boards for use in the sale and distribution thereof;

With the result that some of its competitors, who can compete on even terms only through following such practices to meet the demand for candy thus sold, principally from small retailers, many of whose stores are near schools, and in response to 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 so to do and others felt constrained to adopt the same, trade was diverted from the former to the latter, gambling among children was taught and encouraged, freedom of fair and legitimate competition in the industry concerned was restrained, and sales of goods sold without any gambling or lottery features connected therewith were decreased by the competition, principally, of said feature in the other, use of which in sale and distribution of candy by lot or chance is against the public policy of many of the States, and some of which make lotteries and gambling devices penal offenses:

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. John A. Nash, of Chicago, Ill., for respondent.