

Syllabus

IN THE MATTER OF

M. J. HOLLOWAY & COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 3 OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933.

Docket 2265. Complaint, Dec. 17, 1934—Decision, June 25, 1935

Where a corporation engaged in the manufacture and sale of candy, including such break-and-take assortments as (1) individually wrapped, penny caramels, together with a number of larger pieces or packages of candy to be given as prizes to chance purchasers of a few of said caramels, the concealed color of which, unlike the others, was not uniform throughout, (2) assortments composed of small caramels and larger bars, together with push cards or punch boards, through use of which it was determined, in accordance with explanatory legends thereon set forth and the chance number pushed or punched thereon, at a cost of a penny a punch, whether a caramel or bar should be received by the person making such chance selection, and the last remaining number on which also entitled person punching the same to an additional piece or prize, (3) its "Mystery Chest" assortment composed of large and small pieces of candy and small toys or prizes arranged in individual compartments within which they were concealed by a paper covering, so marked as to show the separate compartments, but not the contents thereof, so that the purchaser's chance selection decided the particular piece, and toy or prize, if any, secured for the money paid, (4) its so-called "Game of Skill" assortment composed of 150 individually wrapped caramels and 65 candy bars, to be given to the chance purchasers of as many caramels, with different colored centers, described by it on assortment's cover, not ordinarily seen, as larger in size than the others, facts being difference, if any, was too small to be discernible, and selection was made wholly by lot or chance, and (5) two-box assortments, separately billed at times, but sold together, and respectively containing assorted caramels, a few of which had concealed centers of a different color than the others, and larger pieces or bars, the number of which corresponded to that of the different colored center caramels, and so arranged that the two boxes might be displayed by the retailer as a single assortment, and the larger pieces distributed as prizes to purchasers of the smaller caramels as hereinbefore set forth;

Sold said assortments and push cards or punch boards to wholesalers and jobbers, so packed and assembled that they could be displayed for sale and distribution to the purchasing public, as hereinbefore set forth, without alteration or rearrangement, and could not, except in the case of said two-box assortments, be resold to the public except as a lottery or gaming device, without unwrapping, unpacking, disassembling, or rearranging the same, with knowledge and intent that said candy would and should thus be resold

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by the retailer; 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 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 of putting at a disadvantage, by reason of their said refusal to adopt such practices, said competitors, who can compete on even terms only through following the same to meet the demand and preference for such candy from certain dealers and small retailers, chiefly, and that of the children from the frequently nearby schools, who purchase said candy by reason of the gambling feature connected therewith, in preference to the so-called "straight goods", and who constitute by far the largest class of purchasers and consumers thereof, and who supply the principal demand therefor, some competitors began the sale and distribution of candy for resale to the public by lot or chance, to meet the constant demand and preference for candy thus sold, trade was diverted to said individual from competitors declining to follow such a practice, freedom of fair and legitimate competition in the industry concerned was restrained and harmed, sales of those dealing in the "straight goods" products exclusively were markedly decreased whenever and wherever the competition of the break-and-take assortments, with their necessarily smaller pieces or inferior quality, was encountered, by reason, principally, of the gambling or lottery feature connected with the latter, gambling among children was taught and encouraged, and the public policy of many of the States, some of which have laws making the operation of lotteries and gambling devices penal offenses, was violated:

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

Before *Mr. Robert S. Hall*, trial examiner.

Mr. Henry C. Lank for the Commission.

Beach, Fathchild & Scofield, 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 *M. J. Holloway & 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 violation of 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 1

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 Chicago, State of Illinois. Respondent, for more than five years last past, has been engaged in the manufacture of candy 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 principal place of business in the city of Chicago, Ill., to purchasers thereof in other States of the United States and in the District of Columbia, at their respective places of business, and there is now and has been for more than a year last past a course of trade and commerce by the said respondent in such candy between and among the States of the United States and in the District of Columbia. In the course and conduct of the said business, respondent is in competition with other corporations, individuals, and partnerships engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States 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 various 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.

Certain of said packages are hereafter described for the purpose of showing the methods used by respondent but this list is not all-inclusive of the various sales plans which respondent has been or is using to distribute candy by lot or chance.

(a) Several of said assortments of candy are composed of a number of pieces of caramel candies of uniform size, shape, and quality, contained within a wrapper, together with a number of larger pieces of candy or packages of candy, which larger pieces of candy or packages of candy are to be given as prizes to purchasers of said caramels of uniform size, shape, and quality in the following manner:

The majority of said caramels are of the same color throughout but a few of said caramels have centers of a different color. The color of the center of these caramels is effectively concealed from the prospective purchasers by the wrapper in which they are contained until a selection or a purchase has been made and the wrapper re-

moved. The said caramels of uniform size, shape, and quality in said assortment retail at the price of one cent each, but the purchasers who procure one of the said caramels having a center of a different color than the majority are entitled to receive and are to be given free of charge one of the said larger pieces of candy or packages of candy heretofore referred to. The aforesaid purchasers of said candies who procure a caramel having a center colored differently from the majority are thus to procure one of the said larger pieces of candy or packages of candy wholly by lot or chance.

(b) Several of said assortments of candy are composed of a number of small pieces of caramel candy and a number of larger pieces of candy together with a device commonly referred to as a push card. The candy contained in said assortment is distributed to purchasers of pushes from said card in the following manner:

The pushes from said card are one cent each and when a push is made a number is disclosed. There are as many separate numbers on the card as there are pushes and the numbers begin with one. The card bears a legend or legends informing the prospective customer as to which numbers receive the small pieces of caramel candy and which numbers receive the larger pieces of candy, for example: The "Holloway's Advertiser Package" contains 110 caramels and 41 caramel bars and the push card bears the following legends: Numbers 1 to 40 receive Holloway bar, numbers 41 to 150 receive Holloway caramel. The numbers on the card are effectively concealed from the purchasers or prospective purchasers until a push or selection has been made and the particular push separated from the card. The candy contained in said assortment is thus distributed to purchasers of pushes from said card wholly by lot or chance.

(c) Another assortment of candy distributed by respondent is composed of a number of small pieces of caramel candy together with a number of larger pieces of candy and is distributed to purchasers thereof in the following manner:

The assortment is contained within a large box, which is divided into a number of small compartments. Each compartment contains one of the small pieces of caramel candy or one of the larger pieces of candy. Over all of the separate compartments is fastened a sheet of paper so marked as to show each of the compartments but not the contents thereof. The purchaser selects the compartment desired and pushes or tears the paper covering therefrom and is entitled to receive the candy contained therein. The contents of each compartment retail at the price of one cent each and the purchaser procures either one of the small pieces of caramel candy or one of

the larger bars of candy, the same being determined wholly by lot or chance.

(d) Another assortment distributed by the respondent is similar in all of its detail to the assortments described in subparagraph (a) above, but the package is known and described by respondent as "Game of Skill" and the lid of the box in which said assortment is contained bears a legend as follows: "The yellow core caramels in this box are larger in size than the other caramels. Therefore, a skillful person can detect these larger caramels". The pieces of caramel are each contained within a wrapper and are of the same size or so nearly the same size as to make it impossible when contained within such wrapper for the purchaser to distinguish the difference in the size thereof. The purchaser of the caramels having a yellow core is entitled to receive and is to be given free of charge a larger piece of candy and these larger pieces of candy are thus distributed to the purchasers of the small caramels wholly by lot or chance and the statement on the box above quoted is a mere subterfuge, in an effort to avoid the effect of distributing candy by a lottery scheme.

(e) The respondent also distributes an assortment of caramels, the majority of which have centers of the same color, but a small number of which have centers of a different color and with this assortment of caramels the respondent sells and distributes an assortment of larger bars of candy, containing approximately the same number of bars of candy as there are caramels with centers colored differently from the majority in the first assortment just above described, and while these two assortments are sometimes billed separately the respondent sells the same number of each to his customers, who in turn resell in the same manner to the retail dealers. The larger bars of candy are distributed as prizes to purchasers of the smaller caramels in the same manner as where they are packed in the same assortment as described in subparagraph (a) above. The purpose of respondent in so packing these separate assortments is a subterfuge in an effort to avoid the effect of selling candy to be distributed by a lottery scheme, and the respondent is placing in commerce merchandise to be sold by means of a lottery scheme. The respondent packs these separate assortments so that they may be sold at retail by a lottery scheme and the respondent knows that in many cases they will be and are sold by means of a lottery scheme and purchasers of the smaller caramels which retail at the price of one cent each, thus procure larger bars of candy wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells his assortments resell said assortments of candy to retail dealers and

said retail dealers expose said assortments for sale and sell said candy 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 the sales plans herein above set forth, as a means of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public, above alleged involves a game of chance or the sale of a chance to procure such larger pieces of candy or packages of candy in the manner alleged. Such games of chance, and the sale along with the sale of such candy of such chance to procure such larger pieces of candy or packages 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 the said facts, many persons, firms and corporations who make and sell candy in competition with respondent as above alleged are unwilling to offer for sale or sell candies so packed and assembled 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 candy are attracted by respondent's said methods 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 respondent who do not use the same or equivalent methods. 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 methods by respondent has the tendency and capacity unfairly, and because of said game of chance alone, to divert to respondent trade and custom from its said competitors who do not use the same or equivalent methods; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or equivalent methods; 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

equivalent methods, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said methods 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 equivalent methods that are contrary to public policy and to criminal statutes as above alleged. Many of said competitors of respondent are unwilling to adopt and use said methods, 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 methods, acts and practices of the respondent are all to the prejudice of the public and of respondent's competitors as hereinabove alleged. Said methods, 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 2

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 Chicago, State of Illinois. Respondent, for more than three years last past has been engaged in the manufacture of candy and in the sale and distribution thereof to wholesale dealers and jobbers located at points in the State of Illinois and at points in various other 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 Chicago, Ill., to the purchasers thereof in the State of Illinois, and to other purchasers thereof in other States of the United States and in the District of Columbia, at their respective places of business, and there is now and has been for more than three years last past a course of trade and commerce by the said respondent in such candy in the State of Illinois and among the States of the United States and in the District of Columbia. In the course and conduct of the said business, respondent is in competition with other corporations, individuals, and partnerships engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States and within the District of Columbia.

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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.

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 hereby 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 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.

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(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 methods 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 methods 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 methods 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 methods, acts and practices of the respondent are and have been in violation of the standard of fair competition for the Candy Manufacturing Industry of the United States. Such violation of such standard in the aforesaid transactions in interstate commerce and in other transactions which affect interstate commerce in the manner set forth in paragraph 6 of count 1 hereof, are in violation of Section 3 of the National Industrial Recovery Act and they are unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act as amended.

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 in two counts upon the respondent, M. J. Holloway & Company, charging in count 1 of the aforesaid complaint that the said respondent had been and was using unfair methods of competition in commerce as "commerce" is defined in said Act of Congress and charging in count 2 of the aforesaid complaint that the said respondent had been and was using unfair methods of competition in commerce in violation of the Act of Congress approved June 16, 1933, known as the National Industrial Recovery Act, and thereafter respondent duly filed answer thereto. Testimony and evidence were received, duly recorded and filed in the office of the Commission and subsequently the proceeding came regularly on for a final hearing before the Commission on said complaint, answer, testimony and evidence, briefs of counsel for the Commission and counsel for the respondent. Oral argument was waived and the Commission having duly 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 as to count 1 of the aforesaid complaint and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, M. J. Holloway & Company, is a corporation organized and doing business under the laws of the State of Illinois, with its principal office and place of business in the city of

Chicago, Ill. Respondent is now and for several years last past has been engaged in the manufacture of candy in Chicago, Ill., and in the sale and distribution of said candy to wholesale dealers and jobbers in the State of Illinois and other States of the United States. It causes said candy when sold to be shipped or transported from its principal place of business in the State of Illinois to purchasers thereof in Illinois and in the States of the United States other than the State of Illinois. 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 and with 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 were several assortments of candy each composed of a number of pieces of caramel candies of uniform size, shape and quality, contained within a wrapper, together with a number of larger pieces of candy or packages of candy to be given as prizes to purchasers of said caramels of uniform size, shape and quality in the following manner:

The majority of the said caramel candies are of the same color throughout but a few of said caramels have centers of a different color. The color of the centers of these caramels is effectively concealed from the prospective purchasers by the wrapper in which they are contained until a selection or a purchase has been made and the wrapper removed. The said caramels of uniform size, shape and quality in said assortment retail at the price of one cent each but the purchasers who procure one of the said caramels having a center of a different color than the majority, are entitled to receive and are to be given free of charge one of the said larger pieces of candy or packages of candy. The aforesaid purchasers of said candies who procure a caramel having a center colored differently from the majority, are thus to procure one of the said larger pieces of candy or packages of candy wholly by lot or chance.

The respondent manufactures, sells and distributes several assortments involving the above lottery or chance feature. The pieces of candy of uniform size, shape and quality are generally 150 in number but, occasionally, vary a few pieces more or a few pieces less and the larger pieces of candy or packages of candy also vary in number in the several assortments, but the principle or sales plan is the same as to each of the said assortments.

PAR. 3. Respondent also manufactures, sells and distributes several assortments of candy each of which is composed of a number of small pieces of candy together with a number of larger pieces of candy and a device commonly referred to as a push card or punch board, con-

taining a definite number of pushes or punches. The candy contained in said assortment is sold or distributed in the following manner:

The push card or punch board is a piece of paper board having a definite number of partially perforated discs and concealed within each disc is a number. These numbers correspond to the number of discs there are on the board but they are not arranged consecutively. Such numbers are so concealed that they can not be ascertained until a push or selection has been made and the disc separated from the board. The push cards or punch boards bear legends giving prospective customers information as to which numbers concealed on the board receive one of the smaller pieces of candy and which numbers receive one of the larger pieces of candy. It is usual for the last push on a card to receive a prize in addition to the merchandise called for by the number obtained and the said push card, ordinarily, has a label informing the prospective purchaser as to what additional candy will be received for such last push. Sales are one cent each and purchasers procuring a number calling for one of the small pieces of candy receive the same and purchasers receiving a number calling for one of the larger pieces of candy are entitled to receive the same without payment of additional money. The fact as to whether a purchaser obtains one of the smaller pieces of candy or one of the larger pieces of candy for the purchase price of one cent is thus determined wholly by lot or chance.

Respondent distributes numerous assortments which involve the same principle or sales plan in the sale and distribution to the consuming public of said assortments. These assortments are described by respondent by various trade names and one of such assortments is "Holloway's Big Sam". The push card for the said assortment bears the following legend:

1¢ per sale HOLLOWAY'S BIG SAM 1¢ per sale

Notice—State, county, and city Officials—This is not a gambling device. It is used in this instance in advertising Holloway's Candy Bars.

Nos. 1 to 25 receive Holloway bar.

Nos. 26 to 150 receive Holloway caramel.

Last push on this card will receive the large candy bar.

The fact as to whether a purchaser obtains a small caramel or a bar of candy (which bars are much larger than the caramels) for the purchase price of one cent, is thus determined wholly by lot or chance in the same manner as described above.

PAR. 4. Another assortment which respondent manufactures, sells and distributes, is described by respondent as "Holloway's Mystery Chest". This assortment is composed of a number of small pieces

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of caramel candy together with a number of larger pieces of candy and a number of small toys or prizes and is distributed to purchasers thereof in the following manner:

The assortment is contained within a large box which is divided into a number of small compartments. Each compartment contains one of the small pieces of caramel candy or one of the larger pieces of candy and some of the compartments contain one of the toys or prizes. Over all of the separate compartments is fastened a sheet of paper so marked as to show each of the compartments but not the contents thereof. The purchaser selects the compartment desired and pushes or tears the paper covering therefrom and is entitled to receive the candy and toy or prize, if any, contained therein. The contents of each compartment retail at the price of one cent each and until a purchaser makes his selection and removes the paper cover from the compartment he does not know whether he will receive one of the small pieces of candy, one of the large pieces of candy or a small piece of candy and a toy for the price paid. The candy in said assortment is thus distributed to the consuming public wholly by lot or chance.

PAR. 5. Another assortment which respondent manufactures, sells and distributes is known and described by respondent as "Game Of Skill" and is similar in all of its details to the assortments described in paragraph 2 hereof. The name "Game of Skill" appears on one end of the lid of the box in which said assortment is contained and on the top of the lid are the following legends.

The yellow core caramels in this box are larger in size than the other caramels. Therefore, a skillful person can detect these larger caramels.

When the lid is taken off the box and the assortment displayed to the consuming public, these legends are not seen ordinarily. The said assortment is composed of 150 pieces of wrapped caramel candies and 65 candy bars. Of the 150 wrapped caramels 85 are of the same color throughout and 65 have a yellow core or center. The pieces of caramel are each contained within a wrapper and are of the same size or so nearly the same size as to make it impossible, when contained within such wrapper, for the purchaser to distinguish the difference in the size thereof. In this connection the evidence discloses that the caramels with the yellow core and those with the plain centers are of the same material and from the same mix or batch of candy as those without the yellow core and that 31 of the caramels with the core weigh the same as 34 of the caramels without the core. The candy which was before the examiner at the time the evidence was being taken, could not, because of its very nature, be retained for permanent comparison as to the size but the weight, as above re-

ferred to, clearly discloses that there is only a very small difference, if any, in the size, both kinds of caramels being of the same shape. The purchaser who procures one of the caramels having a yellow core, receives as a prize one of the larger pieces of candy contained in said assortment and the wrapper around the pieces of caramel effectually conceals the color of the center from the prospective purchaser until a selection has been made and the wrapper removed. The said larger pieces of candy are thus distributed to the consuming public wholly by lot or chance.

PAR. 6. Another assortment which respondent manufactures, sells, and distributes, is contained within two boxes, one box having assorted caramels, the majority of which have centers of the same color, but a small number of which have centers of a different color; the other box contains larger pieces or bars of candy and the number of bars therein is approximately the same as there are caramels with centers colored differently from the majority in the first box above mentioned, and while these two boxes are sometimes billed separately the respondent sells the same number of each to his customers, wholesale dealers, who in turn resell in the same manner to the retail dealers. The two boxes are so packed that they may be displayed by the retail dealers as a single assortment and the larger pieces or bars of candy are distributed as prizes to purchasers of the smaller caramels in the same manner as where they are packed in the same assortment and as described in paragraph 2 herein. The larger pieces or bars of candy are thus distributed to the purchasing public wholly by lot or chance and the respondent in so packing said assortment knows that the same may and will be used as a lottery or chance assortment when sold to the consuming public by the retail dealer.

PAR. 7. The lottery, prize or draw packages described in paragraphs 2, 3, 4, 5, and 6 above, are generally referred to in the candy trade or industry as "break and take", or "draw" 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 assortments described in paragraphs 2, 3, 4, 5, and 6 above, from wholesale dealers or jobbers who in turn have purchased said packages from respondent and such retail dealers display said assortments for sale to the public as packed by the respondent and the candy contained in said assortment is sold and distributed to the consuming public by lot or chance.

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. The assortments 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 above described, without alteration or rearrangement. An examination of the assortments of candy described in paragraphs 2, 3, 4, and 5 herein, as packed, assembled and sold by respondent shows that said 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 assortments.

In the sale and distribution to jobbers and wholesale dealers for resale to retail dealers, of assortments of candy, assembled and packed as described in paragraphs 2, 3, 4, 5 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 retail dealers by the methods described in these findings, is the 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 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.

There is a constant 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 gambling feature connected with the "break and take" or "draw" 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" or "draw" 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" or "draw" 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" or "draw" goods.

PAR. 13. There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize assortments of candy and who sell their "straight goods" candy in interstate commerce in competition with the "break and take" or "draw" 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

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decrease in the sales of "straight goods" candy is principally due to the gambling or lottery feature indicated with the "break and take" or "draw" candy.

PAR. 14. In addition to the assortments described in paragraphs 2, 3, 4, 5, and 6, herein, the respondent manufactures candy which it sells to wholesalers and jobbers without any lottery or chance features.

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 said States have laws making the operating of lotteries and gambling devices penal offenses.

CONCLUSION

The aforesaid acts and practices of respondent, M. J. Holloway and Company, 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 constitute violations 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, ETC.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission (in two counts, count 1 thereof charging 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", and count 2 thereof charging a violation of the National Industrial Recovery Act), the answer of the respondent, the testimony taken and the briefs filed and the Commission having made its findings as to the facts and conclusions that as to count 1, 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 hereby ordered, As to count 1 of the aforesaid complaint, that the respondent, M. J. Holloway & Company, its officers, directors, 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, 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, packages or assortments of candy which are used or may be 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 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 a different color, together with larger pieces of candy, which said larger pieces of candy are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

(4) Supplying to or placing in the hands of wholesale dealers and jobbers assortments of candy together with a device commonly called a push card or punch board, for use or which may be used in distributing or selling said candy to the public at retail.

(5) Furnishing to wholesale dealers and jobbers a device commonly called a push card or a punch board 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.

It is further ordered, That respondent, M. J. Holloway & 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.

And it is hereby further ordered, That, by reason of the decision of the Supreme Court of the United States in *A. L. A. Schechter Poultry Corporation v. United States of America*, decided May 27, 1935,¹ count 2 of the complaint in this proceeding be and the same hereby is dismissed.

MEMORANDA

The Commission, as of the same date, promulgated findings and orders in four other candy lottery cases. Except for the varying allegations describing the different respondents, and the nature of the various lottery assortments used, the findings appear to be similar to those in the principal case above, as do the orders, except in so far as they necessarily reflect the varying nature of the particular

¹ 295 U. S. 495.

assortments used. As in the principal case, the complaints are in two counts, one challenging the use of said acts and practices as violating Section 5, and the other challenging said acts and practices as also in violation of Section 3 of the National Industrial Recovery Act in that they violate the code of fair competition for the candy manufacturing industry. Orders to cease and desist in the respective cases include a paragraph dismissing the second count, on account of the decision of the Supreme Court in the *Schechter case* on May 27, 1935, 295 U. S. 495. The four cases referred to follow, there being set forth only those varying paragraphs, as hereinbefore explained, which deal with the particular respondent and the particular form of the chance or lottery assortment or assortments employed:

Southern Premium Manufacturing Co., in its own name and right and trading as Ryan Candy Co. Docket 2270. Complaint, December 20, 1934. Decision, June 25, 1935.¹

PARAGRAPH 1. The respondent, Southern Premium Manufacturing Company, is a corporation organized under the laws of the State of Texas with its principal office and place of business in the city of Dallas, Tex. Respondent is now and for several years last past has been engaged in the manufacture of candy in Dallas, Tex., and in the sale and distribution of said candy to retail and wholesale dealers and jobbers in the State of Texas and other States of the United States. It causes said candy when sold to be shipped or transported from its principal place of business in the State of Texas to purchasers thereof in Texas and in the States of the United States other than the State of Texas. In carrying on its said business respondent has on numerous occasions made use of the trade name, Ryan Candy Company, and its merchandise is sometimes sold and advertised in its own name, Southern Premium Manufacturing Company, and sometimes sold and advertised in the trade name, Ryan Candy Company. 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 and with partnerships and individuals

¹ In addition to the paragraphs 1 to 4, set forth describing the respondent and the nature of the assortments employed by it, the findings in this particular case contain a paragraph which sets forth that—

At or about the time the complaint was issued in this case, but subsequent to the beginning of the investigation as to the acts and practices of respondent, the respondent endeavored to confine the sales of the assortments as described in paragraph 2 to the State of Texas, but occasionally sales of such assortments are made in States other than the State of Texas. The assortments described in paragraph 3 above are distributed generally to respondent's customers located throughout the United States. The assortments described in paragraph 4 above are principally to customers within the State of Texas but respondent occasionally sells the same to customers in other States than the State of Texas.

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 were several assortments of candy each composed of a number of pieces of candy of uniform size, shape and quality together with a number of larger pieces of candy or smaller boxes of candy to be given as prizes to purchasers of said candies of uniform size, shape and quality, in the following manner:

The majority of said pieces of candies of uniform size, shape and quality have centers of the same color, but a small number of said candies have centers of a different color. The color of the centers of these candies is effectively concealed from the prospective purchasers until a purchase or selection has been made and the candy broken open. The said candies of uniform size, shape and quality in said assortments retail at one cent each, but the purchasers who procure one of said candies having a center of a different color than the majority of said candies, are entitled to receive, and are to be given free of charge one of the said larger pieces or small boxes 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 a larger piece of candy or a small box of candy. The aforesaid purchasers of said candy who procure a candy having a center colored differently from the majority of said pieces of candy thus procure one of the said larger pieces or small boxes of candy wholly by lot or chance.

Respondent manufactures, sells and distributes several assortments involving the above lottery or chance feature. The pieces of candy of uniform size, shape and quality are generally 150 in number, but occasionally vary a few pieces more or a few pieces less, and the prizes are generally larger pieces of candy or small boxes of candy, but occasionally other articles of merchandise are included as prizes, however, the principle or sales plan is the same as to each of the said assortments.

PAR. 3. Respondent also manufactures, sells and distributes several assortments of candy, each of which is composed of a number of small pieces of candy together with a number of larger pieces of candy and a device commonly referred to as a push card or punch board containing a definite number of pushes or punches. The candy contained in said assortments is sold or distributed in the following manner:

The push card or punch board is a piece of paper board having a definite number of partially perforated discs and concealed within each disc is a number. These numbers correspond to the number of discs there are on the board but they are not arranged consecutively.

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Such numbers are so concealed that they cannot be ascertained until a push or selection has been made and the disc separated from the board. The push cards or punch boards bear legends giving prospective customers information as to which numbers concealed on the board receive one of the small pieces of candy and which numbers receive one of the larger pieces of candy. It is usual for the last push on a card to receive a prize in addition to the merchandise called for by the number obtained and the said push card, ordinarily, has a label informing the prospective purchaser as to what additional candy will be received for such last push. Sales are one cent each and purchasers procuring a number calling for one of the small pieces of candy receive the same and purchasers receiving a number calling for one of the larger pieces of candy receive the same without payment of additional money. The fact as to whether a purchaser obtains one of the small pieces of candy or one of the larger pieces of candy for the purchase price of one cent is thus determined wholly by lot or chance.

Respondent distributes numerous assortments which are slightly different in detail but which involve the same principle or sales plan in the sale and distribution to the consuming public of said assortments. One of such assortments is described by respondent as "Pop Deal" and the push card or punch board in said assortment bears the following legends:

NO BLANKS		
Piece candy with each sale		
1¢	Nos. 10, 20, 30, 40, 50, 60, 70, 80, 90,	1¢
Sale	100, 110, 120, 130, 140, 150,	Sale
	5, 15, 25, 35, 45, 55, 65,	
	75, 85, 95, receive bar	
	candy. All other numbers receive	
	1¢ piece candy	
	Last sale receives large prize	
	All numbers that end in 5 and 0 win.	

The fact as to whether a purchaser receives a small piece of candy or a bar of candy or the large prize is thus determined wholly by lot or chance in the same manner as described above.

PAR. 4. The respondent also sells and distributes to concessionaires operating with road shows, medicine shows, tent shows, free shows, circuses and carnivals, an assortment of candy composed of a number of small boxes of candy each containing five pieces of candy and a prize. The small boxes of candy retail at the price of ten cents each and the prizes in said boxes consist of various articles of merchandise of varying value. The particular prize or the value thereof cannot

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be ascertained by the ultimate purchaser until a selection or purchase has been made and the box broken open. The said candy is thus