

Syllabus

IN THE MATTER OF

MEADOW BROOK CANDY 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 2266. Complaint, Dec. 17, 1934—Decision, June 27, 1935

Where a corporation engaged in the manufacture and sale of candy, including break-and-take assortments composed of candy bars of uniform quality, size and shape, and a number of larger pieces, 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 five cents a punch, whether one or two bars of candy or one of the larger pieces should be received by the person making such chance selection, with the last remaining number also entitling the person punching the same to a large piece—

Sold said assortments and push cards or punch boards to retail and wholesale dealers and jobbers, so assembled and packed that they could be displayed for sale and distribution to the purchasing public by lot or chance, with knowledge and intent that they would and should thus be resold; 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:

Complaint

21 F. T. C.

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.

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 the Meadow Brook Candy 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 1¹

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 Moline, 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 and to 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 Moline, 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 three years last past a course of trade and commerce by the said respondent.

¹ Count 2 of the complaint, not published, charges respondent with violating Section 3 of the National Industrial Recovery Act and the practice of unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, in that the methods, acts and practices alleged in Count 1 violate the standard of fair competition for the Candy Manufacturing Industry of the United States, namely, Rule 19, Article VIII of the code of fair competition for said industry, prohibiting the sale or distribution by any member thereof of "break and take" merchandise. The averments of said Count 2, paragraph 1 of which repeats the averments of paragraph 1 of count 1, are in other respects similar to those in count 2 in the complaint against M. J. Holloway & Co., Docket 2265, in which case findings and order issued as of June 25, 1935. See *supra*, at page 79.

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

One of said assortments is composed of a number of bars of candy together with a device commonly referred to as a push card. The bars of candy contained in said assortment are to be given to purchasers of pushes from said card in the following manner:

Pushes from said card are five cents each and when a push is made a number is disclosed. The card bears a statement or statements informing the prospective customer as to which numbers receive bars of candy and the number of such bars. All purchasers of pushes from said card receive one bar of candy but certain pushes, depending upon the number printed thereon, entitle the purchaser to additional bars of candy. The purchaser of the last punch on said card is entitled to receive a larger bar of candy. The numbers on said card are effectively concealed from the purchaser or prospective purchaser 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.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments, 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 in connection with the aforesaid push cards 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 the sales plan 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 additional bars 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 additional bars 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 or additional 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 competitors of the respondent who do 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 its 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 methods are 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 methods are 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.

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, Meadow Brook Candy 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 and brief of counsel for the Commission. No brief was filed on behalf of respondent and oral argument was not requested. 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. The respondent, Meadow Brook Candy Company, is a corporation organized under the laws of the State of Illinois with its principal office and place of business located in the city of Moline,

Ill. Respondent is now and for several years last past has been engaged in the manufacture of candy in Moline, Ill., and in the sale and distribution of said candy to retail and 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 carrying on said business, respondent 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 was an assortment of candy consisting of a number of candy bars of uniform quality, size and shape, 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 assortment was 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 (in this instance, 30) 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. Said numbers are so concealed that they cannot be ascertained until a selection has been made and the disc separated from the board. The push card or punch board bears legends giving prospective customers information as to which numbers concealed on the board receive only one bar of candy and which numbers receive two bars of candy, and which numbers receive one of the larger pieces of candy. Sales are 5 cents each, but the fact as to whether the purchaser obtains one or two bars of candy or one of the larger pieces of candy for the purchase price of 5 cents is thus determined wholly by lot or chance.

The legends on the push card or punch board furnished with the above described assortment are as follows:

5¢ ALL WINNERS 5¢

#30-37 Deal

All numbers ending in 0 or 5 receive two bars.

Numbers 18-28-38 receive LARGE LOAF.

LAST PUNCH ON CARD RECEIVES LARGE LOAF

ALL OTHER NUMBERS RECEIVE A BAR

PAR. 3. The respondent discontinued the manufacture, distribution and sale of the assortment described in paragraph 2 above, on or before July 1, 1934.

The respondent, during the years 1932, 1933, and the early part of 1934, manufactured, sold and distributed various assortments involving the sale of candy by lot or chance, but the manufacture, sale and distribution of all such assortments, including the one described in paragraph 2 above, were discontinued shortly prior to July 1, 1934.

PAR. 4. Lottery, prize, or draw packages similar to the one described in paragraph 2 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. 5. Numerous retail dealers purchased the assortment described in paragraph 2 above, either from respondent or from wholesale dealers or jobbers who in turn had purchased said assortment from respondent, and such retail dealers displayed said assortment for sale to the public as packed by the respondent and the candy contained in said assortment was sold and distributed to the consuming public by lot or chance.

PAR. 6. All sales made by respondent are absolute sales and respondent retains no control over the goods after they are delivered to the dealer. The assortment was assembled and packed in such manner that it could be displayed by the retail dealer for sale and distribution to the purchasing public, as above described, without alteration or rearrangement.

In the sale and distribution to retail dealers and jobbers and wholesale dealers for resale to retail dealers of an assortment of candy assembled and packed as described in paragraph 2 herein, respondent had knowledge that said candy would be resold to the purchasing public by retail dealers by lot or chance, and it packed and assembled such candy in the way and manner described so that it might be and should be resold to the public by lot or chance, by said retail dealers.

PAR. 7. The sale and distribution of candy, by the retail dealers by the method 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 method 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. 8. The principal demand in the trade for the "break and take" or "draw" 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. 9. The pieces of candy in the "break and take" or "draw" 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. 10. 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 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. 11. 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, Meadow Brook Candy 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 Commission having made its findings as to the facts and conclusion 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, That the respondent, Meadow Brook Candy 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 and to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are to be made or may be made by means of a lottery, gaming device or gift enterprise.

(2) Supplying to or placing in the hands of retail and 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) Supplying to or placing in the hands of retail and 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.

(4) Furnishing to retail and 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, Meadow Brook Candy 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, 1935,² count 2 of the complaint in this proceeding be and the same hereby is dismissed.

² 295 U. S. 495.

Memorandum

MEMORANDUM

Dante Candy Co., Docket 2267. Complaint, December 17, 1934. Decision, June 27, 1935.

Findings and order in this matter were similar to those in the Meadow Brook case above, except for the variance dealing with the respondent and the particular scheme employed as set forth in paragraphs 1 and 2 of the findings, below, and as reflected in the order. As in the principal case, the complaint was in two counts, the first charging a violation of Section 5 of the Federal Trade Commission Act by reason of the practices employed, and the second charging also violation of Section 3 of the National Industrial Recovery Act through the violation of the code of fair competition for the candy manufacturing industry in the use of such break-and-take assortments. Second count was dismissed by a paragraph included in the cease and desist order, on account of the Supreme Court decision in the *Schechter case*, 295 U. S. 495. Said paragraphs 1 and 2 follow:

PARAGRAPH 1. The respondent, Dante Candy Company, is a corporation organized under the laws of the State of Illinois with its principal office and place of business located 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 retail and 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 carrying on said business, respondent 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 was an assortment of candy composed of a number of pieces of candy of uniform size, shape and quality together with a number of larger pieces of candy and a toy 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 assortment retail at one cent each, but the purchasers who procure

Memorandum

one of the 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 of candy above mentioned. The purchaser of the last piece of candy in said assortment is entitled to receive and is to be given free of charge the toy above mentioned. 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 of candy wholly by lot or chance.

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

Mr. Henry C. Lank for the Commission.

Complaint

IN THE MATTER OF

HARRY SCHLIFTMAN, TRADING AS EAGLE SUPPLY
COMPANY

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

Docket 2393. Complaint, May 17, 1935—Order, June 29, 1935.

Consent order requiring respondent Harry Schliftman, individually, or trading as Eagle Supply Company, or trading under any other name, his agents, etc., in connection with the sale or offer for sale or distribution of paint in interstate commerce, to cease and desist from—

- (1) Using the words "Manufactured by Masterkraft Color Company, Brooklyn, New York", in advertisements, or on brands or labels affixed to containers or to packages of any such paint, or otherwise, and from using any other word, or words, or representations of similar tenor, import or substance, unless and until such company becomes in reality an existing and operating concern and such paint has been in fact manufactured by such concern; or
- (2) Using any statement, representation or assertion to the effect that any such paint is the product of, or is manufactured, packed, distributed or marketed by, any company or concern, when such company or concern is fictitious, or when in fact such paint is not the product of, or has not been so manufactured, packed, distributed, or marketed by, such company or concern.

Mr. Astor Hogg for the Commission.

Kayman & Schwartz, of Brooklyn, N. Y., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress 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 Harry Schliftman, an individual, trading as Eagle Supply Company, hereinafter referred to as respondent, has been and now is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, states its charges in that respect as follows:

PARAGRAPH 1. Respondent Harry Schliftman is an individual trading under the name and style of Eagle Supply Company, with his principal place of business located in the city of New York in the State of New York. He is now engaged and for more than two years last past has been engaged in the business of selling and distributing paint between and among the various States of the United States. He now causes and for more than two years last past has caused such paint,