

Complaint

IN THE MATTER OF

CHARLES N. MILLER COMPANY

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

Docket 2826. Complaint, May 29, 1936—Decision, Aug. 4, 1936¹

Where a corporation engaged in manufacture and sale of candies, including assortments composed of number of individually wrapped penny pieces of uniform size and shape, together with number of large candy bars given as prizes to chance purchasers of penny pieces, color of which was found to differ from that of majority—

Sold said assortments to wholesalers and retailers by whom they were exposed for sale and sold to purchasing public in accordance with aforesaid sales plan, and thereby supplied to and placed in hands of others means of conducting lotteries in sale of its products in violation of long-established public policy of common law and criminal statutes and of the established public policy of the United States Government;

With capacity and tendency to induce purchasers to buy its said product in preference to that offered and sold by competitors, many of whom were and are unwilling to adopt and use said method or any method involving a game, sale or scheme of chance or other method contrary to public policy, and with result that many dealers in and ultimate purchasers of candy were attracted by said method and manner of packing same and element of chance involved in sale thereof, and induced to purchase such candy, so packed, in preference to that of competitors who do not use same or equivalent methods, and with tendency and capacity, by reason thereof, to divert to it trade and custom from competitors who do not use same or equivalent methods, and to exclude from trade concerned all competitors unwilling to use and who did not use same or equivalent method as unlawful, lessen competition therein, and tend to create monopoly thereof in it and such other candy distributors as used such method, and to deprive purchasing public of benefit of free competition therein, and eliminate therefrom all actual competitors and exclude therefrom all potential competitors who did not adopt and use such method:

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. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank and *Mr. P. C. Kolinski* for the Commission.

Mr. Harold W. Knowlton, of Boston, Mass., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade

¹ Order, however, published as of Nov. 14, 1936.

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Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Charles N. Miller Co., 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 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:

PARAGRAPH 1. Respondent, Charles N. Miller Co., is a corporation organized and operating under the laws of the State of Massachusetts, with its principal office and place of business located at 16 Medford Street, Boston, Mass. Respondent is now, and for one year last past has been, engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States, and causes and has caused its said products, when so sold, to be transported from its principal place of business in the city of Boston, Mass., to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for one year last past, a course of trade and commerce by said respondent in such candy between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other corporations and with partnerships and individuals 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.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale and retail dealers certain 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 of candy is composed of a number of pieces of candy of uniform size and shape, together with a number of large bars of candy, which large bars of candy are to be given as prizes to purchasers of said pieces of candy of uniform size and shape, in the following manner: The majority of the said pieces of candy of uniform size and shape in said assortment have the same color, but a small number of said pieces of candy have a different color; the said pieces of candy of uniform size and shape retail at the price of 1¢ each, but the purchasers who procure one of the said candies colored differently from the majority of said candies are entitled to receive, and are to be given free of charge, one of the said

large bars of candy heretofore referred to. The color of the said pieces of candy of uniform size and shape is effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular piece of candy is unwrapped. The aforesaid purchasers of said candies, who procure a candy colored differently from the majority of said pieces of candy in said assortment, thus procure one of the said large bars of candy wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells its assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale and sell said candy 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, and said sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said product in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public, in the manner above alleged, involves a game of chance or the sale of a chance to procure a large bar of candy.

The use by respondent of said method in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said method, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has a dangerous tendency unduly to hinder competition or create monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the branch of the candy trade involved in this proceeding competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme.

Many persons, firms, and corporations who make and sell candy in competition with the respondent, as above alleged, are unwilling to offer for sale or sell candy 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, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy 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

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the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from its said competitors who do not use the same or equivalent method; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful; 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 the respondent has the tendency and capacity 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.

PAR. 6. 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 or any other method that is contrary to public policy.

PAR. 7. The aforementioned method, acts, and practices of respondent are all to the prejudice of the public and 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 on May 29, 1936, issued and served its complaint in this proceeding upon the respondent, Charles N. Miller Co., a corporation, charging it with the use of unfair methods of competition in commerce, in violation of the provisions of said act.

After the issuance of said complaint, the respondent filed answer thereto in which it stated that before the said complaint was brought it had ceased to sell the assortments of candy packed and assembled as set forth therein and was no longer selling the same, and prayed that the complaint be dismissed. Subsequent thereto, on June 23,

1936, the respondent filed a second answer to the complaint, in which it stated that it admitted all of the material allegations of the complaint to be true, except that it denied that at the time the bill of complaint was brought or since that time it was selling the assortments complained of. The said second answer further stated that respondent consented that the Commission, without hearing, without further evidence and without other intervening procedure, might make, enter, issue and serve upon it its findings as to the facts and conclusion based thereon, and an order to cease and desist from the methods of competition alleged in the complaint.

Thereafter this proceeding came regularly on for final hearing before the Commission on the said complaint and on the first and second answers of respondent, and the Commission having duly considered the same and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Charles N. Miller Co., is a corporation organized and operating under the laws of the State of Massachusetts, with its principal office and place of business located at 16 Medford Street, Boston, Mass. Respondent is now, and for one year last past has been, engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States, and causes and has caused its said products, when so sold, to be transported from its principal place of business in the city of Boston, Mass., to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for one year last past, a course of trade and commerce by said respondent in such candy between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other corporations and with partnerships and individuals 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.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent has sold to wholesale and retail dealers certain 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 the said assortments of candy was composed of a number of pieces of candy of uniform size and shape, together with a number

of large bars of candy, which large bars of candy were to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner: The majority of the said pieces of candy of uniform size and shape in said assortment had the same color, but a small number of said pieces of candy had a different color; the said pieces of candy of uniform size and shape retailed at the price of 1¢ each, but the purchasers who procured one of the said candies colored differently from the majority of said candies were entitled to receive, and were to be given free of charge, one of the said large bars of candy heretofore referred to. The color of the said pieces of candy of uniform size and shape was effectively concealed from purchasers and prospective purchasers until a selection had been made and the particular piece of candy was unwrapped. The aforesaid purchasers of said candies, who procured a candy colored differently from the majority of said pieces of candy in said assortment, thus procured one of the said large bars of candy wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sold its assortments resold the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sold direct exposed said assortments for sale and sold said candy to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplied to and placed 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, and said sales plan had the capacity and tendency of inducing purchasers thereof to purchase respondent's said product in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public, in the manner above alleged, involved a game of chance or the sale of a chance to procure a large bar of candy.

The use by respondent of said method in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said method, was a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and was contrary to an established public policy of the Government of the United States. The use by respondent of said method had a dangerous tendency unduly to hinder competition or create monopoly in this, to wit: that the use thereof had the tendency and capacity to exclude from the branch of the candy trade involved in this proceeding competitors who did not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme.

Many persons, firms, and corporations who made and sold candy in competition with the respondent, as above alleged, were unwilling to offer for sale or sell candy 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, and such competitors refrained therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy were 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 were thereby induced to purchase said candy so packed and sold by respondent in preference to candy offered for sale and sold by said competitors of respondent who did not use the same or equivalent methods. The use of said method by respondent had the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from its said competitors who did not use the same or equivalent method; to exclude from said candy trade all competitors who were unwilling to and who did not use the same or an equivalent method because the same was unlawful; 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 used 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 the respondent had the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who did not adopt and use said method or an equivalent method.

PAR. 6. Many of said competitors of respondent were and 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 or any other method that is contrary to public policy.

PAR. 7. The Commission further finds that the sale and distribution in interstate commerce of assortments or packages of candy so packed and assembled as to enable retail dealers, without alteration, addition or rearrangement, to resell the same to the consuming public by lot or chance is contrary to public policy.

CONCLUSION

The aforesaid acts and practices of the respondent, Charles N. Miller Co., a corporation, under the conditions and circumstances set forth in the foregoing findings as to the facts, are all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in commerce, and constitute 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."

MODIFIED ORDER TO CEASE AND DESIST ¹

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of the respondent admitting the material allegations of the complaint to be true, and waiving all further proceedings herein, and the Commission having made its findings as to the facts and its conclusion that said 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 ordered, That the respondent, Charles N. Miller Co., its officers, agents, representatives and employees, in the offering for sale, sale and distribution in interstate commerce of candy and candy products, do cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are to be made or may be made by means of a lottery, gaming device or gift enterprise;

(2) Supplying to or placing in the hands of wholesale dealers and jobbers or retail dealers packages or assortments of candy which are used 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, for sale to the public at retail, pieces of candy of uniform size and shape 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.

It is further ordered, That the respondent, 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.

¹ Published as modified as of November 14, 1936. See Commission's opinion as of said date, and as published therewith, reasons for so modifying and for denying respondent's request to dismiss the complaint on the ground that it had discontinued the unfair method of competition.

Syllabus

IN THE MATTER OF
KENNETH HAUER, TRADING AS HAUER DISTILLING
COMPANY

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

Docket 2460. Complaint, June 27, 1935—Decision, Aug. 7, 1936

Where an individual engaged in purchasing and bottling whiskies, and in purchasing, rectifying, and selling gins and other spirituous beverages, and in making gin by redistillation of purchased alcohol over juniper berries and other aromatics, and neither owning, operating, nor controlling any place where beverages are made by original distillation from grain, fruit, or vegetable mash, wort, or wash, and distilling no beverage, but purchasing his distilled spirituous requirements from distillers and bottling and reselling same, and in substantial competition, in course of his said business, with (1) individuals and concerns who manufacture and distill from mash, wort, or wash, whiskies, gins, and other spirituous beverages sold by them, and who truthfully use words "Distillery," "Distilleries," "Distiller," or "Distilling" as part of their corporate names, and on their stationery and on labels of the bottles in which they sell and ship their products, and with (2) those engaged in purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages, who do not use aforesaid words, as above set forth—

Represented, through use of his trade name, including word "Distilling," in his advertising matter and on his stationery, price lists, cartons, and on labels attached to bottles in which he sold and shipped his said products, preceded, on latter, in some cases, by words "Distilled by," "Manufactured by," or "Bottled by," as case might be, that he was a distiller of alcoholic beverages, as ordinarily accepted and understood in liquor industry from word "Distilling," i. e., maker of such beverages by original distillation from grain, fruit, or vegetable mash, and failed to negative false and misleading impression created thereby through statement on labels, in some cases, showing State in which liquor was distilled;

With effect of misleading and deceiving dealers and purchasing public, substantial portion of which prefers to buy spirituous liquors bottled by actual distillers and manufacturers thereof, into belief that said whiskies, etc., sold by him were by him made and distilled from mash, wort, or wash, and of inducing dealers and public, in such belief, to purchase said whiskies, etc., and of thereby diverting trade to him from competitors who did not, by their trade or corporate names, or in any other manner, represent that they were manufacturers, by distillation from mash, wort, or wash, of whiskies and other spirituous beverages, and with effect of securing advantage over concerns who did not pursue or practice such misrepresentation and falsely purport to be manufacturers, by reason of prestige attaching in wholesale trade to the distiller, and advantage thereof in overcoming sales resistance, and belief in minds of said trade and public that distiller, investment and expenses of which are, in general,