

Syllabus

IN THE MATTER OF

ANGELO CATALDO, INDIVIDUALLY AND TRADING AS
LIBERTY CHOCOLATE COMPANY AND AS ARCADIA
CHOCOLATE COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2691. Complaint, Jan. 27, 1936—Decision, Sept. 1, 1936¹*

Where an individual engaged in manufacture and sale of candy, including two assortments, in one of which chance selection of one of individually wrapped penny pieces of uniform size, shape, and quality, differing in color from that of majority, entitled purchaser to one of larger pieces included, and in other of which chance selection of one of a small number of white-striped pieces included in assortment of individually wrapped penny pieces of uniform size, etc., entitled purchaser, without charge, to larger piece as prize, while purchaser of last piece in said assortments was respectively entitled, without charge, to box of candy or one of larger pieces included—
Sold said assortments, with explanatory display card, to wholesale and retail dealers for display and sale to purchasing public in accordance with aforesaid or similar plans and thereby supplied to and placed in hands of others means of thus conducting lotteries in sale of its products, as means of inducing purchase of its products in preference to candy offered and sold by competitors, in violation of public policy, long existing in common law and criminal statutes and of the established public policy of the United States Government;

With dangerous tendency unduly to hinder competition or to create monopoly in tendency and capacity of practice to exclude from branch of candy trade involved competitors who did not adopt and use such or equivalent or similar method, and with effect of inducing many dealers in and ultimate purchasers of candy, by reason of their attraction by element of chance involved in sale thereof, to buy its said product, so packed and sold, in preference to that offered and sold by competitors, many of whom are unwilling to offer and sell candy so packed and assembled or otherwise arranged and packed for sale to purchasing public as to involve a game of chance or other method contrary to public policy, and who refrain from so doing; and

With tendency and capacity to divert to him trade and custom from competitors who do not use same or equivalent methods, to exclude from said trade all competitors unwilling to and who do not use such method as unlawful, and to lessen competition in said trade and to tend to create a monopoly thereof in him and such other candy distributors as use such a method, and deprive purchasing public of benefits of free competition therein, and eliminate from trade involved all actual competitors and exclude therefrom all potential competitors who do not adopt and use such or an equivalent method:

¹ Order published, as modified, as of Nov. 4, 1936.

Complaint

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Held, That such acts and practices, under the conditions and circumstances set forth, were 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. Jay I. Moskow, 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 Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Angelo Cataldo, individually and trading as Liberty Chocolate Company and also trading as Arcadia Chocolate Company, 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 is an individual, doing business under his own name and doing business under the trade names, Liberty Chocolate Company and Arcadia Chocolate Company, with his principal office and place of business in the city of Boston, State of Massachusetts. Respondent is now, and for several months last past, has been engaged in the manufacture of candy and in the sale and distribution thereof to wholesale and retail dealers located at points in the various States of the United States, and causes said products, when so sold, to be transported from his place of business in the city of Boston, State of Massachusetts, to purchasers thereof in other States of the United States at their respective places of business, and there is now, and has been for several months 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 the said business, respondent is in competition with other individuals and with corporations and partnerships engaged in the sale and distribution of candy and candy products in commerce between and among the various States of the United States.

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

hereinafter described for the purpose of showing the methods used by respondent, but this list is not all inclusive of the various packages, nor does it include all the details of the several sales plans which respondent has been or is using in the distribution of candy by lot or chance:

(a) One of said assortments is 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 small box of candy, which larger pieces of candy and small box of candy are to be given as prizes to purchasers of said pieces of candy of uniform size, shape, and quality, in the following manner:

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

(b) Another assortment manufactured and distributed by respondent is similar to the assortment described in paragraph (a) above, except that instead of some of the pieces being colored differently from the majority, a small number of pieces have a white stripe around the piece of candy, and the purchaser procuring one of these pieces of candy having a white stripe, is entitled to receive, and is to be given free of charge, a larger piece of candy as a prize, and the purchaser of the last piece of candy also receives one of the larger pieces of candy as a prize.

Respondent furnishes to said wholesale and retail dealers, with said assortments of candy, a display card to be used by the retail dealer in offering said candy for sale to the public. The display card bears a legend or statement informing the prospective pur-

chaser that the said assortment is being sold in accordance with the above described sales plans.

PAR. 3. The wholesale dealers to whom respondent sells his assortments, resell said assortments 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 plans. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of his products in accordance with the sales plans hereinabove 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 his competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or a sale of a chance to procure larger pieces of candy or a small box of candy.

The use by respondent of said method of the sale of candies, and the sale of candies 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 the 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.

Wherefore, 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 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 his said competitors who do not use the same or an equivalent method; to exclude from said

candy trade all competitors who are unwilling to and 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 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.

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 January 27, 1936, issued and served its complaint upon the respondent, Angelo Cataldo, individually and trading as Liberty Chocolate Company and as Arcadia Chocolate Company, hereinafter referred to as respondent, charging him with the use of unfair methods of competition in commerce as "commerce" is defined in said Act of Congress. Respondent filed answer to said complaint on February 14, 1936, and thereafter, on June 24, 1936, the respondent moved to withdraw the answer theretofore filed on February 14, 1936, and offered for filing an amended answer dated June 18, 1936, which motion was granted, and amended answer was received and filed. In the said amended answer respondent admits all the material allegations of the complaint to be true and consents that the Commission may, without further evidence, and without other intervening procedure, make, enter, issue, and serve upon him its findings as to the facts and conclusion based thereon, and an order to cease and desist from the methods of competition alleged in

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the complaint. This proceeding thereafter having regularly come on for final hearing on the said complaint and on the said amended answer of respondent dated June 18, 1936, 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 and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is an individual, doing business under his own name and doing business under the trade names, Liberty Chocolate Company and Arcadia Chocolate Company, with his principal office and place of business in the city of Boston, State of Massachusetts. Respondent is now, and for several months last past, has been engaged in the manufacture of candy and in the sale and distribution thereof to wholesale and retail dealers located at points in the various States of the United States, and causes said products, when so sold, to be transported from his place of business in the city of Boston, State of Massachusetts, to purchasers thereof in other States of the United States at their respective places of business, and there is now, and has been for several months 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 the said business, respondent is in competition with other individuals and with corporations and partnerships engaged in the sale and distribution of candy and candy products in commerce among the various States of the United States.

PAR. 2. In the course and conduct of his business, as described in paragraph 1 hereof, respondent has sold to wholesale and retail dealers 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 hereinafter described for the purpose of showing the methods used by respondent, but this list is not all inclusive of the various packages, nor does it include all the details of the several sales plans which respondent has been using in the distribution of candy by lot or chance:

(a) One of said assortments was 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 small box of candy, which larger pieces of candy and small box of candy were to be given as prizes to purchasers of said pieces of candy of uniform size, shape, and quality, in the following manner:

The majority of the said pieces of candy of uniform size, shape, and quality were of the same color, but a small number of said pieces of candy were of a different color. The said pieces of candy of uniform size, shape, and quality retailed at the price of one cent each, but the purchaser who procured one of the said candies of a different color than the majority, was entitled to receive, and was to be given free of charge, one of the said larger pieces of candy heretofore referred to. The purchaser of the last piece of candy of uniform size, shape, and quality, in said assortment, was entitled to receive, and was to be given free of charge, the small box of candy. Said pieces of candy of uniform size, shape, and quality were contained in individual wrappers, and the color thereof was effectively concealed from purchasers and prospective purchasers until a selection had been made and the wrapper removed. The aforesaid purchasers who procured a piece of candy colored differently from the majority, or the purchaser of the last piece of candy in said assortment, thus procured one of the said larger pieces of candy, or the small box of candy, wholly by lot or chance.

(b) Another assortment manufactured and distributed by respondent was similar to the assortment described in paragraph (a) above, except that instead of some of the pieces being colored differently from the majority, a small number of pieces had a white stripe around the piece of candy, and the purchaser procuring one of these pieces of candy having a white stripe, was entitled to receive, and was to be given free of charge, a larger piece of candy as a prize, and the purchaser of the last piece of candy also received one of the larger pieces of candy as a prize.

Respondent furnished to said wholesale and retail dealers, with said assortments of candy, a display card to be used by the retail dealer in offering said candy for sale to the public. The display card bore a legend or statement informing the prospective purchaser that the said assortment was being sold in accordance with the above described sales plans.

PAR. 3. The wholesale dealers, to whom respondent sold his assortments, resold said assortments 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 plans. Respondent thus supplied to and placed in the hands of others the means of conducting lotteries in the sale of his products in accordance with the sales plans hereinabove 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 his competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involved a game of chance or a sale of a chance to procure larger pieces of candy or a small box of candy.

The use by respondent of said method in the sale of candies, and the sale of candies 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 had the 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 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 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 his said competitors who did not use the same or an 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 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 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.

CONCLUSION

The aforesaid acts and practices of said respondent under the conditions and circumstances hereinabove described, are to the prejudice of the public and respondent's competitors, and are unfair methods of competition in interstate commerce, and constitute a violation 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 issued and served on January 27, 1936, and the answer of the respondent dated June 18, 1936, admitting all 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 the respondent has violated 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, Angelo Cataldo, individually and trading as Liberty Chocolate Company and as Arcadia Chocolate Company, his 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 retail dealers, and 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, retail dealers 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 candy or candy products contained in said assortments 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 but of different colors, or pieces of candy of uni-

¹ Published, as modified, as of Nov. 4, 1936.

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form size and shape, some of which have stripes running around them and others not having such stripes, together with larger pieces of candy or small boxes of candy, which said larger pieces of candy or small boxes of candy are to be given as prizes to the purchaser procuring a piece of candy of a particular color or a piece of candy having a stripe running around it;

4. Furnishing to retail dealers and wholesale dealers and jobbers display cards, either with assortments of candy, or separately, bearing a legend or legends or statements informing the purchaser that the candy is 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.

And it is further ordered, That the respondent, Angelo Cataldo, individually and trading as Liberty Chocolate Company and as Arcadia Chocolate Company, within 30 days after the service upon him of this order shall file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist hereinabove set forth.

Syllabus

IN THE MATTER OF

CHARLES L. JOHNSON, INDIVIDUALLY AND TRADING AS
NATIONAL INSTITUTE OF ACCOUNTANCY, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2524. Complaint, May 26, 1936¹—Decision, Sept. 2, 1936*

Where an individual engaged in sale and distribution of correspondence courses in accountancy, through salesmen supplied with printed enrollment blanks and contract forms with such caption as "Application for Membership in the Department of Practical Higher Accountancy," and with advertising matter to be passed on, in accordance with instructions, to purchasers and prospective purchasers—

- (a) Represented that corporate name employed by him in his said business and which included words "National Institute of Accountancy," stood for a corporation with offices in the Institute Building in the city in or from which he conducted said business, and was a large, substantial correspondence school comparable with leading correspondence schools in the United States, with staff of trained and experienced teachers who would instruct and advise students, and that he was its "President," "Treasurer," or "Director," through practice of thus signing letters to subscribers, and through aforesaid printed matter, facts being corporation so named, acquired by him theretofore, had been dissolved pursuant to court decree several years theretofore, neither he nor business indicated was domiciled in said building, and business was a one-man concern with no teaching staff other than himself, and, at times, one or two persons to assist in grading papers;
- (b) Represented, as aforesaid, that such Institute of Accountancy was authorized to confer degree of Bachelor of Science in accountancy, and that lesson papers were reviewed and graded by certified public accountants, and that such degree certified that student had completed required subjects given in course and was entitled to recognition as a graduate in business and professional accountancy, facts being he was not authorized to confer such a degree, and practically all lesson materials were reviewed and graded by himself and not by certified public accountants; and
- (c) Represented that he had positions as accountants at his disposal for students who completed said courses, and that prospective purchasers would be given employment and such positions, upon such completion, facts being he did not secure or give such positions to purchasers and had no arrangements with any concerns or other employers of accountants through which they would employ students who had completed and paid for his said courses;

With effect of inducing and persuading purchasers to buy the same, and with result that there was substantial diversion of trade to him from competitors; to their injury and that of the public:

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

¹ Amended and supplemental.