

Complaint

IN THE MATTER OF

AMERICAN MINT CORPORATION ET AL.

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

Docket 2762. Complaint, Apr. 10, 1936—Decision, Oct. 2, 1936.

Where two individuals and a corporation engaged in manufacture and sale of candy, including a packaged assortment of penny pieces of uniform size, shape, and quality, a small number of which contained a sum of money so concealed that purchasers procured same wholly by lot or chance—

Sold such assortments to wholesalers, brokers, and retail chain stores, along with retailers' display cards explaining aforesaid sales plan and money prizes; contrary to public policy as long recognized in the common law and criminal statutes, and to that of the United States Government, and in competition with many who were unwilling to offer and sell candy so packed, assembled, or otherwise arranged for sale to the purchasing public as to involve a game of chance, and refrained therefrom;

With result of placing in hands of others means of conducting a lottery in sale of their products, to induce purchase thereof in preference to competitors', and with result that many dealers and ultimate purchasers were induced to buy the candy thus packed and sold, attracted by said method and manner of packing same and element of chance involved in sale thereof, in preference to that offered and sold by said competitors who do not use such methods, and with tendency and capacity thereby to divert to them trade and custom from said competitors who do not use such a method, to exclude from said candy trade all competitors who are unwilling to, and do not, use same or equivalent method because unlawful, and to tend to lessen competition in said trade and create a monopoly thereof in them and such other distributors as use same or equivalent method, deprive the purchasing public of the benefit of free competition therein, and eliminate from trade in question all actual competitors and exclude all potential competitors who do not adopt and use such or an equivalent 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. P. C. Kolinski and *Mr. Henry C. Lank* for the Commission.

Burnstine, Geist & Netter, of New York City, 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 Ameri-

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can Mint Corporation, a corporation, and Mack R. Keshen and Oswald Freund, individually and as copartners, trading under the name of American Mint Corporation, hereinafter referred to as respondents, have been and are 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, American Mint Corporation, is a corporation organized on February 20, 1923, under the laws of New Jersey with its principal office and place of business located at 114 E. 13th St., New York City. Respondents, Mack R. Keshen and Oswald Freund are copartners doing business under the name and style of American Mint Corporation, with their principal office and place of business located at 114 E. 13th Street, New York City. Said individual respondents, and the corporate respondent, American Mint Corporation, since the date of its organization, are engaged in the manufacture of candies, and in the sale and distribution thereof to brokers, wholesalers, and retail chain stores located at points in the various States of the United States, and cause said products, when so sold, to be transported from their principal place of business in New York City, N. Y., 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 years last past a course of trade and commerce by said respondents in such candy between and among the States of the United States. In the course of said business, respondents are in competition with other corporations, 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 their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesalers, brokers, and retail chain stores a package or assortment of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

Said assortment of candy is composed of a number of pieces of candy of a uniform size, shape, and quality, but a small number of said pieces of candy have contained within them a sum of money. The said sums of money contained within the said pieces of candy are effectually concealed from the consumer until after he has purchased the said piece of candy and broken it apart. The said pieces of candy in said assortment retail at the price of 1¢ each, but the purchasers who procure one of said pieces of candy having a sum

of money contained therein thus procure the said sum of money contained therein as a prize and wholly by lot or chance.

Respondents furnished to said wholesale dealers, brokers, and retail chain stores with said assortment of candy, display cards to be used by retailers in offering said candy for sale, which display cards bear a legend or statement informing the prospective purchaser that the said assortment of candy is being sold in accordance with the sales plan above mentioned, and portraying the actual monetary character of the prizes.

PAR. 3. The wholesale dealers to whom respondents sell their assortment resell said assortment to retail dealers, and said retail dealers, and the chain store retail dealers to whom respondents sell direct, expose said assortment for sale and sell said candy to the purchasing public in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their products in accordance with the sales plan hereinabove set forth, as a means of inducing purchasers thereof to purchase respondents' said product in preference to candy offered for sale and sold by their 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 sum of money.

The use by respondents 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 respondents 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.

Many persons, firms, and corporations who make and sell candy in competition with the respondents, 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 respondents' 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 respondents in preference to candy offered for sale and sold by said competitors of respondents who do not use the same or equivalent methods. The use of said method by respondents has the tendency and capacity, because of said game of chance, to divert to respondents trade and custom from their 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 respondents 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 respondents 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 respondents 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 respondents are all to the prejudice of the public and of respondents' 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 April 10, 1936, issued and served its complaint in this proceeding upon the respondents, American Mint Corporation, a corporation, and Mack R. Keshen and Oswald Freund, individually and as copartners, trading under the name of American Mint Corporation, charging them with the use of unfair methods of competition in interstate commerce in violation of the provisions of said act. Respondents filed answer to said complaint on April 30, 1936, and thereafter, on July 9, 1936, the respondents moved to withdraw the answer theretofore filed on April 30, 1936,

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and offered for filing an amended answer, which motion was granted and the amended answer was received and filed. In the said amended answer respondents admit all the material allegations of the complaint to be true and consent that the Commission may, without further evidence and without other intervening procedure, make, enter, issue, and serve upon them 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. This proceeding thereafter having regularly come on for final hearing on the said complaint and on the said amended answer of respondents, dated July 9, 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, American Mint Corporation, is a corporation organized on February 20, 1923, under the laws of New Jersey, with its principal office and place of business located at 114 East 13th Street, New York City. Respondents, Mack R. Keshen and Oswald Freund, are copartners doing business under the name and style of American Mint Corporation, with their principal office and place of business located at 114 East 13th Street, New York City. Said individual respondents, and the corporate respondent, American Mint Corporation, since the date of its organization, are engaged in the manufacture of candies and in the sale and distribution thereof to brokers, wholesalers, and retail chain stores located at points in the various States of the United States, and cause said products, when so sold, to be transported from their principal place of business in New York City, N. Y., 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 years last past, a course of trade and commerce by said respondents in such candy between and among the States of the United States. In the course of said business, respondents are in competition with other corporations, 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 their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesalers, brokers, and retail chain stores a package or assortment of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

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Said assortment of candy is composed of a number of pieces of candy of a uniform size, shape, and quality, but a small number of said pieces of candy have contained within them a sum of money. The said sums of money contained within the said pieces of candy are effectively concealed from the consumer until after he has purchased the said piece of candy and broken it apart. The said pieces of candy in said assortment retail at the price of 1¢ each, but the purchasers who procure one of said pieces of candy having a sum of money contained therein thus procure the said sum of money contained therein as a prize and wholly by lot or chance.

Respondents furnish to said wholesale dealers, brokers, and retail chain stores, with said assortment of candy, display cards to be used by retailers in offering said candy for sale, which display cards bear a legend or statement informing the prospective purchaser that the said assortment of candy is being sold in accordance with the sales plan above mentioned, and portraying the actual monetary character of the prizes.

PAR. 3. The wholesale dealers, to whom respondents sell their assortment, resell said assortment to retail dealers, and said retail dealers, and the chain store retail dealers to whom respondents sell direct, expose said assortment for sale and sell said candy to the purchasing public in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their products in accordance with the sales plan hereinabove set forth, as a means of inducing purchasers thereof to purchase respondents' said product in preference to candy offered for sale and sold by their 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 sum of money.

The use by respondents 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 respondents 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.

Many persons, firms, and corporations who make and sell candy in competition with the respondents, 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 respondents' 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 respondents in preference to candy offered for sale and sold by said competitors of respondents who do not use the same or equivalent methods. The use of said method by respondents has the tendency and capacity, because of said game of chance, to divert to respondents trade and custom from their 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 respondents 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 respondents 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 respondents 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 the respondents, under the conditions and circumstances set forth in the foregoing findings as to the facts, are all to the prejudice of the public and respondents' competitors, and constitute unfair methods of competition in commerce, and constitute a violation of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

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ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission issued and served on April 10, 1936, and the amended answer of the respondents dated July 9, 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 said respondents have 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 respondents, their agents, representatives, and employees, in the offering for sale, sale, and distribution by them 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 or candy of uniform size and shape, some of which pieces of candy have concealed within them pieces of money;

(4) Furnishing to retail dealers and wholesale dealers and jobbers display cards, either with assortments of candy, or separately, bearing legends or statements informing the purchaser that some of the said pieces of candy contained in said assortment have pieces of money concealed within them.

And it is further ordered, That the respondents, within 30 days after the service upon them of this order shall file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist hereinabove set forth.

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IN THE MATTER OF
M. & J. BECKER, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT ON CONGRESS APPROVED SEPT. 26, 1914*Docket 2923. Complaint, Sept. 17, 1936—Decision, Oct. 8, 1936*

Where a corporation engaged in manufacture, distribution, and sale of hats and caps—

Sold to wholesalers and to retailers baseball caps made from second-hand, old, and discarded felts which had been cleaned and otherwise processed or treated and refitted with new sweat bands and trimmings, and which had appearance of new caps, of new felt, and never worn, and were susceptible of sale at retail under circumstances indicating such to be the fact, with no labels to indicate the true nature of such articles, cost of which to it was much less than new caps;

Notwithstanding fact of common belief and understanding among wholesalers and retailers and purchasing public that caps having appearance of new and unused products as those distributed and sold by it and others dealing in such articles, as aforesaid, with no labels indicating their nature, were in fact new, unused, and never-worn goods, and that such dealers and public, in purchasing such articles with appearance of new and unused goods and without labels as above set forth, were entitled to receive new and unused caps, and not those made from second-hand, old, used, and discarded felts, renovated and made over;

With capacity and tendency to induce a substantial number of wholesalers and retailers and of the purchasing public to buy its aforesaid caps as and for new and unused articles made from new felts, and with result that trade was unfairly diverted to it from competitors engaged in sale and distribution of caps made from new and unused felts, or those made from used, old, second-hand, and discarded felts, and who truthfully labeled the character and quality thereof; to the substantial injury of competition in commerce:

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Mr. J. T. Welch for the Commission.

Mr. Perry Gottlieb, of New York City, 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. Becker, Inc., a corporation, hereinafter referred to as respondent, is: