

IN THE MATTER OF
UCANCO CANDY COMPANY, INC.

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

Docket 2612. Complaint, Nov. 4, 1935—Decision, Nov. 11, 1936

Where a corporation engaged in manufacture and sale of candy, arranged, with push cards, as "draw" or "deal" assortments, principal trade demand for which comes from the small retailers, with stores, in many instances, near schools and patronized by the school children, and sale and distribution of which, or similarly sold candy, offering the opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children, the largest class by far of purchasers and consumers of such type of candy, who buy the same in preference to the so-called "straight" goods when displayed side by side, by reason of the lottery or gambling feature connected with the former, and sale of which in the market of the other, i. e., the "straight" goods, sold exclusively by many manufacturers, has been followed by a marked decrease in sale of such "straight" candy due to the gambling or lottery feature of the so-called "draw" or "deal" merchandise—

Sold to wholesale dealers and jobbers located in practically all the States of the United States east of the Rocky Mountains, together with push cards, (1) assortments in which the number disclosed by chance on the card by purchaser determined whether such purchaser received one of the candy bars making up such assortment free of charge, or paid an amount ranging from 1¢ to 5¢, as the case might be, for such bar, and (2) assortments in which the penny purchaser received, depending upon the number pushed by chance or the making of the last push in each of the sections into which the board was divided, a small piece, one of the larger pieces or bars, or one of the still larger bars for such purchaser's penny; so packed and assembled that such various assortments could be displayed and offered by the numerous retail dealers, purchasers thereof from its own wholesale or jobber customers, and with knowledge and intent that such assortments would and could be sold, without alteration, addition, or rearrangement, to the public by lot or chance by retail dealers therein; in violation of public policy, and in competition with some manufacturers who had begun sale and distribution of candy for resale to the public by lot or chance to meet competition of those who sell and distribute candy sold by such methods and in demand; With result that the public and its competitors were prejudiced and injured, and trade was diverted to it from said competitors, and there was a restraint upon and a detriment to the freedom of fair and legitimate competition in the industry involved:

Held, That such acts and practices, under the conditions and circumstances therein 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.

Cook & Balluff, of Davenport, Iowa, 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 the Ucanco Candy Company, Inc., a corporation, hereinafter referred to as respondent, has been and is now 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 a corporation organized under the laws of the State of Delaware, with its principal office and place of business located in the city of Davenport, State of Iowa. Respondent for several years 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 several of the States of the United States and causes its said products when so sold to be transported from its principal place of business in the city of Davenport, Iowa, 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 respondent in such candy between and among the States of the United States. In the course and conduct of its said business respondent is in competition with other corporations, and with 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.

PAR. 2. In the course and conduct of its business as described in paragraph 1 herein 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 details of the methods used by respondent, but this list is not all inclusive of the various sales plans which respondent has been or is using to distribute candy by lot or chance.

(a) Several of the said assortments are composed of a number of bars of candy of uniform quality, size, and shape together with a device commonly called a push card. The bars of candy are sold to the consuming public at varying prices and the price which a purchaser or consumer pays is determined in the following manner:

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The push card has a number of partially perforated disks and when a disk is pushed from the card a retail price is disclosed and this is the price which that particular customer pays for one of the bars of candy. The retail price on said disks are effectively concealed from the consumer until a selection has been made and the disk separated from the card. In some of the assortments the prices are 0¢, 1¢, 2¢, and 3¢. In other assortments the prices are 1¢, 2¢, 3¢, 4¢, and 5¢. The push cards in said assortments bear legends or statements advising customers or prospective customers that the candy in said assortments is being sold in accordance with the above described sales plans. The fact as to whether a customer obtains one of the bars free or pays 1¢, 2¢, 3¢, 4¢, or 5¢ is thus determined wholly by lot or chance.

(b) Other assortments consist of a number of smaller pieces of candy, a number of larger bars of candy and a number of giant bars of candy together with a device commonly called a push card. The candy in said assortments is to be distributed to purchasers in the following manner:

Sales are 1¢ each and when a push is made a number is disclosed. Certain numbers entitle the purchaser to receive one of the smaller pieces of candy, other numbers entitle the purchaser to receive one of the larger bars of candy. The push card is divided into a number of sections and the purchaser of the last push in each section is entitled to receive one of the giant bars of candy. The push card bears legends or statements informing the customers and prospective customers as to which numbers receive one of the small pieces of candy and which numbers receive one of the larger bars of candy. The numbers on the said disks or pushes are effectively concealed from the consuming public until a selection has been made and the disk or push separated from the card. The fact as to whether a purchaser receives one of the small pieces of candy, one of the larger bars of candy or one of the giant bars of candy at a price of 1¢ is thus determined wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells said 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 in connection with the aforesaid push cards and sell said candy to the purchasing public in accordance with the aforesaid sales plans. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with the sales plans 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 its competitors.

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The sales plans and methods of respondent as above described also appeal to the gambling instinct of the consumers of candy and said candies are sold to the consuming public by means of such appeal rather than on the basis of merit or value and a large number of the ultimate purchasers of respondent's said candies are minors.

PAR. 4. The sale of candy to the purchasing public as above alleged invoices a game of chance or the sale of a chance to procure additional or larger pieces of candy or packages of candy in the manner alleged. Such games of chance and the sale along with the sale of such candy of such chance to procure such additional or larger pieces of candy or packages of candy in the manner alleged are contrary to the established public policy of the several States of the United States and 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 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 or 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 additional or larger pieces of candy by chance; and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said methods and manner of packing said candy and by the element of chance involved in the sale thereof, in the manner above described and are thereby induced to purchase said candy so packed and sold by respondent in preference to candies offered for sale and sold by said competitor of respondent who do not use the same or equivalent methods. Many dealers in candies are induced to purchase said candies so offered for sale and sold by respondent in preference to all others, because said ultimate purchasers thereof give preference to respondent's said candies on account of said game of chance so involved in the sale thereof.

PAR. 6. The use of said methods by respondent has the tendency and capacity unfairly, and because of said game of chance alone, to divert to respondent trade and custom from its said competitors who do not use the same or equivalent methods; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or equivalent methods; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or equivalent methods, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said methods by respondent has the tendency and capacity unfairly, to

eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or equivalent methods that are contrary to public policy and to criminal statutes as above alleged. Many of said competitors of respondent are unwilling to adopt and use said methods, or any method involving a game of chance or the sale of a chance to win something by chance, because such method is contrary to public policy or to the criminal statutes of certain of the States of the United States, or because they are of the opinion that such method is detrimental to public morals and to the morals of the purchasers of said candy, or because of any or all of such reasons.

PAR. 7. The aforementioned methods, acts, and practices of the respondent are all to the prejudice of the public and of respondent's competitors as hereinabove alleged. Said methods, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, MODIFIED 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 November 4, 1935, issued and served a complaint upon the respondent, Ucanco Candy Company, Inc., a corporation, charging that the respondent had been and was using unfair methods of competition in commerce as "commerce" is defined in said act of Congress.

Respondent filed answer to said complaint, and thereafter, testimony and other evidence in support of the allegations of the complaint were introduced by Henry C. Lank and P. C. Kolinski, attorneys for the Commission, before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded in the files of the Commission.

The respondent was represented by Walter N. Balluff, Esq., but offered no evidence and called no witnesses in opposition to the charges of the complaint. Thereafter, the proceeding came regularly on for final hearing on said complaint and the testimony and other evidence and brief in support of the complaint (respondent, through its counsel, having advised that it did not desire to file brief or to orally argue the matter) and the Commission having duly con-

sidered 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, Ucanco Candy Company, Inc., is a corporation organized under the laws of the State of Delaware, with its principal office and place of business in the city of Davenport, State of Iowa. Respondent is now and for several years last past has been engaged in the manufacture of candy in Davenport, Iowa, and in the sale and distribution of said candy to wholesale dealers and jobbers located in practically all the States of the United States east of the Rocky Mountains. It causes said candy when sold to be shipped or transported from its principal place of business in the State of Iowa to purchasers thereof in Iowa and in the States of the United States, as described above, other than the State of Iowa. In so carrying on said business respondent is and has been engaged in interstate commerce and is and has been in active competition with other corporations, partnerships, and individuals engaged in the manufacture of candy and in the sale and distribution thereof between and among the various States of the United States.

PAR. 2. Among the candies manufactured and sold by the respondent is an assortment composed of a number of bars of candy of uniform quality, size, and shape, together with a device commonly called a "push card." The bars of candy are sold to the consuming public at varying prices, and the price which a purchaser or consumer pays is determined by use of the said push card in the following manner:

The push card has a number of partially perforated disks, and when a disk is pushed from the card a retail price is disclosed and this is the price the particular customer pays for one of the bars of candy. The retail price on said disk is effectively concealed from a purchaser and prospective purchaser until a selection has been made and the disk separated from the card. The retail prices on the various disks are 0¢, 1¢, 2¢, and 3¢. The push card bears legends or statements advising customers and prospective customers that the candy in said assortment is being sold in accordance with the above described sales plan. The fact as to whether a customer obtains one of the bars free of charge or pays 1¢, 2¢, or 3¢ is thus determined wholly by lot or chance.

The respondent also manufactures and distributes assortments, with which a push card is included, where the retail prices indicated are 1¢, 2¢, 3¢, 4¢ and 5¢. The fact as to whether a customer pays 1¢, 2¢, 3¢, 4¢

or 5¢ for one of the bars of candy is thus determined wholly by lot or chance.

PAR. 3. The respondent also manufactures and distributes several assortments consisting of a number of small pieces of candy, a number of larger pieces or bars of candy, and a number of still larger bars, and a device commonly called a "push card." The push card included with this assortment bears legends at the top thereof stating the manner in which the candy in said assortment is to be distributed to the ultimate purchasers. These legends are as follows:

1¢

SUMMER ADVERTISER

1¢

Numbers ending in 5 or 0 receives a sample bar. All other numbers receive a quality caramel. Last push in each section receives a giant bar.

Push : Push : Push : Push : Push : Push : Push : Push

Etc.

The push card has a number of partially perforated disks divided into sections and under each disk is a number which is effectively concealed from the purchaser and prospective purchaser until a push or selection has been made and a particular disk separated from the card. The candy contained in said assortment is distributed to the consuming public in accordance with the legends at the top of said card. Sales are 1¢ each, and the fact as to whether a purchaser receives one of the small pieces of candy, one of the larger pieces or bars of candy, or one of the still larger bars of candy for the price of 1¢ is thus determined wholly by lot or chance.

PAR. 4. The lottery or prize assortments as described in paragraphs 2 and 3 above are generally referred to in the candy trade or industry as "draw" or "deal" assortments, and assortments of candy without the gaming device or lottery feature 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 those respective types of candy.

PAR. 5. Numerous retail dealers purchase the assortments described in paragraphs 2 and 3 above from wholesale dealers or jobbers who in turn have purchased said assortments from respondent, and such retail dealers display said assortments for sale to the public as packed by the respondent. Candy contained in said assortments is sold and distributed to the consuming public in the manner described.

PAR. 6. All sales made by respondent are absolute sales and re-

spondent retains no control in any way over the goods after they are delivered to the wholesale dealer or jobber.

An officer of the respondent corporation testified that it carried the several push cards in stock and that it furnished the same to wholesale dealers and jobbers separate from the assortments of candy. Several wholesale dealers and a broker selling respondent's candies testified, and the Commission finds, that the respondent furnished the said push cards along with the assortments of candy, and packed the said push card in boxes containing the candy. The Commission further finds that the assortments are assembled and packed in such manner that they are sold and may be sold by retail dealers to the purchasing public in the manner described, without alteration, addition, or rearrangement.

The Commission, further finds that by reason of the manner in which the respondent packs and assembles these assortments, by reason of his experience in the candy business, and by reason of the testimony of the several witnesses that respondent has knowledge that said assortments will be resold to the purchasing public by retail dealers by lot or chance, respondent assembles such candy in the way and manner described so that without alteration, addition or rearrangement it may be resold to the public by lot or chance by said retail dealers.

PAR. 7. The sale and distribution of candy by retail dealers by the methods described in paragraphs 2 and 3 above is a sale and distribution of candy by lot or chance and constitutes a lottery or gaming device.

There is a demand for candy which is sold by lot or chance, and in order to meet the competition of manufacturers who sell and distribute candy which is sold by such methods some competitors of respondent have begun the sale and distribution of candy for resale to the public by lot or chance. The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and to respondent's 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. One of the principal demands in the trade for the "draw" or "deal" candy comes from the small retailers. The stores of these small retailers are in many instances located near schools and attract the trade of 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 "draw" or "deal" package and the possibility of becoming a winner, children

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purchase candy from such packages in preference to the "straight goods" candy, when the two types of assortments are displayed side by side. The sale and distribution of "draw" or "deal" packages 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. 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 "draw" or "deal" 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 features connected with the "draw" or "deal" candy.

PAR. 10. In addition to the assortments described in paragraphs 2 and 3 herein the respondent manufactures candy which it sells to retail dealers and jobbers without any lottery or chance feature. The exact proportion of the respondent's sales of "straight" merchandise in relation to the sale of the "draw" or "deal" assortments was not shown. However, upon the testimony and other evidence offered the Commission finds that the respondent is distributing numerous "draw" or "deal" assortments as described in paragraphs 2 and 3 hereof, and is selling such assortments in practically all States of the United States east of the Rocky Mountains.

PAR. 11. The Commission further finds that the sale and distribution in interstate commerce of assortments 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, Ucanco Candy Company, Inc., 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 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."

Order

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, the testimony and other evidence in support of the charges of the complaint taken before Miles J. Furnas, an examiner of the Commission heretofore duly designated by it, the respondent having offered no testimony or other evidence in opposition to the complaint, and the Commission having made its findings as to the facts and its conclusion that said 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 hereby ordered, That the respondent, Ucanco Candy Company, Inc., a corporation, its officers, agents, representatives, and employees, in the offering for sale, sale, and distribution in interstate commerce of candy products do cease and desist from:

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

2. Supplying to, or placing in the hands of wholesale dealers or 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 wholesale dealers and jobbers assortments of candy together with a device commonly called a "push card" for use or which may be used in distribution of said candy to the public at retail.

4. Furnishing to wholesale dealers and jobbers a device commonly called a "push card", either with assortments of candy, or separately, and 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.

It is further ordered, That the respondent, Ucanco Candy Company, Inc., 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.

IN THE MATTER OF
ERNA SAFFAN, INC., AND ROY M. KIRTLAND

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

Docket 2885. Complaint July 29, 1936—Decision Nov. 11, 1936

Where a corporation and an individual, its majority stockholder and secretary-treasurer and manager and director of its policies and practices, engaged in sale and distribution of a "hair color restorer" or dye preparation named "Youthray"; in advertising the same to the consuming public through numerous advertisements in newspapers and periodicals which circulated among the consuming public throughout the various States, and by means of advertising booklets, circulars, and other printed matter sent by mail and otherwise from their place of business to consumers and prospective consumers in many other States—

- (a) Represented that said preparation would restore hair to its original or natural color, and that it could be used as a hair color restorer without the aid of harmful dyes, and that it brought to gray hair an even, lustrous, youthful color; the facts being that it could not be thus used without the aid of harmful dyes, would not effectively restore the natural color of the hair, or bring it an even, lustrous, youthful color;
- (b) Falsely represented that said preparation was a fine germicide and antiseptic, and therefore beneficial to users thereof, and that it was not a dye, and was harmless to the most delicate scalp and hair; and
- (c) Falsely represented that they employed chemists, or owned, operated, or controlled laboratories;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that said representations were true, and with the result, as a direct consequence of such mistaken and erroneous beliefs, induced as aforesaid, that a number of the consuming public purchased a substantial volume of said preparation and treatment, and trade was unfairly diverted to them from others engaged in the sale of color restorers and similar preparations and treatments which they truthfully advertise; to the substantial injury of competition in commerce:

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

Mr. Joseph C. Fehr 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 Erna Saffan, Inc., a corporation, and Roy M. Kirtland, an individual, hereinafter referred to as respondents, have been and are now using unfair