

IN THE MATTER OF  
CHARLES N. MILLER COMPANY

OPINION AND DECISION AND MODIFIED ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

*Docket 2826. Complaint, Mar. 29, 1936—Order, Nov. 14, 1936*<sup>1</sup>

Dismissal of complaint, hereinbefore issued, requested on ground that respondent had discontinued unfair methods of competition therein charged, namely, use of a lottery scheme in sale of its candy, rejected, but prior order modified for reasons set forth in opinion and decision as respectively applicable.

Before *Mr. Miles J. Furnas*, trial examiner.

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

*Mr. Harold W. Knowlton* and *Jacobs & Jacobs*, of Boston, Mass., for respondent.

OPINION

The complaint in this case charged the Charles N. Miller Company, a Massachusetts corporation, with principal office and place of business at Boston, in that State, with the violation of Section 5 of the Federal Trade Commission Act (38 Stat. 717, 719; 15 U. S. C. A. Sec. 45), in selling and distributing candy, in interstate commerce, by methods involving lotteries.

The respondent in due course filed answer, in which it stated that, before issuance of the complaint, it had ceased to sell its candy by the methods charged. Subsequently, it filed a second answer, admitting all the material allegations of the complaint, denying that at the time the complaint was issued or since that time it was using lottery methods in the sale of its products, and waiving all further proceedings.

Thereafter, the proceeding came on regularly for final hearing before the Commission on the complaint and answers, and the Commission, having duly considered the record and being fully advised in the premises, on August 4, 1936, made and entered its report in writing in which it stated its findings as to the facts and conclusion, and issued and served on respondent an order which directed the respondent, and its officers, agents, representatives, and employees, in the manufacture, sale, and distribution in interstate commerce of candy and candy products, to 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

<sup>1</sup> For text of complaint and findings, as heretofore issued, and not modified, see ante at page 211.

assembled that sales of such candy to the general public are to be made or *are designed* to 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 *are designed* to 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.

Respondent requested a dismissal of the complaint on the ground that it had discontinued the unfair methods of competition. Discontinuance or abandonment of such methods does not of itself constitute a ground for dismissal. Only the issuance of an order to cease and desist will act as a deterrent against resumption of the unfair acts. After an order has been issued, if there is a violation, there may be a proceeding for enforcement without the expense and delay incident to instituting another case. The Federal Trade Commission Act empowers the Commission to issue complaints involving unfair methods of competition that *have been* used, if it appears to the Commission that such proceedings would be in the public interest.

It will be noted that paragraphs 1 and 2 of the order, above quoted, contain the words "are designed to." The Commission feels that a strict interpretation of these words, when referring to a method of competition employed by a respondent, might be construed as referring to the intent of such respondent; and that it would be unwise to establish a precedent by issuing an order to cease and desist which might, under a certain construction, require proof of such intent. Accordingly, the order will be modified by changing the words "are designed to" to the word "may."

The respondent through its counsel, seems to be a bit exercised for fear that some candy jobber or dealer might purchase some of its "straight" merchandise and assemble the same in a lottery assortment, or offer the same for sale by means of some lottery scheme. The Commission feels that such fears are without foundation. The language of the order, as modified, clearly indicates that, unless the respondent so packs and assembles its merchandise in such a way that it is or may be

## Order

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used without alteration or rearrangement as a lottery, it would not be violating the order.

Order modified by substitution of the word "may" for the words "are designed to" in paragraphs 1 and 2.

## MODIFIED ORDER TO CEASE AND DESIST

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.

## Syllabus

IN THE MATTER OF  
MAJESTIC DISTILLING COMPANY, 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 2376. Complaint, July 1, 1935<sup>1</sup>—Decision, Nov. 17, 1936*

Where two partners and their corporate successor, acting upon their direction, engaged in purchasing, rectifying, blending, and bottling whiskies, brandies, rums, and other spirituous beverages, and in the sale thereof to wholesalers and retailers, in substantial competition with those engaged in the manufacture by true distillation of whiskies, brandies, rums, and other spirituous beverages, and in the sale thereof, and with those engaged in rectifying, blending, and bottling whiskies and other spirituous beverages, and never engaged in distillation of alcoholic beverages by original and continuous distillation from mash, wort, or wash, as long understood from word "distilling" in the trade as meaning manufacture of such liquors by process of distillation from some kind of mash, and with no stills or other apparatus for the production of distilled spirits—

Represented, through use of word "Distilling" in their corporate name, printed on their stationery and on the labels attached to the bottles in which they sold and shipped their said products, and furnished their wholesale customers with the means of representing to the retailer and ultimate purchaser that the said whiskies, brandies, and other spirituous beverages contained in such bottles were by them made through process of distillation, notwithstanding fact they were not distillers and did not distill said whiskies or other liquors thus bottled, sold, and transported by them;

With tendency to mislead and deceive wholesalers, retailers, and ultimate purchasers into belief that in buying said liquors they were purchasing a product bottled at a distillery by the original distiller thereof, as preferred by a substantial portion of purchasers, and with effect of unfairly diverting trade to them from their competitors, including those who manufacture spirituous liquors by process of original and continuous distillation from mash, wort, or wash, and truthfully designate themselves as "distilling" companies, and those who, engaged as rectifiers, do not untruthfully designate themselves as "distilleries," "distillers," or "distilling companies":

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

Before *Mr. John W. Bennett*, trial examiner.

*Mr. PGad B. Morehouse* and *Mr. DeWitt T. Puckett* for the Commission.

*Nash & Donnelly*, of Washington, D. C., for respondent.

<sup>1</sup> Amended and supplemental.