

IN THE MATTER OF
JOHN H. DOCKMAN & SON, INC.

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

Docket 2709. Complaint, Jan. 31, 1936—Decision, Nov. 27, 1936

Where a corporation engaged in manufacture and sale of "straight" goods candy, and of so-called "break-and-take," "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 opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children, largest class by far of purchasers and consumers of such type of candy, who buy same in preference to so-called "straight" goods when displayed side by side, by reason of lottery or gambling feature connected with 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 syndicated retail dealers and to wholesalers and jobbers in the various States, its said candy, including such break-and-take, draw, or deal assortments, as assortments in which (1) chance punch from 150-hole punch board included determined whether person making selection received simply the candy pellet disclosed or, depending upon the red, white, or blue color of a few of said pellets, further received, as the case might be, a toy auto whistle, stone pendant, or toy bird warbler, with purchaser of last punch further receiving gilt pencil; (2) same plan and board were used with other articles of merchandise; and in which, (3) chance selection of one of a large number of pieces of chocolate-coated candy, concealed color of a few of which differed from that of majority, entitled person to prize consisting of larger pieces or boxes of candy; so packed and assembled that such various assortments could be displayed and offered by the numerous retailer purchasers thereof, 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 the retailers thereof, including practically all stores in which candy is sold; in violation of public policy, and in competition with some manufacturers who have begun sale and distribution of candy for resale to public by lot or chance to meet competition of those who sell and distribute candy sold by such methods and in demand, and in competition with many who regard such methods of sale and distribution as morally bad and as encouraging gambling, and especially among children, and as injurious to the industry, through resulting in the merchandising of a chance or lottery instead of candy, and as providing retailers with the means of violating the laws of the several States, and, therefore, refuse to sell candy so packed and assembled that it can be resold to public by lot or chance;

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With the result that such refusing competitors, who can compete on even terms only by giving same or similar devices to retailers, were put to a disadvantage in competing and their sales of straight candy showed a continual decrease, public and competitors were prejudiced and injured, and trade was diverted to it from its said competitors, and there was a restraint upon and a detriment to the freedom of fair and legitimate competition in the industry concerned:

Held, That such acts and practices 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.

Samuels & Clark, of Baltimore, Md., 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 John H. Dockman & Son, Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation, organized under the laws of Maryland with its principal place of business in the city of Baltimore, State of Maryland. Respondent is now, and 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 the various States of the United States, and causes said products, when so sold, to be transported from its place of business in the city of Baltimore, State of Maryland, 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 the said business, respondent is in competition with other corporations and with individuals 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 its 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

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and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One of said packages is hereinafter described for the purpose of showing the methods used by respondent, but this description is not all-inclusive of the various packages nor does it include all of the details of the several sales plans which respondent has been or is using in the distribution of candy by lot or chance. These assortments are advertised and sold under several names, but each involves use of the same method of chance by which the purchaser may procure, at no additional cost, other articles of merchandise. The method used is as follows:

Certain of said assortments are composed of a number of pieces of candy of uniform size, shape, and quality, together with a number of articles of merchandise, together with a device commonly called a punchboard. The candy and articles of merchandise contained in said assortment are distributed to purchasers of punches from said punchboard in the following manner:

Punches from said board are 1¢ each, and when a punch is made a colored pellet is disclosed. There are as many separate pellets as there are punches on said board. A majority of said pellets are of uniform color, but a small number of said pellets bear colors of a shade different from the color of the majority of said pellets. The board bears statements or legends informing the prospective purchaser as to which pellets entitle him to receive a small item of candy, and which pellets entitle him to receive an article of merchandise. All purchasers of punches from said board receive an item of candy, but certain punches, namely those disclosing a pellet colored differently from the majority of pellets, entitle the purchaser to another article of merchandise in addition. The pellets in said punchboard are effectively concealed from purchasers or prospective purchasers until a punch has been made and the particular pellet separated from the punchboard. The additional articles of merchandise contained in said assortments are thus distributed to purchasers of punches from said punchboards wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells its 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 plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with the sales plan hereinabove set forth, 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.

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 other articles of merchandise.

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 its 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

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or the sale of a chance to win something by chance or any other method that is contrary to public policy.

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

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission, on January 31, 1936, issued and served its complaint in this proceeding upon the respondent, John H. Dockman & Son, Inc., a corporation, charging the respondent with the use of unfair methods of competition in commerce in violation of the provisions of said act.

After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said 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 the said testimony and other evidence were duly recorded and filed in the office of the Commission.

The respondent was represented by Messrs. Edwin F. Samuels and Thomas W. Y. Clark, but offered no testimony or other evidence in opposition to the allegations of the complaint.

Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence on behalf of the Commission, and brief in support of the complaint; no brief having been filed on behalf of the respondent, oral argument having been waived, and the Commission, having duly considered the matter and being now 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. The respondent, John H. Dockman & Son, Inc., is a corporation organized under the laws of the State of Maryland, with

its principal office and place of business in the city of Baltimore, State of Maryland.

Respondent is now, and for several years last past has been, engaged in the manufacture of candy in Baltimore, Md., and in the sale and distribution of said candy to wholesale dealers and jobbers located in the State of Maryland and in the other States of the United States. It causes said candy, when sold, to be shipped or transported from its principal place of business in Baltimore, Md., to purchasers thereof in Maryland and in other States of the United States.

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 and with 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. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale dealers and jobbers 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.

One such assortment consisted of a number of pieces of candy, a number of other articles of merchandise, and a device commonly called a "punchboard." The candy and other articles of merchandise were distributed by means of the said punchboard in the following manner:

The punchboard contained 150 punches, and when a punch was made a candy pellet was disclosed. The majority of the said pellets were black, but a small number were red, a small number were white, and a small number were blue. The color of the pellets was concealed from the purchaser and prospective purchaser until a punch had been made and the pellet separated from the board. Purchasers obtaining a black pellet received one of the pieces of candy, purchasers obtaining a red pellet received a toy auto whistle, purchasers obtaining a white pellet received a stone pendant, and purchasers obtaining a blue pellet received a toy bird warbler. The purchaser of the last punch from said board received, in addition to the piece of candy or other article of merchandise, a gilt pencil. This assortment was designated by respondent as "150 Pencil Puncherine."

The fact as to whether a purchaser received one of the pieces of candy or one of the other articles of merchandise was thus determined wholly by lot or chance.

This assortment, when offered to the public, contained 150 units of sale and the complete assortment was sold by the respondent to wholesale dealers and jobbers for 80¢, and the normal price paid for the complete assortment by retail dealers was \$1.00.

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The respondent manufactured, sold and distributed a similar assortment containing a number of pieces of candy and a number of other articles of merchandise and a punchboard identical in design. This assortment was designated by respondent as "150 Harmonica Puncherine."

The respondent also distributed two other assortments involving the same principle but varying in detail, namely, assortments containing 150 pieces of candy, the color of which was concealed within a chocolate coating, and the prizes consisting of larger pieces or boxes of candy to be given free of charge to purchasers obtaining a piece of candy of a particular color.

PAR. 3. The candy assortments involving a lot or chance feature, as described in paragraph 2 hereof, are generally referred to in the candy trade or industry as "break and take," "draw," or "deal" assortments. Assortments of candy without the lot or chance 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 designate these types of assortments.

PAR. 4. Numerous retail dealers purchase the assortments described in paragraph 2 hereof from wholesale dealers and jobbers who in turn have purchased said assortments from the respondent. Such retail dealers display said assortments for sale to the public as packed and assembled by the respondent, and the candy and other articles of merchandise contained in said assortments are sold and distributed to the consuming public by means of the above described punchboards, or in accordance with the above described sales plans.

PAR. 5. The respondent sells its merchandise to syndicated retail dealers and to wholesale dealers and jobbers in the various States of the United States, and respondent's merchandise, both "straight" and "break and take" or "draw" or "deal" assortments, is resold in practically all stores where candy is sold.

All sales made by respondent are absolute sales, and respondent retains no control over the goods after they are delivered to the wholesale dealers and jobbers, or to the retail dealers. The assortments described in paragraph 2 hereof are packed in such manner that they can and may be displayed and offered for sale without alteration, addition or rearrangement to the consuming public by means of a lottery, gaming device, or gift enterprise.

The sale and distribution of candy by retail dealers by the methods described herein is the sale and distribution of candy by lot or chance and constitutes a lottery, gaming device, or gift enterprise.

In the sale and distribution to wholesale dealers and jobbers for resale to retail dealers of assortments of candy assembled and packed

as described in paragraph 2 hereof, respondent has knowledge that the said candy will be resold to the purchasing public by retail dealers by lot or chance, and it packs and assembles such candy in the way and manner described so that it may, without alteration, addition or rearrangement, be resold to the public by lot or chance by said retail dealers.

PAR. 6. Many competitors of respondent regard such methods of sale and distribution as morally bad and as encouraging gambling, especially among children; as injurious to the candy industry because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several States. Because of these reasons, some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. Said competitors can compete on even terms only by giving the same or similar devices to retailers. This they are unwilling to do and their sales of "straight" candy show a continued decrease.

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 resold 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 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. 7. The principal demand in the trade for the "break and take," or "deal," or "draw" 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 candy assortments are principally children and because of the lottery or gambling feature connected with the "break and take," or "draw," or "deal" assortments and the possibility of becoming a winner it has been observed that the children purchase them in preference to the "straight" candy when the two types of assortments are displayed side by side.

The children prefer to purchase the lottery or prize assortments of candy because of the gambling feature connected with its sale. The sale and distribution of "break and take," or "draw," or "deal" assortments 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

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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. 8. 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" candy in interstate commerce in competition with the "break and take," or "draw," or "deal" candy, and manufacturers of the "straight" type of candy have noted a marked decrease in the sales of their product whenever and wherever the lottery or prize candy has appeared in their markets. This decrease in the sales of "straight" candy is principally due to the gambling or lottery feature connected with the "break and take," or "draw," or "deal" candy.

PAR. 9. An officer of the respondent corporation testified and the Commission finds that the gross annual volume of respondent's business is approximately \$250,000.

PAR. 10. The Commission further finds that the sale and distribution in interstate commerce of assortments or packages of candy so packed and assembled as to enable retail dealers, without alteration, addition or rearrangement, to resell the same to the consuming public by lot or chance is contrary to public policy.

CONCLUSION

The aforesaid acts and practices of the respondent, John H. Dockman & Son, Inc., are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning 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 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 taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, and brief of counsel for the Commission, and no testimony or other evidence having been offered by the respondent, nor brief having been filed, and oral argument having been waived, 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."

Order

It is ordered, That the respondent, John H. Dockman & Son, Inc., a corporation, 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 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 assortments of candy which are used or which may be used, without alteration or rearrangement of the contents of such 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 "punchboard," for use or which may be used in the distribution of said candy to the public at retail;

(4) Furnishing to wholesale dealers and jobbers a device commonly called a "punchboard," either with the 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.

It is further ordered, That the respondent, John H. Dockman & Son, 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 this order.

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IN THE MATTER OF
JEROME C. CLAEYS, TRADING AS J. C. CLAEYS

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

Docket 2920. Complaint, Sept. 14, 1936—Decision, Nov. 27, 1936

Where a corporation engaged in the manufacture and sale of candy, including assortments of candy bars and push cards, under plan or arrangement by which purchaser received for his five cents one, two, three, or four bars, in accordance with particular number pushed by chance, as announced by cards' explanatory legends, and last push secured box of candy—

Sold, to wholesalers and jobbers and to retailers direct, for resale to purchasing public in accordance with aforesaid sales plan, said assortments, and thereby supplied to and placed in hands of others the means of conducting lotteries in the sale of its said product, in accordance with such plan, and contrary to public policy long recognized by the common law and criminal statutes, and to the established public policy of the United States Government, and in competition with many who, unwilling to offer or sell their candy so packed and assembled or otherwise arranged and packed to the purchasing public, as to involve a game of chance, refrain therefrom;

With result that many dealers and ultimate purchasers of candy were attracted by said method and manner of packing said product and by element of chance involved in sale thereof as aforesaid, and were thereby induced to purchase such candy, thus packed and sold by him, in preference to that offered and sold by competitors who do not use same or equivalent methods, and with tendency and capacity to induce such preferential purchase and to divert to him trade and custom from his said competitors, who do not use such methods, exclude from said trade all competitors who are unwilling to and do not use such a practice because unlawful, lessen competition therein and tend to create a monopoly thereof in him and such other distributors as do make use thereof, deprive purchasing public of benefit of free competition in trade involved, and eliminate from said trade all actual, and exclude therefrom all potential, competitors who do not use such or an equivalent practice:

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

Mr. Henry C. Lanck and Mr. P. C. Kolinski 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 Jerome C. Claeys, an individual trading under the firm name and style of J. C. Claeys, hereinafter referred to as respondent, has been and is using unfair