

IN THE MATTER OF
KROEKEL-OETINGER, INC.

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

Docket 2763. Complaint, Apr. 13, 1936—Decision, Nov. 28, 1936

Where a corporation engaged in the manufacture and sale of candy, including assortments, which were so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, and consisted of a number of penny pieces of uniform size and shape, together with a number of larger pieces to be given as prizes to those purchasers of said uniform pieces who secured, by chance, pieces, the enclosed colored centers of which differed in color from those of the majority—

Sold to wholesalers and retailers direct, for resale to the purchasing public in accordance with aforesaid sales plan, said assortments, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of its said products, in accordance with such plan, as a means of inducing purchasers thereof to buy its said product, thus sold, in preference to candy offered and sold by competitors; 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 for sale to the purchasing public as to involve a game of chance, refrain therefrom;

With result that many dealers in 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 it, in preference to that offered and sold by competitors who do not use same or equivalent methods, and with tendency and capacity to divert to it trade and custom from its said competitors who do not use such practices, 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 it and such other candy 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 adopt and 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.

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

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

Mr. David H. Kinley, of Philadelphia, Pa., for respondent.

Complaint

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 Kroekel-Oetinger, 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, Kroekel-Oetinger, Inc., is a corporation organized and operating under the laws of the State of Pennsylvania, with its principal office and place of business located at No. 4655 Stenton Avenue, Philadelphia, Pa. Respondent is now and for one year last past has been engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States, and causes and has caused its said products, when so sold, to be transported from its principal place of business in the city of Philadelphia, Pa., to purchasers thereof in other States of the United States at their respective places of business; and there is now and has been for one year 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 said business, respondent is in competition with other corporations and with 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 its business, as described in paragraph 1 hereof, respondent sells and has sold, since on or about January 15, 1936, to wholesale and retail dealers certain 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 of said assortments of candy is composed of a number of pieces of candy of uniform size and shape, together with a number of larger pieces of candy, which larger pieces of candy are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner:

The majority of the said pieces of candy of uniform size and shape in said assortment have centers of the same color, but a small number of said pieces of candy have centers of a different color, the said pieces of candy of uniform size and shape retail at the price of 1¢

Complaint

23 F. T. C.

each, but the purchasers who procure one of the said candies having a center colored differently from the majority of said candies is entitled to receive and is to be given free of charge one of the said larger pieces of candy heretofore referred to. The purchaser of the last piece of candy of uniform size and shape in said assortment is entitled to receive and is to be given free of charge a still larger piece of candy also contained in said assortment. The color of the center of the said pieces of candy of uniform size and shape is effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular piece of candy broken open. The aforesaid purchasers of said candies who procure a candy having a center colored different from the majority of said pieces of candy in said assortment, thus procure one of the said larger pieces of candy wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells its assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose said assortment 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 product 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 larger pieces of candy.

The use by respondent 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 respondent of said method has a 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 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 equivalent method; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by the respondent has the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or an equivalent method.

PAR. 6. Many of said competitors of respondent are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance or any other method that is contrary to public policy.

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

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on April 13, 1936, issued and served its complaint in this proceeding upon the respondent, Kroekel-Oetinger, Inc., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. On June 4, 1936,

Findings

23 F. T. C.

the respondent filed its answer dated June 2, 1936, in which answer it admitted all the material allegations of the complaint to be true and stated that it waived hearing on the charges set forth in the said complaint and consented that without further evidence or other intervening procedure, the Commission might issue and serve upon it findings as to the facts and conclusion and an order to cease and desist from the violations of law charged in the complaint. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint and the answer thereto, and the Commission having duly considered the same, 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. Respondent, Kroekel-Oettinger, Inc., is a corporation organized and operating under the laws of the State of Pennsylvania, with its principal office and place of business located at 4655 Stenton Avenue, Philadelphia, Pa. Respondent is now, and for one year last past has been, engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States, and causes and has caused its said products, when so sold, to be transported from its principal place of business in the city of Philadelphia, Pa., to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for one year 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 said business, respondent is in competition with other corporations and with 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 its business, as described in paragraph 1 hereof, respondent sells and has sold, since on or about January 15, 1936, to wholesale and retail dealers, certain 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 of said assortments of candy is composed of a number of pieces of candy of uniform size and shape, together with a number of larger pieces of candy, which larger pieces of candy are to be

given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner:

The majority of the said pieces of candy of uniform size and shape in said assortment have centers of the same color, but a small number of said pieces of candy have centers of a different color; the said pieces of candy of uniform size and shape retail at the price of 1¢ each, but the purchasers who procure one of the said candies having a center colored differently from the majority of said candies is entitled to receive and is to be given free of charge one of the said larger pieces of candy heretofore referred to. The purchaser of the last piece of candy of uniform size and shape in said assortment is entitled to receive, and is to be given free of charge, a still larger piece of candy also contained in said assortment. The color of the center of the said pieces of candy of uniform size and shape is effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular piece of candy broken open. The aforesaid purchasers of said candies, who procure a piece of candy having a center colored differently from the majority of said pieces of candy in said assortment, thus procure one of the said larger pieces of candy wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells its assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose said assortment 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 product 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 larger pieces of candy.

The use by respondent 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 respondent of said method has a 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 com-

Conclusion

23 F. T. C.

petitors 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 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 equivalent method; to exclude from said candy trade all competitors who are unwilling to and do not use the same or an equivalent method because the same is unlawful; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by the respondent has the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors who do not adopt and use said method or an equivalent method.

PAR. 6. Many of said competitors of respondent are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance or any other method that is contrary to public policy.

PAR. 7. The Commission further finds that the sale and distribution in interstate commerce of assortments of candy, as described in paragraph 2 hereof, are contrary to public policy.

CONCLUSION

The aforesaid acts and practices of the respondent, Kroekel-Oettinger, 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

1064

Order

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 and the answer of respondent, in which answer respondent admits all the material allegations of the complaint to be true, and states that it waives hearing on the charges set forth in said complaint and consents that, without further evidence or other intervening procedure, the Commission may issue and serve upon it findings as to the facts and conclusion and an order to cease and desist from the violations of law charged in the complaint, and the Commission having made its findings as to the facts and 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, Kroekel-Oettinger, Inc., its officers, representatives, agents, 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 a number of 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.

Memorandum

23 F. T. C.

MEMORANDUM

The Commission, as of the same date, made similar findings and orders in two other candy lottery cases, as follows:

SOUTH BEND DISTRIBUTING Co., Inc., Docket 2871—Complaint, July 3, 1936.—Selling to wholesalers and jobbers, on the part of respondent manufacturer, with principal office and place of business at South Bend, Ind., assortments of candy bars with push cards, for sale under a plan by which the purchaser receives for the five cents charged, in accordance with the card's explanatory legend and number pushed by chance, one, two, three, or four bars of candy, with purchaser of last disk on the card receiving, free, the box of candy included. *Mr. Henry C. Lank* and *Mr. P. C. Kolinski* for the Commission. *Jones, Obenchain & Butler*, of South Bend, Ind., for respondent.

QUEEN ANNE CANDY Co., Docket 2890—Complaint, August 7, 1936.—Selling, on the part of respondent manufacturer, with principal office and place of business in Seattle, assortments of boxes of chocolate candy, value of which exceeds five cents each, together with other articles of merchandise and a punchboard, for sale under a plan by which five-cent purchaser receives for his money, in accordance with the number punched by chance, a box of candy or nothing other than the privilege of making a selection, with purchaser of last punch on the board receiving article of merchandise. Before *Mr. Henry M. White*, trial examiner. *Mr. Henry C. Lank* and *Mr. P. C. Kolinski* for the Commission.

Syllabus

IN THE MATTER OF
NATIONAL GRAVE VAULT COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 3 OF TITLE I OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933¹

Docket 2324. Complaint, Mar. 12, 1935—Decision, Nov. 30, 1936.

Where a corporation engaged in the manufacture of air sealed and mechanically sealed end closing metal burial vaults, and in the sale thereof to jobbers, funeral directors and undertakers—

- (a) Represented, in periodicals of wide interstate circulation and in booklets, circulars, etc., and through photographs, testimonials, and other advertising media, that its said vaults were made of rust resisting metal and were waterproof, verminproof, and airtight, and that they were rust proof and would not corrode, and had been tested and proved by time as permanently sealed, that no earth load could crush through the top, and they afforded full protection to the contents against water, earth and nature's ruthless elements; and
- (b) Made use of certificates of warranty or guarantee in connection with the sale and offer of its said vaults which guaranteed the same to be vermin and waterproof for fifty years and undertook therein to replace any vault without cost in the event of damage to the contents by vermin, water, or other elements admitted due to rust, corrosion, etc.;

The facts being that, while its said vaults were equal to the standard comparable product made by the industry, and not inferior in metal or method of construction to those used by reputable and responsible members thereof, but were made with great care by skilled workmen, of the highest grade and quality of metals obtainable by it for the manufacture of such vaults, impervious and impenetrable by moisture, vermin, and water during the life of the metals, such metals were not rust or corrosion resistant to the extent that they would never rust or corrode after burial, and, once rusted or corroded to a certain extent during a period of years, they would crumble and disintegrate just as do, ultimately, all other materials; corrosive qualities, present in all soils, vary greatly, so that, while in many sections throughout the United States in which soil corrosion is not a problem, a twelve gauge metal vault buried would resist penetration by corrosion for more than one hundred years, in other soils its said vaults would pit through and cease to be waterproof in from eight to ten years; conjunction of conditions, which does not always exist, must obtain in the case of said air sealed vaults in order to provide protection from entering water; its vaults and materials from which made had not been tested under ground for the full period of fifty years, disinterment is rare and it had rarely been called upon to replace its said vaults;

With capacity and tendency, as result of such misleading acts and practices, to induce the public to purchase and use its said vaults in the belief that

¹ Count 2 of the complaint alleging violation of the National Industrial Recovery Act dismissed November 9, 1935.