

IN THE MATTER OF
BONOMO CANDY AND NUT CORPORATION

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

Docket 2776. Complaint, Apr. 21, 1936—Decision, Dec. 11, 1936

Where a corporation engaged in manufacture and sale of "straight" goods candy and of so-called "break and take," "draw," or "deal" assortments, one of the principal trade demands 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 selling of which in the market of the other, i. e., the "straight" goods, sold exclusively by many manufacturers, has been followed by a market decrease in sales of such "straight" candy, due to gambling or lottery feature connected with so-called "break and take," "draw," or "deal" merchandise—

Sold, to wholesalers and jobbers, assortments consisting of a number of penny pieces of uniform size and shape, together with a number of boxes of candy secured as prizes by chance purchasers of those uniform penny pieces, the enclosed concealed centers of which differed from that of the majority; so packed and assembled that such 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 or rearrangement, to the consuming or purchasing public by lot or chance, in accordance with such arrangement, in violation of public policy and in competition with many who regard such methods of sale and distribution as morally bad and as encouraging gambling, and especially among children, as injurious to the industry through resulting 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, and some of whom, for such reasons, refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance;

With the result that such refusing competitors, who can compete on even terms only by furnishing the same or similar assortments, were put to a disadvantage in competing and their sales of "straight" candy showed a continued decrease, some competitors began the sale and distribution of candy for resale to the public by lot or chance, for which, thus sold, there is demand, 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 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.
Burnstine, Geist & Netter, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Bonomo Candy and Nut Corporation, 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 the State of New York, with its principal office and place of business located at 649 Morgan Avenue, in the city of Brooklyn, State of New York. It is now, and for several years 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 products, when so sold, to be transported from its principal place of business in the city of Brooklyn, N. Y., to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for several years last past, a course of trade and commerce by said 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 December 1935, to wholesale and retail dealers, 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 of said assortments consists of a number of pieces of candy of uniform size and shape, together with a number of boxes of candy, which boxes 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 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 in said assortment, retail at the price of 1¢ each, but the purchaser who procures one of said candies having a center colored differently from the majority is entitled to receive, and is to be given free of charge, one of the said boxes of candy heretofore referred to. The color of the centers of said pieces of candy of uniform size and shape is effectively concealed from the purchaser and prospective purchaser until a selection has been made and the piece of candy broken up. The aforesaid purchasers of said candies, who procure a candy having a center colored differently from the majority of said pieces of candy of uniform size and shape in said assortment, thus procure one of the said boxes of candy wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers, to whom respondent sells its assortment, resell said assortment 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 product 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 boxes 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 the dangerous tendency unduly to hinder competition or create monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the branch of the candy trade involved in this proceeding competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme.

Many persons, firms, and corporations who make and sell candy in competition with the 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 or the sale of a chance to win something by chance or any other method that is contrary to public policy.

PAR. 7. In the course and conduct of its business, as described in paragraph 1 hereof, respondent has caused and causes the representation to be made on labels and containers for one of its candy products, as follows:

Minty Chocs. 20 Count—10 Cents

Petite Chocolate Peppermints

The effect of the use of the words, as above indicated, is to falsely represent to the public that the candy to be purchased from respondent is peppermint candy. There are among members of the purchasing public a substantial number who have a preference for peppermint candy. In truth and in fact, the candy sold and offered for sale by the respondent, under the above-stated representations, is not peppermint candy, but is principally of the type known as marshmallow candy.

PAR. 8. In the course and conduct of its business, as described in paragraph 1 hereof, respondent has advertised and offered for sale, and distributed as premiums packages of candy, falsely representing them to have a content weight of three ounces, when in truth and in fact such packages do not contain contents of the net weight of three ounces.

PAR. 9. There are among the competitors of the respondent corporation a substantial number of persons, partnerships, and corporations who do not falsely represent the type and flavor of candy offered by them for sale, or who do in fact sell and offer for sale peppermint candy and marshmallow candy, each truthfully represented and designated as such.

There are among the competitors of the respondent a substantial number of persons, partnerships and corporations who offer for sale merchandise of a like nature and character with that in which the respondent deals, offering the same for sale to the members of the purchasing public and truthfully representing the proper net weight of the candy so offered for sale, offering the same in packages similar to those used by the respondent but truthfully representing the exact and correct weight of the merchandise so offered.

Respondent's false representations have had, and now have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such representations are true, causing them to purchase respondent's product in reliance on same. Said false representations have the tendency and capacity to, and do, divert trade to respondent from its competitors who truthfully label their products, thereby causing substantial injury to substantial competition in commerce.

PAR. 10. 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 April 21, 1936, issued and served a complaint upon the respondent, Bonomo Candy and Nut Corpora-

tion, 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 thereto on May 12, 1936. 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 and filed in the office of the Commission. Respondent was represented by counsel but offered no testimony or other evidence in opposition to the charges of the complaint. Thereafter the proceeding regularly came on for final hearing before the Commission on said complaint, the testimony and other evidence in support thereof, and on the brief of counsel for the Commission, respondent through its counsel having advised that it did not desire to file brief nor present oral argument, and the Commission, having duly considered the matter and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of New York, with its principal office and place of business located at 649 Morgan Avenue, in the city of Brooklyn, State of New York. Respondent is now, and for several years 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 in the eastern part of the United States, and causes and has caused its products, when so sold, to be transported from its principal place of business in the State of New York 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 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. Beginning about December 1935, the respondent manufactured and distributed to wholesale dealers and jobbers an assort-

ment containing a number of pieces of candy of uniform size and shape, together with a number of boxes of candy, which boxes of candy were 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 had centers of the same color but a small number of said pieces of candy had centers of a different color. The said pieces of candy of uniform size and shape in said assortment retailed at the price of 1¢ each but the purchaser, who procured one of said candies having a center colored differently from the majority, was entitled to receive, and was to be given free of charge, one of the said boxes of candy heretofore referred to. The color of the centers of said pieces of candy of uniform size and shape was effectively concealed from the purchaser and prospective purchaser until a selection had been made and the piece of candy broken open. The aforesaid purchasers of said candies, who procured a candy having a center colored differently from the majority of the said pieces of candy of uniform size and shape in said assortment, thus procured one of the said boxes of candy wholly by lot or chance.

PAR. 3. The lottery or prize assortments, similar to the assortment described in paragraph 2 hereof, are generally referred to in the candy industry as "break and take," "draw," or "deal" assortments, and packages or 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 these respective types of candy.

PAR. 4. Numerous retail dealers purchase assortments, as described in paragraph 2 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, and the candy contained in said assortments is sold and distributed to the consuming public in the manner described.

PAR. 5. All sales made by respondent to wholesale dealers and jobbers are absolute sales and respondent retains no control in any manner over the goods after they are delivered to the wholesale dealers or jobbers. The assortments are assembled and packed in such manner that they are sold and may be sold by the retail dealers to the purchasing public in the manner described.

The respondent has knowledge that said assortments 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, without alteration, addition, or rearrangement, it may be resold to the public by lot or chance by retail dealers.

PAR. 6. The sale and distribution of candy by the retail dealers in the manner described in paragraph 2 hereof is a sale and distribution of candy by lot or chance and constitutes a lottery or gaming device.

Competitors of respondent appeared as witnesses in this proceeding and testified, and the Commission finds as a fact, that many competitors 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 disadvantage in competing. Certain retailers, who find that they can dispose of more candy by the "break and take," or "draw," or "deal" methods, buy respondent's products and the products of others employing the same or similar methods of sale, and thereby trade is diverted to respondent and others using similar methods from said competitors. Said competitors can compete on even terms only by furnishing the same or similar assortments, and this they are unwilling to do and their sales of "straight" goods 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 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. 7. One of the principal demands in the trade for the "break and take," or "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 "break and take," or "draw" package, and the possibility of becoming a winner, children purchase candy from such packages in

Conclusion

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preference to the "straight" goods candy, when the two types of assortments are displayed side by side. The sale and distribution of "break and take," or "draw" 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. 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" goods candy in interstate commerce in competition with the "break and take," or "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 "break and take," "draw," or "deal" candy.

PAR. 9. In addition to the assortment described in paragraph 2 hereof, respondent manufactures candy which it sells without any lottery or chance feature in connection with its resale to the public. Such assortments are sold to syndicate and retail accounts and to wholesale dealers and jobbers. The sale of the "break and take," or "draw," or "deal" assortments, as described in paragraph 2 hereof, is confined to wholesale dealers and jobbers. An officer of the respondent corporation was called as a witness and testified that the respondent's annual volume of business was approximately \$700,000, but the proportion represented by "straight" assortments and "break and take," or "draw," or "deal" assortments was not shown.

PAR. 10. 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.

PAR. 11. The complaint, in paragraph 7, charged the respondent with falsely representing that certain of its packages of candy were peppermint flavored. The Commission finds that the testimony and other evidence introduced do not support this allegation.

CONCLUSION

The aforesaid acts and practices of the respondent, Bonomo Candy and Nut Corporation (excluding the acts and practices referred to in paragraph 11 hereof), 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, and testimony and other evidence taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, in support of the charges of the complaint, and the brief filed on behalf of counsel for the Commission, no testimony or other evidence having been offered in opposition to the allegations of the complaint and no brief having been filed by the respondent, 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 ordered, That the respondent, Bonomo Candy and Nut Corporation, a corporation, its officers, agents, representatives and employees, in the offering for sale, sale, and distribution in interstate commerce of candy, 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 packages or assortments of candy which are used or which 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 contained in said packages or assortments to the public.

(3) Packing or assembling in the said packages or assortments of candy 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 small boxes of candy, which said small boxes 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 shall, within 30 days after the service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF
NAT D. GOLDBERG, TRADING AS SUNSET DISTILLING
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 2416. Complaint, May 27, 1935—Decision, Dec. 12, 1936

Where an individual engaged as wholesaler and rectifier of distilled spirits in blending and bottling cordials, brandies, liqueurs, rums, gins, and other spirituous beverages, in a rectifying plant and under rectifier's permit, and in selling his aforesaid various products to wholesalers and distributors in substantial competition with those engaged in the manufacture, by true distillation, of gins, rums, and other spirituous beverages from mash, wort, or wash, and in selling same in trade and commerce among the various States and in the District of Columbia, and with those engaged in purchasing, rectifying, blending, and bottling cordials, brandies, liqueurs, rums, gins, and other spirituous beverages in rectifying plants and under rectifiers' permits, and in similarly selling the same, and including among said competitors those who, as manufacturers and distillers from mash, wort, or wash of gins, rums, and other spirituous beverages sold by them, truthfully use words "distillery," "distilleries," "distillers," or "distilling," as a part of their corporate or trade names and on their stationery and advertising, and on the labels of the bottles in which they sell and ship such products, and those who, engaged in purchasing, rectifying, blending, and bottling cordials and other spirituous beverages as hereinbefore set forth, do not, as hereinbefore set forth, use said words—

Represented, through use of word "Distilling" in his trade name, printed on his stationery and on the labels attached to the bottles in which he sold and shipped his said products, and in various other ways, to his customers, and furnished them with the means of thus representing to their vendees, both retailers and ultimate consuming public, that the said cordials, brandies, liqueurs, rums, gins, and other spirituous beverages contained in such bottles were by him made through process of distillation from mash, wort, or wash, notwithstanding fact he did not thus distill said various beverages, thus bottled, labeled, sold, and transported by him, by original and continuous distillation, as above set forth, and through continuous closed pipes and vessels until manufacture is complete, as long definitely understood and implied to trade and ultimate purchasing public from word "Distilling," and did not own, operate, or control any place or places where alcoholic beverages are thus made, and was not a distiller, for the purchase of the bottled liquors of which there is a preference on the part of a substantial portion of the purchasing public;

With effect of misleading and deceiving dealers and purchasing public into the belief that the cordials, brandies, liqueurs, gins, rums, and other spirituous beverages sold by him were by him made and distilled from mash, wort, or

¹ Count Two of the complaint, under the National Industrial Recovery Act, dismissed by reason of decision in *A. L. A. Schechter Poultry Corp. v. U. S.*, 295 U. S. 493.