

Syllabus

IN THE MATTER OF

THE LEADER NOVELTY CANDY COMPANY, INC.

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

Docket 2789. Complaint, Apr. 28, 1936—Decision, Dec. 15, 1936

Where a corporation engaged in sale and distribution of candy and candy products, and in manufacture, sale, and distribution of novelty toys to wholesale dealers, including so-called "break and take," "draw" or "deal" assortments, sale of which type, in competition with the exclusively "straight" merchandise of many candy manufacturers and distributors, has been followed by a marked decrease in latter, due to gambling or lottery feature connected with former, and which assortments consisted of (1) package of individually wrapped penny pieces of uniform size and shape, color of a few of which differed from that of the majority, and (2) package of novelty toys such as water pistols and rubber return balls, ordinarily sold and billed by it separately to wholesaler and jobber vendees, but not separately at same price assigned each package for sale together, and usually identical in number, so that such respective packages might be displayed side by side as a single unit and sold under a plan by which chance purchaser of one of said penny pieces, concealed color of which differed from that of majority, additionally received, for his penny, one of aforesaid toys—

Sold to wholesalers or jobbers said "break and take," "draw," or "deal" assortments, so assembled and packed by it that they were and might be sold by retail dealers to purchasing public as single unit, as hereinbefore set forth, and as a lottery or gaming device, for resale to their numerous retailer purchasers thereof, by whom the respective packages, as packed by it and as a single unit, were displayed and candy involved sold and distributed to consuming public as hereinbefore set forth, and by lot or chance; contrary to 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 candy industry in 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 public by lot or chance;

With result that sales of "straight" goods of such unwilling and refusing competitors, who could compete on even terms only by furnishing the same or similar assortments, showed a continued decrease and they were put to a competitive disadvantage, and trade was diverted from them to it and others using similar methods:

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. Victor Warren Milch, of New York City, for respondent.

Complaint

24 F. T. C.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that The Leader Novelty Candy Co., 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 the State of New York, with its principal office and place of business located at 23 Marcy Avenue, in the city of Brooklyn, State of New York. It is now, and for several years last past has been, engaged in the sale and distribution of candy to wholesale dealers, jobbers, and retail dealers, located at points in the various States of the United States, and causes the said product, when so sold, to be transported from its principal place of business in the city of Brooklyn, 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 the course and conduct of said business, respondent is in competition with other corporations and with partnerships and individuals engaged in the sale and distribution of candy in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its said business, respondent has caused and causes the representation to be made to its customers and prospective customers by its salesmen and agents, and has caused and causes said representation to be set forth on its business stationery, billheads, invoices, catalogues, labels, and other trade literature, to the effect that it controls and operates factories and is the manufacturer of said candy in which it deals. A substantial portion of the purchasing public, including retail dealers in candy, have expressed, and have, a preference for dealing direct with the manufacturer of products being purchased, such purchasers believing that they secure closer prices, superior quality, and other advantages that are not obtained when they purchase from a selling agency or middleman.

PAR. 3. The use by respondent of said representation that it is a manufacturer of candy has the capacity and tendency to and does

mislead and deceive many of respondent's said customers and prospective customers into the erroneous belief that respondent is a business concern which controls and operates a factory in which aforesaid candy sold by respondent is manufactured, and that persons dealing with respondent are buying said candy directly from the manufacturer thereof, thereby eliminating the profits of middlemen and obtaining various advantages, including advantages in service, delivery, and adjustment of account that are not obtained by persons purchasing goods from middlemen. The truth and fact is that respondent neither owns, controls, nor operates any factory whatsoever and does not manufacture said candy sold by it, but on the contrary only purchases and repacks the candy which it sells.

PAR. 4. There are among the competitors of respondent referred to in paragraph 1 hereof, many who manufacture the candy which they sell and who rightfully represent that they are the manufacturers thereof. There are others of said competitors who purchase the candy in which they deal and resell the same at a profit to themselves over and above the cost of said candy to said competitors, and who in no wise represent that they manufacture said candy. The above alleged acts and practices of respondent as set out in paragraphs 2 and 3 hereof tend to and do divert business from and otherwise injure and prejudice said competitors.

PAR. 5. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale dealers, jobbers and retail dealers a package or assortment of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, and is as follows:

The said assortment is composed of a number of pieces of candy of uniform size, shape, and quality, together with a number of articles of merchandise, which articles of merchandise are to be given as prizes to purchasers of said pieces of candy of uniform size, shape, and quality, in the following manner: The majority of the said pieces of candy of uniform size, shape, and quality are of the same color, but a small number of said pieces of candy are of a different color. The said pieces of candy of uniform size, shape, and quality retail at the price of one cent each, but the purchaser who procures one of the said candies of a different color than the majority is entitled to receive, and is to be given free of charge, one of the said articles of merchandise heretofore referred to. Said pieces of candy of uniform size, shape and quality are contained in individual wrappers, and the color thereof is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. The aforesaid purchasers who procure a piece of

candy colored differently from the majority thus procure one of the said articles of merchandise wholly by lot or chance.

PAR. 6. The jobbers and wholesale dealers 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 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 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. 7. 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 articles of merchandise.

The use by respondent of said method of 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.

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. 8. 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, and who do not adopt and use said method or an equivalent method.

PAR. 9. 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. 10. The aforementioned methods, acts and practices of the respondent are all to the prejudice of the public and of respondent's competitors as hereinabove alleged. Said methods, acts and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, 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 28, 1936, issued and served its complaint in this proceeding upon the respondent, The Leader Novelty Candy Co., Inc., charging it 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, attorney for the Commission, before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Victor W. Milch, Esquire, attorney for the respondent. For the purpose of eliminating the taking of certain additional testimony, counsel for the Commission and counsel for the respondent stipulated (Tr. p. 12) concerning the substance of such testimony and agreeing that the Commission might consider such testimony as actually having been offered in this case. The said testimony and other evidence, including the stipulation of counsel, were duly recorded and filed in the office of the Commission. Thereafter

the proceeding regularly came on for final hearing before the Commission on the said complaint and answer thereto, testimony and other evidence, including the stipulation of counsel, brief in support of the complaint, respondent having waived filing of any brief and not having requested oral argument; 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. Respondent, The Leader Novelty Candy Co., Inc., is a corporation organized under the laws of the State of New York, with its office and principal place of business located at 23 Marcy Avenue, Brooklyn, N. Y. Respondent is now, and for several years last past has been, engaged in the sale and distribution of candy and candy products and in the manufacture, sale and distribution of novelty toys to wholesale candy dealers and jobbers located throughout the United States but the majority of whom are located in New York State, in Connecticut and in the New England States. It causes the said candy and novelty toys when sold to be shipped and transported from its principal place of business in New York State to the purchasers thereof in the 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, sale, and distribution of candy and novelty toys between and among the various States of the United States.

PAR. 2. Respondent designates its business as "novelty candy business", and among the assortments which respondent assembles, sells and distributes is an assortment containing a number of small pieces of candy of uniform size and shape, each contained within wrappers, and a number of other articles of merchandise. The small pieces of candy of uniform size and shape are each contained within wrappers and the majority thereof are of the same color but a small number of said pieces of candy are of a different color. The purchaser who procures one of the small pieces of candy of a color different from the majority is entitled to receive, and is to be given free of charge, one of the other articles of merchandise. These articles of merchandise are novelty toys and among such toys are water pistols and rubber return balls. The purchaser who procures one of the candies of the color of the majority of the small pieces of candy receives only that piece of candy for his money. The small pieces of candy of uniform

size and shape retail at the price of 1¢ each and the color of the said pieces of candy is effectively concealed from purchasers and prospective purchasers until a selection or purchase has been made and the wrapper removed therefrom. The other articles of merchandise in said assortment are thus distributed to purchasers of the small pieces of candy of uniform size and shape wholly by lot or chance.

PAR. 3. The candy contained in the above described assortment is contained in one package and the other articles of merchandise or novelty toys are contained in a separate package. The two packages are ordinarily sold and billed separately to the wholesale dealers and jobbers to whom respondent sells its merchandise, but the packages of each which respondent sells to its customers are generally identical in number, and the said assortments are so packed and assembled that the same may be displayed side by side as a single unit and sold in accordance with the above described sales plan. The president of the respondent corporation was called as a witness and testified that the separate packages were sold and billed to wholesale dealers and jobbers at 40¢ each or 80¢ for the two packages; that the respondent did not and would not sell the package containing the other articles of merchandise at this price except in connection with the sale of the package containing the candy; that the other articles of merchandise actually cost him more than 40¢, but that by selling the two packages for 80¢ he was able to realize a profit on the transaction.

PAR. 4. The lottery or prize assortments described in paragraph 2. hereof are generally referred to in the candy trade as "break and take," "draw," or "deal" assortments, and packages or assortments of candy without any gaming device or lottery feature in connection with their resale to the public are generally referred to in the candy trade as "straight" goods. These terms will be used hereafter in these findings to describe these respective types of candy.

PAR. 5. Numerous retail dealers purchase the packages of candy and toy novelties described in paragraph 2 above from wholesale dealers or jobbers who in turn have purchased said packages from respondent, and such retail dealers display one of each of said packages for sale to the public as packed by respondent and as a single unit, and the candy contained in said packages is sold and distributed to the consuming public in the manner described.

PAR. 6. All sales made by respondent are absolute sales, and respondent retains no control in any manner over the merchandise after it is delivered to the wholesale dealer or jobber. 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 as a single unit in the manner described.

Findings

24 F. T. C.

PAR. 7. The sale and distribution of assortments of candy and toy novelties by retail dealers by the method described in paragraph 2 above is a sale and distribution by lot or chance and constitutes a lottery or gaming device.

PAR. 8. It was stipulated and agreed by counsel for the Commission and for respondent that various witnesses were available to the Commission and that if called would testify, and that the Commission might consider their testimony as having been offered to the effect that the sale of assortments similar to those sold and distributed by respondent injure the sale of "straight" candy assortments having no lottery or chance feature connected therewith; that the sale of such assortments is injurious to the candy trade generally and to the general public; that the resale of such assortments by retail dealers to the consuming public is violative of the statutes of the several States and is contrary to good morals; that such practices and methods are an unfair method of competition; and in accordance with said stipulation 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 a disadvantage in competing and 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 to retailers and this they are unwilling to do and their sales of "straight" goods show a continued decrease.

PAR. 9. There are in the United States many manufacturers and distributors of candy who do not sell lottery or prize assortments of candy and who sell their "straight" merchandise in interstate commerce in competition with the "break and take" or "draw" or "deal" assortments, 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 market. This decrease in sales of "straight" candy is principally due to the gambling or lottery feature connected with the "break and take," "draw," or "deal" assortments.

PAR. 10. The exact annual volume of respondent's business was not shown but it consists principally in the sale of assortments similar to that described in paragraph 2 hereof.

217

Order

PAR. 11. The Commission further finds that the sale and distribution in interstate commerce of assortments as described in paragraph 2 hereof are contrary to public policy.

PAR. 12. The complaint in this case contains an allegation that the respondent represents that it is the manufacturer of the candy in which it deals; that this representation is false; and that it is an unfair method of competition, diverts trade from respondent's competitors, and is contrary to public interest. The evidence offered concerning this allegation of the complaint is meager and indefinite, and the Commission finds that the said allegation is not supported by the testimony.

CONCLUSION

The aforesaid acts and practices of the respondent, The Leader Novelty Candy Co., Inc., except as referred to in paragraph 12 above, 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 thereto, testimony and other evidence and stipulation entered into before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint, and in opposition thereto, brief filed herein by counsel for the Commission, respondent having waived filing of any brief and not having requested oral argument; 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, The Leader Novelty Candy Co., Inc., its officers, representatives, agents, and employees, in the sale, offering for sale, and distribution in interstate commerce of candy and candy products and of toy novelties, do cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers candy and other articles of merchandise so packed and assembled that sales of such candy and of other articles

Order

24 F. T. C.

of merchandise 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 and other articles of merchandise 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 and other articles of merchandise contained in said packages or assortments to the public.

(3) Packing or assembling in the same package or in separate packages for sale to the public at retail pieces of candy of uniform size and shape having centers of different colors and other articles of merchandise, which other articles of merchandise are to be given as prizes to the purchaser procuring a piece of candy of a particular color.

It is further ordered, That the respondent, The Leader Novelty Candy Co., Inc., 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.

Complaint

IN THE MATTER OF

HELENA RUBINSTEIN, INC.

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

Docket 2939. Complaint, Oct. 2, 1936—Decision, Dec. 15, 1936

Where a corporation engaged in the advertisement, sale, and distribution of a line of cosmetics, facial creams, and toilet preparations, including some fifteen separate products and, among others, "Youthifying Hand Cream," "Grecian Anti-Wrinkle Cream," "Golden Automatic Lipstick," "Youthful Herbal Mask," "Herbal Eye Tissue Oil," "Marienbad Slenderizing Bath Salts," "Eyelash Grower and Darkener," "Eye Lotion," "Hormone Scalp Food," "Hormone Beauty Mask," and "Hormone Twin Youthifier" creams "No. 1" and "No. 2," for day and night use respectively, in substantial competition with others engaged in distribution and sale of similar preparations in commerce among various States and the District of Columbia—
Misrepresented, in advertising said line of cosmetics, creams, and preparations in newspapers and periodicals of general circulation throughout the various States, and in advertising literature and folders printed and similarly circulated to customers and prospective customers, and through statements on the labels and containers thereof, the composition, properties and results of aforesaid various fifteen or sixteen preparations, and falsely represented that they would, as the case might be, serve as a food for or nourish the skin, muscles, or tissues, and prevent crows feet and wrinkles, and revitalize skin tissues, and contained living sparks of life which increased their therapeutic value, and that they would rebuild worn out cells and restore youth to dry, lined, wrinkled skin, and would dissolve fatty tissues and act as effective fat reducers, and strengthen the eye nerves:

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

Mr. Morton Nesmith for the Commission.

Mr. Henry M. Flateau, of New York City, for respondent.

COMPLAINT ¹

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 Helena Rubinstein, Inc., hereinafter referred to as respondent, has been and is now using

¹ An extended enumeration in Par. 3 of the complaint, quoting respondent's representations in advertising and on labels and containers, purporting to describe fifteen items offered and sold by it, which also appears in the findings, *infra*, at page 231, is omitted from the complaint as published.