

Syllabus

IN THE MATTER OF
CHARLES ELISCO, TRADING AS MAYWOOD CANDY
COMPANY

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

Docket 2970. Complaint, Nov. 6, 1936—Decision, Dec. 18, 1936

Where an individual, engaged in packing and assembling candy into assortments, including those which were so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, and which were composed of a number of small penny packages of candy, within the majority of which there were concealed articles of merchandise or prizes of equal value and amounting to a small fractional part of a cent, and within a few of which there were similarly concealed a one cent coin, thus distributed to purchasers wholly by lot or chance—

Sold to wholesalers and to retailers, for display and resale to 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 his said products 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 candy so packed and assembled, or otherwise arranged and packed, to the purchasing public as to involve a game of chance or sale of a chance to win something by chance, or any other method contrary to public policy, refrained therefrom;

With result that many dealers in and ultimate purchasers of candy were attracted by said method and manner of packing said products and by element of chance involved in sale thereof as aforesaid, and 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 the 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 or an equivalent practice because unlawful, lessen competition therein and tend to create a monopoly thereof in him and such other distributors as use such or an equivalent practice, deprive purchasing public of benefit of free competition in trade involved, and eliminate from said trade all actual, and exclude all potential, competitors who do not use such or equivalent methods.

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

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

Complaint

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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 Charles Elisco, individually, and trading as Maywood Candy Company, 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, Charles Elisco, is an individual doing business under the trade name Maywood Candy Company, with his principal office and place of business located at 415 Lake Street, Maywood, Ill. Respondent is now and for six months' last past has been engaged in the business of packing and assembling candy into assortments and selling and distributing such assortments of candy to wholesale and retail dealers located at points in various States of the United States, and causes and has caused his said products when so sold, to be transported from his principal place of business in the city of Maywood, State of Illinois, to purchasers thereof in the State of Illinois and in other States of the United States, at their respective places of business; and there is now and has been for six months 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 individuals and with partnerships and corporations 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 his business as described in paragraph 1 hereof, respondent sells and has sold to wholesale and retail dealers assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

Said assortments, sold and distributed by respondent, are composed of a number of small packages of candy which said packages retail at the price of one cent each. Each of said small packages of candy contains, in addition to the candy, an article of merchandise or a one cent coin. The majority of these articles of merchandise or prizes contained within the said packages have a value of a small fractional part of one cent, but a small number of the said packages contain a one cent coin. The articles of merchandise or prizes or

the one cent coin are concealed from the consuming public within the small packages of candy until after a selection has been made and the particular package selected broken open. The articles of merchandise, although having value of only a fractional part of a cent, are, nevertheless, of unequal value and are of a much lesser value than the one cent coins. The articles of merchandise or prizes of unequal value and the one cent coins are thus distributed to purchasers of the small packages of candy wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells his 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 his products, in accordance with the sales plan hereinabove set forth and said sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by his 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 an article of merchandise of greater value or a one cent coin.

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

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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 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. 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 November 6, 1936, issued and served its complaint in this proceeding upon respondent, Charles Elisco, individually, and trading as Maywood Candy Company, charging him with the use of unfair methods of competition in commerce in violation of the provisions of said act. On November 23, 1936, respondent filed his answer dated November 20, 1936, in which answer he admitted all the material allegations of the complaint to be true and stated that he 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 him 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 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, Charles Elisco, is an individual doing business under the trade name Maywood Candy Company, with his principal office and place of business located at 415 Lake Street, Maywood, Ill. Respondent is now and for six months last past has been engaged in the business of packing and assembling candy into assortments and selling and distributing such assortments of candy to wholesale and retail dealers located at points in various States of the United States, and causes and has caused his said products, when so sold, to be transported from his principal place of business in the city of Maywood, State of Illinois, to purchasers thereof in the State of Illinois and in other States of the United States, at their respective places of business; and there is now and has been for six months 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 individuals and with partnerships and corporations 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 his business as described in paragraph 1 hereof, respondent sells and has sold to wholesale and retail dealers assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

Said assortments sold and distributed by respondent are composed of a number of small packages of candy which said packages retail at the price of one cent each. Each of said small packages of candy contains, in addition to the candy, an article of merchandise or a one cent coin. The majority of these articles of merchandise or prizes contained within the said packages have a value of a small fractional part of one cent, but a small number of the said packages contain a

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one cent coin. The articles of merchandise or prizes or the one cent coin are concealed from the consuming public within the small packages of candy until after a selection has been made and the particular package selected broken open. The articles of merchandise, although having value of only a fractional part of a cent, are nevertheless of unequal value and are of a much lesser value than the one cent coins. The articles of merchandise or prizes of unequal value and the one cent coins are thus distributed to purchasers of the small packages of candy wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells his 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 his products in accordance with the sales plan hereinabove set forth, and said sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by his 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 an article of merchandise of greater value or a one cent coin.

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 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. 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, Charles Elisco, individually, and trading as Maywood Candy Company, 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 and the answer of respondent, in which answer respondent admits all the material allegations of the complaint to be true and states that he waives hearing on the charges set forth in said complaint and consents that, without further evidence or other intervening procedure, the Commission may

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issue and serve upon him 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, Charles Elisco, individually, and trading as Maywood Candy Company, his agents, representatives, and employees, in the sale, offering for 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, and 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 and retail dealers 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 assortments to the public.

(3) Packing or assembling in the same assortment of candy for sale to the public at retail small packages of candy of uniform appearance, a few of which small packages of candy have concealed within them a one cent coin in addition to the candy contained in said small packages.

It is further ordered, That the respondent, Charles Elisco, individually, and trading as Maywood Candy Company, shall, within 30 days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

Syllabus

IN THE MATTER OF

SOL BLOCK AND SIDNEY BLUMENTHAL, TRADING AS
RITTENHOUSE CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914*Docket 2071. Complaint, May 15, 1936¹—Decision, Dec. 19, 1936*

Where two partners 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 of candy carrying with sale thereof to public 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" candy 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 marked 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 which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to the consumers thereof and the consuming public in grocery stores, candy stores, drug stores, stores in vicinity of schools selling candy, and in practically all retail outlets where such product is sold, and which consisted of a number of penny pieces of candy of uniform size, shape, and quality, together with a small number of larger pieces of candy, a small number of one-cent coins inserted in an aluminum "lucky piece," and a punch board, for sale and distribution to purchasers under a plan by which penny purchasers secured one of said small uniform pieces only, or, additionally, one of the larger pieces, or a one-cent coin in the "lucky piece," in accordance with the particular number punched and procured by chance, as set forth on board's explanatory legend; so assembled and packed that such assortments were and might be sold by retailers to purchasing public, and with knowledge and intent that such assortments might be thus sold, as hereinbefore set forth, without alterations, addition, or rearrangement, to public by lot or chance by aforesaid retail dealers, 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

¹ Date is that of amended and supplemental complaint. Original findings and order in this matter on April 3, 1934 (18 F. T. C. 339), were vacated by order reopening, etc., on May 15, 1936. See 22 F. T. C. 911.