

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.

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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 certain retailers, finding such candy more salable, purchased their products and those of others employing the same methods of sale, some competitors began sale and distribution of candy for resale to public by lot or chance, for which, thus sold, there is demand, "straight" goods sales of such refusing competitors, who can compete on even terms only by giving same or similar devices to retailers, showed a continued decrease in their unwillingness to do so, public and competitors were prejudiced and injured and trade was diverted to them from their said competitors, and there was a restraint upon and a detriment to the freedom of fair and legitimate competition in the industry concerned:

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

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

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

AMENDED AND SUPPLEMENTAL COMPLAINT

Whereas, the Federal Trade Commission did heretofore, to wit on October 24, 1932, issue its complaint herein charging and alleging that respondents herein are and have been guilty of unfair methods of competition in interstate commerce within the meaning and intent 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, and

Whereas, this Commission having reason to believe that respondents herein have been and are using unfair methods of competition in commerce as "commerce" is defined in said act, other than and in addition to those in relation to which the Commission issued its complaint as aforesaid, and it appearing to said Commission that a further proceeding by it in respect thereof would be in the public interest:

Now, therefore, acting in the public interest, pursuant to the provisions of the act of September 26, 1914, aforesaid, the Federal Trade Commission charges that Sol Block & Sidney Blumenthal, individually and as copartners trading under the name and style of Rittenhouse Candy Company, have been and now are using unfair methods of competition in commerce as "commerce" is defined in said act, and states its charges in that respect as follows:

PARAGRAPH 1. The respondents are copartners trading under the name and style of Rittenhouse Candy Company, with their principal office and place of business located at Worth and Herbert Streets, in the city of Philadelphia, State of Pennsylvania. Respondents are engaged in the manufacture, sale, and distribution of candy and in the sale and distribution of candy specialties and punch board devices

for use in the sale of their candy products. Respondents sell their products to wholesale dealers and jobbers and to retail dealers located at points in the various States of the United States, and cause said products when so sold to be transported from their said principal place of business in the city of Philadelphia, in the State of Pennsylvania, 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 respondents in such candy between and among the States of the United States. In the course and conduct of their said business, respondents are in competition with other individuals, partnerships, and corporations 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 their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesale and retail dealers, various packages or assortments of candy, so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

One of said assortments is composed of a number of pieces of candy of uniform size, shape, and quality, a smaller number of larger pieces of candy, some penny coins, and an article of merchandise, together with a device commonly called a punchboard. The candy and article of merchandise contained in said assortment are distributed to purchasers of punches from said punchboard in the following manner: Punches from said board are 1¢ each, and when a punch is made a number is disclosed. There are as many separate numbers as there are punches on said board. The board bears statements or legends informing the prospective purchaser as to which numbers entitle him to receive a small piece of candy, and which numbers entitle him to receive a penny and a larger piece of candy. All purchasers of punches from said board receive a piece of candy, but certain punches, namely those disclosing a number specified in the legend, entitle the purchaser to a penny and a larger piece of candy. The purchaser of the last punch on the board receives a small piece of candy and the article of merchandise. The numbers on said punchboard are effectively concealed from purchasers or prospective purchasers until a punch has been made and the particular number separated from the punchboard. The additional article of merchandise, penny coins and larger pieces of candy contained in said assortment are thus distributed to purchasers of punches from said punchboards wholly by lot or chance.

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PAR. 3. The wholesale dealers and jobbers, to whom respondents sell their assortment, resell said assortment to retail dealers, and said retail dealers, and the retail dealers to whom respondents sell direct, expose said assortment for sale and sell said candy to the purchasing public in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their product in accordance with the sales plan hereinabove set forth, and with the capacity and tendency of inducing purchasers thereof to purchase respondents' said product in preference to candy offered for sale and sold by their 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 penny coins, larger pieces of candy, or an article of merchandise.

The use by respondents 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 respondents 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 respondents, 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 respondents' 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 respondents, in preference to candy offered for sale and sold by said competitors of respondents who do not use the same or equivalent methods. The use of said method by respondents has the tendency and capacity, because of said game of chance, to divert to respondents trade and custom from their 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 respondents 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 respondents 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 respondents 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 respondents are all to the prejudice of the public and of respondents' 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 October 24, 1932, issued and served a complaint upon the respondents, Sol Block and Sidney Blumenthal, individually and as copartners trading under the name and style of Rittenhouse Candy Company, charging that the respondents had been and were using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress. Thereafter on May 15, 1936, the Commission issued and served its amended and supplemental complaint on the respondents, charging them with the use of unfair methods of competition in commerce other than and in addition to those in relation to which the Commission issued its complaint on October 24, 1932, as aforesaid. No answer was filed by respondents; nevertheless hearings were had and testimony and other evidence in support of the said complaint were introduced by Henry C. Lank and P. C. Kolinski, attorneys for the Commission, before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly

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recorded and filed in the office of the Commission. No testimony or other evidence was introduced or offered by respondents.

Thereafter the proceeding regularly came on for final hearing before the Commission on the said amended and supplemental complaint, testimony and other evidence in support of the allegations of said complaint, the respondents having offered no testimony or other evidence in opposition thereto; 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. Respondents are individuals trading as a partnership under the firm name and style of Rittenhouse Candy Company, having their principal office and place of business at Worth and Herbert Streets in the city of Philadelphia, State of Pennsylvania. They are now, and for several years last past have been, engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers and jobbers located at points in the various States of the United States, and cause their said products, when so sold, to be transported from their principal place of business in the State of Pennsylvania 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 respondents in such candy between and among the States of the United States. In the course and conduct of such business, respondents are in competition with other partnerships and with corporations 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 their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesale dealers and jobbers various packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

One of said assortments is composed of a number of pieces of candy of uniform size, shape, and quality, a small number of larger pieces of candy, and a small number of one cent coins inserted in an aluminum "lucky piece," together with a device commonly called a punchboard. The candy and the one cent coins inserted in the lucky pieces are distributed to purchasers of punches from said punchboard in the following manner: Punches from said board are 1¢ each, and

when a punch is made a number is disclosed. There are as many separate numbers as there are punches on said board. The punch-board bears statements or legends informing customers and prospective customers as to which numbers entitle them to receive a small piece of candy, which numbers entitle them to receive a small piece of candy and one of the larger pieces of candy, and which numbers entitle them to receive the one cent coin in the lucky piece and a small piece of candy. All purchasers of punches from said board receive one of the small pieces of candy, but certain punches, namely, those disclosing a number specified in the legends, entitle the purchaser to a larger piece of candy or a one cent coin inserted in the lucky piece in addition to the small piece of candy. The numbers on said punch-board are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the particular number separated from the board. The larger pieces of candy and the one cent coins inserted in the lucky piece are thus distributed to purchasers of punches from said punchboard wholly by lot or chance.

PAR. 3. The lottery or prize assortment, as described in paragraph 2 hereof, is generally referred to in the candy industry as "break and take," "draw," or "deal" assortment, 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 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 the assortment described in paragraph 2 above from wholesale dealers or jobbers who in turn have purchased said assortment from respondents, and such retail dealers display said packages or assortments for sale to the public as packed by the respondents, 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 respondents are absolute sales and respondents retain no control in any manner over the goods, after they are 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 retail dealers to the purchasing public in the manner described.

The respondents have knowledge that said assortments will be resold to the purchasing public by retail dealers by lot or chance, and they pack and assemble 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 said retail dealers.

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

Respondents' candy is sold to the consuming public in grocery stores, candy stores, drug stores, stores in the vicinity of schools selling candy, and in practically all retail outlets where candy is sold.

Competitors of respondents 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 respondents 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. Certain retailers who find that they can dispose of more candy by the "break and take" or "draw" methods buy respondents' products and the products of others employing the same methods of sale, and thereby trade is diverted to respondents and others using similar methods from said competitors. Said competitors can compete on even terms only by giving the same or similar devices to retailers. This they are unwilling to do and their sales of "straight" 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 respondents have begun the sale and distribution of candy for resale to the public by lot or chance. The use of such methods by respondents in the sale and distribution of their candy is prejudicial and injurious to the public and to respondents' competitors and has resulted in the diversion of trade to respondents from their 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 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, the respondents manufacture candy which they sell to wholesale dealers and jobbers without any lottery or chance features. The annual volume of respondents' business is approximately \$250,000 or \$275,000 and while at the time of taking testimony the portion of respondents' business represented by the lottery or prize assortment, as described in paragraph 2 hereof, was comparatively small yet the evidence shows, and the Commission finds, that it has until recently constituted the major portion of respondents' total volume of business.

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.

CONCLUSION

The aforesaid acts and practices of respondents, Sol Block and Sidney Blumenthal, individually and as copartners trading under the name and style of Rittenhouse Candy Company, are to the prejudice of the public and of respondents' 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."

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ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended and supplemental complaint of the Commission, the testimony and other evidence in support of the allegations of said complaint taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, the respondents having offered no testimony or other evidence in opposition to the allegations of said complaint, and the Commission having made its findings as to the facts and its conclusion that said respondents have 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 respondents, Sol Block and Sidney Blumenthal, individually and as copartners trading under the name and style of Rittenhouse Candy Company, their 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 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 package 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 assortments to the public.

(3) Supplying to or placing in the hands of wholesale dealers and jobbers assortments of candy, together with a device commonly called a punchboard, for use, or which may be used, in distributing said candy to the public at retail.

(4) Furnishing to wholesale dealers and jobbers a device commonly called a punchboard, either with assortments of candy or separately, bearing a legend or legends or statements informing the consuming public that the candy is being sold by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

It is further ordered, That the respondents shall, within 30 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

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IN THE MATTER OF

C. G. HYRE, TRADING AS THE PEPSOTALIS COMPANY

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

Docket 2977. Complaint, Nov. 10, 1936—Decision, Dec. 19, 1936

Where an individual engaged in the compounding of a medicinal preparation called "Pepsotalis," and in the sale thereof to the drug trade—

Represented, on the containers thereof and in radio broadcasts, that his said preparation was an intestinal antiseptic and very helpful in cases of indigestion, acidity, and stomach disorders in general, and afforded quick relief in such cases, and had brought relief to countless numbers suffering from stomach trouble, and read and caused to be read purported letters from users thereof in which they were represented as stating that it had cured them or given them permanent relief from different forms of such trouble, notwithstanding fact it was nothing more than an antacid, whose only therapeutic effect was to decrease, temporarily, gastric hyperacidity;

With capacity and tendency to mislead and deceive purchasers into the erroneous and mistaken belief that said product was a competent intestinal antiseptic, and adequate and satisfactory remedy or treatment for indigestion and stomach troubles, and into the purchase thereof by reason of such belief, and with result that trade was unfairly diverted to him from those competitors who do not misrepresent the quality and character or effectiveness of their respective products; to the injury of competition in commerce:

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

Mr. Robt. N. McMillen for the Commission.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that C. G. Hyre, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, 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, C. G. Hyre is now, and has been for more than one year last past, doing business under the name and style of the Pepsotalis Company, with his principal place of business at Morgantown, W. Va. He is and has been engaged in the business of compounding and selling to the drug trade a medicinal preparation called Pepsotalis. Pursuant to such sales, and as a part thereof, respondent