

IN THE MATTER OF

D. GOLDENBERG, INC., AND FRANK RABINOWITZ, TRADING AS NOVELTY SWEETS COMPANY.¹

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

Docket 2808. Complaint, May 16, 1936—Decision, Dec. 21, 1936

Where an individual engaged in purchase of various types of candies and in assembling thereof into assortments which involved a lottery or chance feature when sold and distributed to ultimate consumers, and which consisted of a number of penny pieces of chocolate-covered candy of uniform size and shape, some of the enclosed concealed centers of which had colors differing from color of the majority thereof, and chance selection of which entitled recipient to certain larger pieces of candy and other articles of merchandise included therewith—

Sold said assortments to wholesalers, jobbers, and retailers, together with explanatory display cards for retailers' use, so assembled and packed that they might be and were displayed and sold by retail dealers to the consuming and purchasing public as hereinbefore described, and with knowledge and intent that, without alteration, addition or rearrangement, they might thus be resold to public by lot or chance by such retail dealers, and through use of such a lottery or gaming device, in violation of public policy:

Held, That such 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. Alfred M. Roth and *Mr. Isaac Ash*, of Philadelphia, Pa., for D. Goldenberg, Inc.

Mr. Lester L. Dolfman, of Philadelphia, Pa., for Frank Rabinowitz.

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 D. Goldenberg, Inc., a corporation, and Frank Rabinowitz, an individual, trading as Novelty Sweets Company, hereinafter referred to as respondents, have been and are 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:

¹ Dismissed as to D. Goldenberg, Inc.

PARAGRAPH 1. D. Goldenberg, Inc., is a corporation organized under the laws of the State of Pennsylvania, with its principal office and place of business located at I and Ontario Streets in the city of Philadelphia, State of Pennsylvania. The respondent, Frank Rabinowitz, is an individual, with his principal office and place of business located at 2019 East Arizona Street, in the city of Philadelphia, State of Pennsylvania. The above-named respondents are engaged in business at 2019 East Arizona Street, in the city of Philadelphia, State of Pennsylvania, and are doing business under the trade name of Novelty Sweets Company. They are now, and for some time last past have 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 cause and have caused their products when so sold to be transported from their place of business in the city of Philadelphia, Pa., to purchasers thereof in other States of the United States at their respective places of business; and there is now and has been for some time 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 said business, respondents are in competition with other corporations, 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 their business, as described in paragraph 1 hereof, respondents sell and have sold 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. The following detailed description of certain of said packages or assortments is not an all inclusive list of the packages sold and distributed by respondents, but illustrates the sales plan involved in the several assortments sold and distributed by respondents.

One of said assortments consists of a number of pieces of chocolate coated candy of uniform size and shape, together with a number of larger pieces of candy and other articles of merchandise, which larger pieces of candy and other articles of merchandise 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, and a still smaller number of said pieces of candy have centers of a still different color. The said pieces of candy of uniform size and shape in said assortment retail at the price of 1¢ each, but the pur-

chaser who procures one of said candies colored differently from the majority is entitled to receive and is to be given free of charge one of the said larger pieces of candy, or one of the other articles of merchandise heretofore referred to. The purchaser of the last piece of candy of uniform size and shape in said assortment is entitled to receive and is to be given free of charge one of the said other articles of merchandise. The color of the centers of said pieces of candy of uniform size and shape is effectively concealed from the purchasers and prospective purchasers until a selection has been made and the piece of candy broken open. 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 larger pieces of candy or one of the other articles of merchandise wholly by lot or chance.

The respondents sell and distribute several variations of the above assortment, but all involving the same principle or sales plan. Some of the assortments which respondents sell by the above sales plan are named and designated: "Bullseye," "Knockout Punch," "Movies," "Pen and Pencil," "Harmony," "Easy Sailing," "Champion," "Good Scout," "Rainbow Eggs."

Respondents also furnish with certain of said assortments a display card to be used by the retailer in offering said assortments to the consuming public.

PAR. 3. The wholesale dealers and jobbers, to whom respondents sell their assortments, resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondents sell direct expose said assortments for sale and sell the same 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 its product in accordance with the sales plan hereinabove set forth, and said sales plan has 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 larger pieces of candy or other articles 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 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 respondent 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 May 16, 1936, issued and served a complaint upon the respondents, D. Goldenberg, Inc., a corporation, and Frank Rabinowitz, an individual, trading as Novelty Sweets 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. Respondent, D. Goldenberg, Inc., was represented by Isaac Ash, Esq., and Alfred M. Roth, Esq., and filed answer dated June 1, 1936, denying the material allegations of the complaint. Respondent, Frank Rabinowitz, was represented by Lester L. Dolfman, Esq., and subsequent to the hearings herein filed answer dated December 15, 1936, admitting all the material allegations of the complaint except those which the said respondent denied when he was called as a witness in this matter on July 7, 1936. Hearings were held and testimony and other evidence 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. Said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter the proceeding regularly came on for final hearing before the Commission on said complaint, the answers thereto, testimony and other evidence in support thereof and on the brief of counsel for the Commission respondents through their counsel having advised that they did not desire to file brief nor to present 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, D. Goldenberg, Inc., is a corporation organized under the laws of the State of Pennsylvania, with its principal office and place of business located at I and Ontario Streets, Philadelphia, Pa., and is and has been for several years last past engaged in the manufacture, sale, and distribution of candy and

candy products to wholesale dealers and jobbers located at points in the various States in the eastern part of the United States, and has caused such products, when so sold, to be transported from its principal place of business in the State of Pennsylvania to the purchasers thereof at their respective points of location.

Respondent, Frank Rabinowitz, is an individual with his place of business located at 2019 East Arizona Street, Philadelphia, Pa., and has been engaged in the sale and distribution of candy and candy products to wholesale dealers, jobbers, and retail dealers located at points in the various States of the eastern part of the United States, and has caused such products, when so sold, to be transported from his principal place of business to the purchasers thereof at their respective points of location.

PAR. 2. Respondent, Frank Rabinowitz, was called as a witness by counsel for the Commission and testified, and the Commission finds, that he is an individual and was doing business under the trade name Novelty Sweets Company; that he began such business on or about November 15, 1935, purchasing various types of candies from the respondent, D. Goldenberg, Inc., and assembling such candies into assortments; and that he sold and distributed such assortments to wholesale dealers, jobbers, and retail dealers in the State of Pennsylvania and in the several States of the United States bordering on or surrounding the State of Pennsylvania.

The respondent, Frank Rabinowitz, trading as Novelty Sweets Company, before reselling said candy, assembled the same into assortments involving a lottery or chance feature when sold and distributed to the ultimate consumers thereof, as follows: Said assortments consisted of a number of pieces of chocolate covered candy of uniform size and shape, together with a number of larger pieces of candy and other articles of merchandise. 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, and a still smaller number of said pieces of candy had centers of a still different color. The said pieces of candy of uniform size and shape in said assortments retailed at the price of 1¢ each, but the purchaser who procured one of the said candies colored differently from the majority was entitled to receive, and was to be given free of charge, one of the said larger pieces of candy or one of the other articles of merchandise heretofore referred to. The purchaser of the last piece of candy of uniform size and shape in said assortments was entitled to receive, and was to be given free of charge, one of the said other articles of merchandise. The color of the centers of the said pieces of candy of uniform size and shape was

effectively concealed from purchasers and prospective purchasers 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 said pieces of candy of uniform size and shape in said assortments, thus procured one of the said larger pieces of candy or one of the other articles of merchandise wholly by lot or chance.

The respondent, Frank Rabinowitz, assembled, sold and distributed several variations of the above assortment but all involving the same principle or sales plan. Some of the assortments which the respondent, Frank Rabinowitz, sold and distributed, and which involved the above described sales plan, were named and designated: "Bull's Eye," "Knockout Punch," "Movies," "Pen and Pencil," "Harmony," "Easy Sailing," "Champion," "Good Scout," and "Rainbow Eggs."

Respondent, Frank Rabinowitz, also included and furnished with certain of said assortments a display card to be used by the retail dealer in offering said assortments to the consuming public, which display cards bore legends or statements informing the consuming public that the said assortments were being sold and distributed in accordance with the above sales plan.

PAR. 3. The lottery or prize assortments, as described in paragraph 2 above, are generally referred to in the candy industry as "break and take" assortments, and assortments of candy without any gaming device or lottery features 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 purchased the assortments described in paragraph 2 above direct from the respondent, Frank Rabinowitz, or from wholesale dealers or jobbers who in turn had purchased said assortments from respondent, Frank Rabinowitz, and such retail dealers displayed said packages for sale to the public as packed by said respondent, and the candy contained in said assortments were sold and distributed to the consuming public in the manner described.

PAR. 5. All sales made by respondent, Frank Rabinowitz, whether to wholesale dealers and jobbers or to retail dealers, were absolute sales and said respondent retained no control in any manner over the goods after they were delivered to the wholesale dealer or jobber or retail dealer. The assortments, as described in paragraph 2 hereof, were assembled and packed in such a manner that they might be sold by retail dealers to the purchasing public in the manner described.

The respondent, Frank Rabinowitz, had knowledge that said assortments would be resold to the purchasing public by retail dealers by lot or chance, and he packed and assembled such candy in the way and manner described so that, without alteration, addition or rearrangement, they might 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 methods described in paragraph 2 above is a sale and distribution of candy by lot or chance and constitutes a lottery or gaming device.

PAR. 7. The respondent, Frank Rabinowitz, when called as a witness denied that the business conducted by him under the trade name Novelty Sweets Company was in any way a partnership or joint enterprise with the respondent, D. Goldenberg, Inc., but stated that the said business was his business exclusively, and he did not deny any of the facts hereinabove set forth.

PAR. 8. 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. 9. The respondent, Frank Rabinowitz, commenced business as described in paragraph 1 hereof, on or about November 15, 1935, and, according to his testimony, discontinued said business on or about June 15, 1936, said discontinuance being subsequent to the issuance of the complaint herein but prior to the date when hearings were held. The Commission further finds that the use of the trade name or style, Novelty Sweets Company, was used by respondent, Frank Rabinowitz, and was not a trade name or style also adopted by respondent, D. Goldenberg, Inc.

PAR. 10. The testimony is to the effect, and the Commission finds, that for several years last past the respondent, D. Goldenberg, Inc., has not manufactured and distributed, in its own name and right or by any trade name or style, any candy assortments involving the lottery or chance feature and described in these finds as "break and take" assortments; said testimony is further to the effect, and the Commission finds, that the respondent, D. Goldenberg, Inc., has packed and sold all of its candy products as "straight" merchandise. The Commission further finds that the evidence adduced fails to support the allegation of the complaint that the business carried on under the trade name, Novelty Sweets Company, was a joint enterprise of D. Goldenberg, Inc., a corporation, and Frank Rabinowitz, an individual; and finds that the business carried on under the trade name, Novelty Sweets Company, was the exclusive business of the respondent, Frank Rabinowitz.

Order

24 F. T. C.

CONCLUSION

The aforesaid practices of the said respondent, Frank Rabinowitz, individually, and trading as Novelty Sweets Company, are to the prejudice of the public and respondent's competitors and are unfair methods of competition in interstate commerce and constitute a violation 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, ETC.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, D. Goldenberg, Inc., the answer of the respondent, Frank Rabinowitz, individually and trading as Novelty Sweets Company, admitting all the material allegations of the complaint to be true except those which said respondent denied when he was called as a witness on July 7, 1936, the testimony and other evidence taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it; and the Commission having made its findings as to the facts and its conclusion that the respondent, Frank Rabinowitz, 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 complaint issued herein be and the same hereby is dismissed as to the respondent, D. Goldenberg, Inc., for the reason that the evidence fails to establish the allegations of the complaint as to said respondent.

It is further ordered, That the respondent, Frank Rabinowitz, individually, and trading as Novelty Sweets Company, his agents, representatives, 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 retail dealers, and 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 retail dealers and wholesale dealers and jobbers 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 candy or candy products contained in said assortments to the public.

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

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

And it is further ordered, That the respondent Frank Rabinowitz, individually, and trading as Novelty Sweets Company, shall, within 30 days after the 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.

IN THE MATTER OF
FORT CLARK DISTILLERIES, INC.

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

Docket 2949. Complaint, Oct. 16, 1936—Decision, Dec. 21, 1936

Where a corporation engaged, as rectifier and wholesaler of distilled spirits, in purchasing and bottling whiskies, gins, and other spirituous beverages, including product by it branded as "Prescription Whiskey," and in making gin with a still which it used therefor by redistillation of purchased alcohol, not produced by it, over juniper berries and other aromatics, and in selling its aforesaid various products in trade and commerce among the various States and in the District of Columbia, in substantial competition with those engaged in manufacture by true distillation of whiskies, gins, and other spirituous beverages from mash, wort, or wash, and in sale thereof as aforesaid, and with those engaged in purchasing, rectifying, blending, and bottling such various beverages and in similarly selling same, and including among said competitors those who, as manufacturers and distillers from mash, wort, or wash of whiskies, gins, 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, advertising, and labels of the bottles in which they sell and ship such products, and those who, engaged in purchasing, rectifying, blending, and bottling such various products, do not use aforesaid words as above set forth, and also with those who do not misrepresent the strength, quality, or purity of their whiskies nor that such products are specially produced for medicinal use—

- (a) Represented, through use of word "Distilleries" in its corporate name, printed on its stationery and on the labels attached to the bottles in which it sold and shipped its said products, and in various other ways to its customers, and furnished the same with the means of representing to their vendees, both retailers and ultimate consuming public, that whiskies, gins, and other spirituous beverages contained in such bottles were by it made through process of distillation from mash, wort, or wash, notwithstanding fact it did not distill such various beverages thus bottled, labeled, sold, and transported by it, and did not own, operate, or control any place where alcoholic liquors are made by original and continuous distillation from mash, wort, or wash through continuous closed pipes and vessels until manufacture thereof is complete, as long definitely understood in trade and by ultimate purchasing public from word "distillery," and was not a distiller, for the purchase of the bottled products of which there is a preference on the part of a substantial portion of the purchasing public; and
- (b) Represented and implied, by various references to its "Prescription" Brand whiskey and to physicians, hospitals, and nurses and the United States Pharmacopoeia, in advertising booklets attached to each bottle, that its aforesaid whiskey conformed to the requirements thereof or was of a kind, nature, and quality superior to the standard of whiskey speci-