

IN THE MATTER OF
VONEIFF-DRAYER COMPANY¹

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

Docket 1724. Complaint, Nov. 21, 1929—Decision, Jan. 15, 1937

Where a corporation engaged in manufacture and sale of "straight" goods candy and of so-called "break and take" assortments, principal trade demand for which comes from the small retailers with stores, in many instances, near schools and patronized by school children, and sale and distribution of which, or of candy giving, 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 and principal consumers or purchasers 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, has been followed by marked decrease in sales of such "straight" candy, due to gambling or lottery feature connected with so-called "break and take" merchandise—
Sold to wholesalers assortments composed of a number of penny pieces of chocolate covered candy of uniform size and shape, of which the centers of a relatively few were chocolate instead of white, and which the centers of a still smaller number, relatively were pink, together with a number of larger pieces and also a number of still larger pieces, to be given free of charge to those selecting, by chance, chocolate centers or pink centers, as the case might be, and together with explanatory display cards for retailers' use in offering same to public; so assembled and packed that such assortments were and might be displayed and sold by numerous retail dealer purchasers thereof, in accordance with above described plan and display cards, in practically all types of stores where candy is sold, and with knowledge and intent that such assortments might thus be displayed and sold by lot or chance to public by retail dealers as above set forth, 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 retailers with a means of violating 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 retailers, finding such candy more salable, purchased its products and those of others employing similar methods, some competitors began sale and distribution of candy for resale to public by lot or chance, "straight" goods sales of such refusing competitors, who can compete on even terms only by giving same or similar devices to retail dealers, showed a continued decrease in their unwillingness to do so, public and

¹ Original findings and order in this matter on April 3, 1934 (18 F. T. C. 280), were vacated and set aside on October 16, 1935. See footnote in 21 F. T. C. 745.

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competitors were prejudiced and injured, and trade was diverted to it from said competitors, and there was a restraint upon and detriment to the freedom of fair and legitimate competition in the industry concerned:

Held, That such acts and practices were all 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.

COMPLAINT

Acting in the public interest 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 charges that the Voneiff-Drayer Company, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Maryland, with its principal office and place of business in the city of Baltimore in said State. It is engaged in the manufacture of candies and the sale thereof to wholesale dealers located at points in various States of the United States. It causes its said products when so sold to be transported from its said principal place of business in the city of Baltimore, Md., into and through other States of the United States to said vendees at their respective points of location. In the course and conduct of said business, respondent is in competition with other individuals, partnerships, and corporations engaged in the manufacture of candies and the sale and transportation thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its aforesaid business, respondent sells to aforesaid wholesale dealers certain packages or assortments of candies named and dominated by respondent "Vee-Dee." Said packages or assortments of candies are composed of three assortments, called respectively, "Bar Assortment," "Package Assortment," and "Blank Assortment." Each of said assortments of candies are composed of a number of chocolate covered pieces of candy, of uniform size and shape, which are sold at retail at the uniform price of one cent each, together with a number of larger pieces of candy known as "Bars" or "Patties," which are to be given as prizes to purchasers of said chocolate covered candies, in the following manner:

Among aforesaid chocolate covered candies are a number having colored centers, and when said packages of candies are displayed for

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sale to the consuming public every purchaser of aforesaid chocolate covered candies at the price of one cent each who procures one of said candies having a colored center is entitled to receive, and is to be given free of charge, one of the "Bars" or "Patties" heretofore referred to. Also included in the assortments known as "Bar Assortment" and "Package Assortment" is a larger piece of candy known as a "Bar" or "Patty," and a 4-ounce box of chocolates, respectively. The purchaser of the last piece of aforesaid chocolate covered candies at the price of one cent each in each of said assortments of candies, respectively, is entitled to receive, and is to be given free of charge, said "Bar" or "Patty," or said 4-ounce box of chocolates. Aforesaid purchasers of said candies who procure candies having a colored center, or who purchase the last piece of candy in each of said assortments, are thus to procure one of said larger pieces of candy, or a box of 4-ounce chocolates, wholly by lot or chance.

The package or assortment of candies known as "Blank Assortment" contains a number of pieces having a colored center, as in the other two assortments aforesaid, but the larger pieces of candy which are to be given as prizes to purchasers of the candy having colored centers, are not supplied by respondent but are supplied to the retailer by the wholesale dealer to whom respondent sells the assortment, and such larger pieces of candy or prizes are wholly within the discretion of said wholesale dealer.

Respondent furnishes with each of said packages or assortments of candies called "Bar Assortment" and "Package Assortment," a display card to be used by the retailer in offering said candies for sale, which display card bears a legend and statement informing the reader that persons purchasing said candies having a colored center, and purchasing the last piece of candy in each of said assortments, will receive one of said larger pieces of candy free of charge.

PAR. 3. Aforesaid wholesale dealers of respondent resell said "Vee-Dee" Assortments to retail dealers in various States of the United States, and said retail dealers expose said assortments for sale in connection with aforesaid explanatory card and sell said candies to the purchasing public according to aforesaid plan, whereby the purchaser of said candies having colored centers and the purchaser of the last piece of candy in said assortments procure and receive free of charge one of said larger pieces of candy, or a 4-ounce box of chocolates, hereinbefore referred to. Respondent thus supplies to and places in the hands of others the means of conducting a lottery wherein said larger pieces of candy and 4-ounce boxes of chocolates are distributed and given to the purchasing public wholly by lot or chance.

PAR. 4. Among the purchasers of respondent referred to in paragraph 1 hereof, are many who sell chocolate and other candies at wholesale at reasonable wholesale prices, and who do not offer and place in the hands of others any additional candy or other merchandise to be given to purchasers by chance or otherwise. Respondent's aforesaid practices thus tend to and do induce many of the consuming public to purchase respondent's said candies in preference to the candies of respondent's said competitors, because of the chance of obtaining certain pieces of candy free of charge.

PAR. 5. For more than two years last past respondent has engaged in the acts and practices under the conditions and circumstances and with the results all hereinbefore set out.

PAR. 6. The above alleged acts and practices of respondent are all to the prejudice of the public and respondent's competitors, and 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 21, 1929, issued and served its complaint in this proceeding upon the respondent, Voneiff-Drayer Company, a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. Respondent filed answer thereto on December 26, 1929, and thereafter on March 28, 1934, filed a substitute answer dated February 28, 1934, consenting that the Commission might make, enter, issue and serve upon it an order to cease and desist from the practices complained of, after first having obtained leave to withdraw its answer filed on December 26, 1929. Subsequent thereto, on April 3, 1934, the Commission entered an order against respondent to cease and desist from the practices complained of in said complaint.

On October 16, 1935, the Commission entered and served its order vacating and setting aside the aforesaid order to cease and desist entered on April 3, 1934. Thereafter testimony and other evidence in support of the allegations of the complaint were introduced by Henry C. Lank and P. C. Kolinski, attorneys for the Commission, before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it. Respondent was not represented by counsel and

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offered no testimony or other evidence in opposition to the charges of the complaint. Said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter this proceeding regularly came on for final hearing before the Commission on the said complaint, answer of the respondent, the testimony and other evidence duly recorded and filed in the office of the Commission, respondent having indicated that it did not desire to file any brief nor to orally argue the matter, and the Commission having duly considered the matter and being fully advised in the premises finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Voneiff-Drayer Company, is a corporation organized under the laws of the State of Maryland, with its principal office and place of business located in the city of Baltimore in said State. Respondent is now, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to wholesale dealers located at points in the various States of the United States, and causes said candy, when so sold, to be shipped or transported from its principal place of business in the State of Maryland to purchasers thereof in Maryland and in other States of the United States at their respective places of business. In so carrying on said business, respondent is and has been engaged in interstate commerce and is and has been in active competition with other corporations and with partnerships and individuals engaged in the manufacture of candy, and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. Among the candy manufactured and sold by respondent are several assortments known and designated by respondent as "Vee-Dee." Said assortments are composed of a number of pieces of chocolate covered candy of uniform size and shape, together with a number of larger pieces of candy and a number of still larger pieces of candy. These larger pieces of candy are given as prizes to purchasers of said chocolate covered candy of uniform size and shape in the following manner:

The majority of the said pieces of chocolate covered candy in said assortments have white centers, but a small number of said pieces of chocolate covered candy have chocolate centers and a still smaller number of said chocolate covered candy have pink centers. Said pieces of candy of uniform size and shape retail at the price of 1¢ each, but the purchasers who procure one of the said pieces of candy

having a chocolate center are entitled to receive, and to be given free of charge, one of the said larger pieces of candy heretofore referred to, and the purchasers who procure one of the said pieces of candy having a pink center are entitled to receive, and are to be given free of charge, one of the still larger pieces of candy heretofore referred to. The color of the center of said pieces of candy of uniform size and shape is effectively concealed from purchasers and prospective purchasers until a selection has been made and the piece of candy selected broken open. The aforesaid purchasers of said candy, who procure a chocolate or a pink center, thus procure one of the said larger pieces of candy or one of the still larger pieces of candy wholly by lot or chance.

Respondent furnishes to said wholesale dealers a display card to be used by the retail dealer in offering said candy for sale to the public. The display card bears a legend or legends informing the prospective purchaser that the said assortment is being distributed in accordance with the above described sales plan.

PAR. 3. The candy assortments involving the lot or chance feature, as described in paragraph 2 above, are generally referred to in the candy trade or industry as "break and take" assortments. Assortments of candy without the lot or chance feature in connection with their resale to the public are generally referred to in the candy trade or industry as "straight" goods. These terms will be used hereafter in these findings to designate these types of assortments.

PAR. 4. Numerous retail dealers purchase and have purchased the said assortments described in paragraph 2 above from wholesale dealers and jobbers who in turn have purchased said assortments from the respondent. Such retail dealers display said assortments for sale to the public as packed and assembled by the respondent, and the candy contained in said assortments is sold and distributed to the consuming public in accordance with the above described sales plan and in accordance with the legends printed on the display card.

PAR. 5. The respondent sells its merchandise to wholesale dealers and jobbers in the various states of the United States. Respondent's assortments, both "straight" and "break and take," are resold in practically all types of stores where candy is sold.

PAR. 6. All sales made by respondent are absolute sales and respondent retains no control in any way 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 and may be displayed by the retail dealer for sale and distribution to the purchasing public in accordance with the above described sales plan.

The respondent has knowledge that said assortments will be resold to the purchasing public by retail dealers by lot or chance and it packs and assembles such candy in the way and manner described so that it may and can be resold to the public by retail dealers in the manner described.

PAR. 7. The sale and distribution of candy by the retail dealers by the method herein described is a sale and distribution of candy by lot or chance and constitutes a lottery or gaming device.

Competitors of respondent appeared as witnesses in this proceeding and testified, and the Commission finds as a fact, that many competitors regard such methods of sale and distribution as morally bad and as encouraging gambling especially among children; as injurious to the candy industry because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several States. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. The retailers, finding that they can dispose of more candy by the "break and take" method, buy from respondent and others employing the same methods of sale and thereby trade is diverted to respondent and others using similar methods from said competitors. Said competitors can compete on even terms only by giving the same or similar device to retail dealers. This they are unwilling to do, and their sales of "straight" candy show a continued decrease.

In order to meet the competition of manufacturers who sell and distribute candy which is resold by such methods, some competitors of respondent have begun the sale and distribution of candy for resale to the public by lot or chance. The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its competitors and has resulted in the diversion of trade to respondent from said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 8. There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize assortments and who sell their "straight" candy in interstate commerce in competition with the "break and take" assortments of respondent and other manufacturers of similar candy. The sale of candy without a lottery or gaming feature in connection therewith is adversely affected by the sale of "break and take" candy, and manufacturers of the former

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 market. This decrease in the sales of "straight" candy is principally due to the gambling or lottery feature connected with the "break and take" candy.

PAR. 9. The principal demand in the trade for the "break and take" 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 assortments are principally children, and because of the lottery or gambling feature connected with the "break and take" assortments and the possibility of becoming a winner it has been observed that the children purchase them in preference to the "straight" candy when the two types of assortments are displayed side by side.

The children prefer to purchase the lottery or prize assortments of candy because of the gambling feature connected with their sale. The sale and distribution of "break and take" assortments 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. 10. An officer of the respondent testified, and the Commission finds, that the gross annual sales of the respondent are approximately \$650,000. The evidence does not disclose how much of this annual business is "break and take" assortments nor how much is "straight" candy, but the evidence shows, and the Commission finds, that the "break and take" business of the respondent is and has been a substantial part of its total volume.

PAR. 11. The Commission further finds that the sale and distribution in interstate commerce of assortments so packed and assembled as to enable retail dealers, without alteration, addition, or rearrangement, to resell the same to the consuming public by lot or chance is contrary to public policy.

CONCLUSION

The aforesaid acts and practices of the respondent, Voneiff-Drayer Company, a corporation, under the conditions and circumstances set forth in the foregoing findings of fact, are all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in commerce and constitute a violation 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of the respondent, testimony and other evidence taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint, no testimony or other evidence having been offered by respondent in opposition thereto, 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, Voneiff-Drayer Company, a corporation, its officers, representatives, agents, and employees, in the offering for sale, sale, and distribution in interstate commerce of candy, do cease and desist from:

1. Selling and distributing to jobbers and wholesale dealers for resale to retail dealers candy so packed and assembled that sales of such candy to the general public are made by means of a lottery, gaming device, or gift enterprise.

2. Supplying to or placing in the hands of 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 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 pieces of candy of uniform size and shape having centers of different color, together with larger pieces of candy, which said larger pieces of candy are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

4. Furnishing to wholesale dealers and jobbers display cards, either with assortments of candy or separately, bearing a legend or legends 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.

It is further ordered, That the respondent shall, within 30 days after 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.

Syllabus

IN THE MATTER OF
BANNER DISTILLING COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 3
OF TITLE I OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933¹

Docket 2397. Complaint, May 18, 1935—Decision, Jan. 15, 1937

Where a corporation engaged as rectifier and wholesaler of spirituous liquors, in purchasing and bottling whiskies and gins and other spirituous beverages, including different grades of cordials made by it through combining fruit and fruit flavors with neutral spirits or whiskey, and purchasing, incident to its aforesaid business, its entire distilled spirits requirements of both whiskey and alcohol from distillers who produced same from the raw materials, and in selling its aforesaid various products at wholesale in constant course of trade and commerce among the various States and in the District of Columbia, in substantial competition with those engaged in the manufacture by distillation of whiskies, gins, and other spirituous beverages and in selling same 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 of whiskies, gins, and other spirituous beverages sold by them from mash, wort or wash as above set forth, truthfully use words "distillery," "distilleries," "distillers," or "distilling" as a part of their corporate names and on their stationery, advertising, and on the labels of the bottles in which they sell and ship their said products, and those who, engaged in rectifying, blending, and bottling such various products, do not use aforesaid words as above set forth—

Represented, through use of word "Distilling" in its corporate name, printed on its stationery and advertising and on the labels attached to the bottles in which it sold and shipped its said products, together with the words "Bottled by" on some of its labels, "Produced in California and Bottled by" on others, "Prepared and Bottled by" on others, and "Made and Bottled by" on still others, and words "Rectifiers and Blenders" on its stationery, invoices and advertising matter, and through other ways to its customers, and furnished same with the means of representing to their vendees, both retailers and ultimate consuming public, that the 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 thus distill said whiskies, gins and other spirituous beverages, thus bottled, labeled, sold, and transported by it, by process of original and continuous distillation from mash, wort, or wash through continuous closed pipes and vessels until manufacture is complete, as long definitely understood from word "Distilling" in liquor industry in the trade and by the ultimate purchasing public, and did not rectify, purify, or refine distilled spirits or wines by such process, and was not a distiller, for the purchase

¹ Count 2 of the complaint, under the National Industrial Recovery Act, dismissed by reason of decision in *A. L. A. Schechter Poultry Corp. v. U. S.*, 295 U. S. 495.