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IN THE MATTER OF
PLANTATION CHOCOLATE COMPANY, INC.

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

Docket 2777. Complaint, Apr. 21, 1936—Decision, Mar. 4, 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 candy, affording with sale thereof to public opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children, principal consumers or purchasers of such type of candy and largest class by far thereof, 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 principally to gambling or lottery feature connected with so-called "break-and-take" merchandise—

Sold to wholesale and retail dealers its so-called "Here-Tiz" assortments, composed of a number of small penny pieces of chocolate-covered candy of uniform size and shape, the color of the concealed centers of a small number of which differed from that of the majority thereof, together with a number of larger pieces of candy to be given as prizes to those procuring one of said pieces, colored center of which differed, as aforesaid, from majority thereof, and also together with a still larger piece, to which purchaser of last piece of aforesaid chocolate-covered candies was entitled without charge; so assembled and packed that such assortments might be, and were, displayed and sold to consuming public by numerous retail dealers purchasers thereof in accordance with above-described plan, and with knowledge and intent that such assortments could and would thus be resold to public by retail dealers by lot or chance without alteration, addition, or rearrangement, 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, 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 the means of violating the laws of the several States, and some of whom, for such reasons, refuse to sell candy so packed and assembled that it can be resold to public by lot or chance;

With result that some competitors began sale and distribution of candy for resale to public as above set forth, to meet competition of those manufacturers who thus sold and distributed their candy, for which product as thus sold there is demand; sales of "straight" candy of aforesaid refusing competitors who can compete on even terms only by giving same or similar devices to retailers, showed a continued decrease; public and competitors were prejudiced and injured, and trade was diverted from latter to it, and

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there was a restraint upon and a detriment to the freedom of fair and legitimate competition in industry involved:

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.

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 Plantation Chocolate Co., Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Pennsylvania with its principal office and place of business located at 3150 Janney Street, in the city of Philadelphia, State of Pennsylvania. It is now and for several years last past has been engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers, located at points in the various States of the United States and causes and has caused its products, when so sold, to be transported from its principal 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 several years last past a course of trade and commerce by said respondent in such candy between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other corporations and with partnerships and individuals engaged in the 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 its business, as described in paragraph 1 hereof, respondent sells and has sold since on or about December 1935, 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;

One of said assortments consists of a number of pieces of candy of uniform size and shape, together with a number of larger pieces of

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candy, which larger pieces of candy 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. The said pieces of candy of uniform size and shape in said assortment, retail at the price of 1¢ each, but the purchaser who procures one of said candies having a center 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 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 a still larger piece of candy also contained in said assortment. The color of the centers of said pieces of candy of uniform size and shape is effectively concealed from the purchaser and prospective purchaser until a selection has been made and the piece of candy broken up. 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 wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortment, resell said assortment to retail dealers, and said retail dealers, and the retail dealers to whom respondent sells direct, expose said assortment for sale and sell said candy to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its product in accordance with the sales plan hereinabove set forth, as a means of inducing purchasers thereof to purchase respondent's said product in preference to candy offered for sale and sold by its competitors.

PAR. 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.

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 its said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by the respondent has the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, 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 April 21, 1936, issued and served its complaint in this proceeding upon the respondent, Plantation Chocolate Co., Inc., a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. Respondent filed no answer thereto, but testimony and other evidence in support of the allegations of 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 recorded and filed in the office of the Commission. Respondent was not represented by counsel and offered no testimony or other evidence.

Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint, testimony and other evidence, and brief of counsel for the Commission in support of the complaint; 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. The respondent, Plantation Chocolate Co., Inc., is a corporation organized under the laws of the State of Pennsylvania, with its principal office and place of business located at 3150 Janney Street, Philadelphia, Pa. Respondent is now, and for several years last past has been engaged in the manufacture of candy in Philadelphia, Pa., and in the sale and distribution of said candy to retail and wholesale dealers located in the State of Pennsylvania and in the majority of the other States of the United States. It causes said candy when sold to be shipped or transported from its principal place of business in Philadelphia, Pa., to purchasers thereof in Pennsylvania 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 was an assortment designated as "Here Tiz," composed of a number of small chocolate covered pieces of candy of uniform size and shape, together with a number of larger pieces of candy and one still larger piece of candy. The larger pieces of candy and the largest piece of candy were given as prizes to the purchasers or consumers of said chocolate covered candies, in the following manner:

The majority of the said chocolate covered candies in said assortment had white centers, but a small number of said chocolate covered candies had pink centers. The color of the centers of the said chocolate covered candies was effectively concealed from purchasers and prospective purchasers until a selection had been made and the particular piece of candy broken open. The said chocolate covered candies retailed at the piece of 1¢ each, but the purchaser or consumer who procured one of the said candies having a pink center was entitled to receive, and was given free of charge, one of the larger pieces of candy. The purchaser of the last piece of said chocolate covered candy was entitled to receive, and was given free of charge, the largest piece of candy in said assortment. The larger pieces of candy in said assortment were thus distributed to purchasers of the small chocolate covered candies wholly by lot or chance.

PAR. 3. 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 have purchased assortments as described in paragraph 2 above, direct from respondent or from wholesale dealers and jobbers who in turn have purchased said assortments from respondent. Such retail dealers displayed said assortments for sale to the public as packed and assembled by the respondent, and the candy contained in said assortments was sold and distributed to the consuming public in accordance with the above described sales plan.

PAR. 5. All sales made by respondent were absolute sales, and respondent retained no control over the goods after they were delivered to the retail dealers or the wholesale dealers and jobbers. The assortments were packed in such manner that they could be displayed and offered for sale, and were designed to be displayed and offered for sale, without alteration, addition or rearrangement, to the consuming public by means of a lottery, gaming device or gift enterprise.

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The sale and distribution of candy by retail dealers by the method described herein is the sale and distribution of candy by lot or chance and constitutes a lottery, gaming device or gift enterprise. In the sale and distribution to retail dealers and to wholesale dealers and jobbers for resale to retail dealers of assortments of candy assembled and packed, as described in paragraph 2, respondent had knowledge that the said candy would be resold to the purchasing public by retail dealers by lot or chance, and it packed and assembled such candy in the way and manner described so that it might, without alteration, addition, or rearrangement, be resold to the public by lot or chance by said retail dealers.

PAR. 6. Many competitors of respondent 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 and have refused 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. 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" candy 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 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 respondent's competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 7. The principal demand in the trade for the "break and take" candy assortments 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 candy 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.

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The children prefer to purchase the lottery or prize assortments of candy because of the gambling feature connected with its 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. 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" candy in interstate commerce in competition with the "break and take" candy, and manufacturers of the "straight" type of candy have noted a marked decrease in the sales of their product whenever and wherever the lottery or prize candy has appeared in their markets. 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. An officer of the respondent corporation was called as a witness and testified, and the Commission finds, that the total volume of respondent's business has been approximately \$175,000 annually, and that while the major part of respondent's business was the sale of "straight" merchandise, yet the exact proportions were not shown.

PAR. 10. The Commission further finds that the sale and distribution in interstate commerce of assortments of candy 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 the public policy.

CONCLUSION

The aforesaid acts and practices of respondent, Plantation Chocolate Co., Inc., were 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, 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, and brief of counsel for the Commission; and the Commis-

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sion 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, Plantation Chocolate Co., Inc., its officers, 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, or 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, or retail dealers, packages or assortments of candy which are used or 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 or candy products contained in said assortment to the public.

3. Packing or assembling in the same package or assortment, for sale to the public at retail, pieces of candy of uniform size and shape having centers of a different color, together with a number of 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.

It is further ordered, That the respondent shall, within 30 days after the service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth.

Syllabus

IN THE MATTER OF
EUCLID 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 2882. Complaint, July 28, 1936—Decision, Mar. 4, 1937

Where a corporation, engaged in manufacture and sale of candy, including certain assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and some of which consisted of a number of penny pieces of uniform size and shape, the concealed color of the centers of a small number of which differed from that of the majority thereof, together with a number of large bars to be given as prizes to purchasers of those pieces colored centers of which differed, as aforesaid, from the majority—

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 its said products in accordance with such plan, contrary to public policy long recognized by the common law and criminal statutes and to an 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 for sale to purchasing public as to involve a game of chance, or to adopt and use any method involving such a game of chance or sale of a chance to win something by chance, or any other method contrary to public policy, refrain therefrom;

With result that many dealers in and ultimate purchasers of candy were attracted by said method and manner of packing said product, and by element of chance involved in sale thereof, as aforesaid, and thereby induced to purchase such candy thus packed and sold by it in preference to that offered and sold by said competitors who do not use same or equivalent methods; and with tendency and capacity, because of said game of chance, to divert to it trade from its competitors, as aforesaid, exclude from such trade all competitors who are unwilling to and do not use such or an equivalent method because unlawful, lessen competition therein, and tend to create a monopoly thereof in it and such other distributors as use same or an equivalent method, deprive purchasing public of the benefit of free competition in trade involved, and eliminate from said trade all actual, and exclude therefrom all potential competitors who do not adopt and use such or an equivalent method:

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

Before *Mr. Charles P. Vicini*, trial examiner.

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

Mr. Philip S. Ehrlich, of San Francisco, Calif., for respondent.