

IN THE MATTER OF
WINTHROP NOVELTY 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 3109. Complaint, Apr. 20, 1937—Decision, June 25, 1937

Where a corporation engaged in sale and distribution 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 which included such assortments as large number of wrapped penny caramels of uniform size and shape, majority of which were uniform throughout, together with a number of Radio Star Jig Saw puzzles, to be given, without charge, to those purchasing, by chance, one of a few red-centered caramels included in assortment in question—

(a) Sold, to wholesalers and jobbers, and to retailers, for display and resale to purchasing public by the retailer-vendee, in accordance with aforesaid plan, such 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 as long recognized in the common law and criminal statutes, and contrary to an established public policy of the United States Government, and in competition with many who, unwilling to offer and sell candy so packed and assembled, or otherwise arranged and packed for sale to the purchasing public, as to involve a game of chance, refrain therefrom;

With result that consuming public was induced to buy its said candies because of chance of obtaining one of said puzzles or prizes, and with capacity and tendency to induce purchasers to buy said products in preference to those offered and sold by competitors, and with result that many dealers in and ultimate purchasers of candy were attracted by its said method or manner of packing such product and by element of chance involved in sale thereof, as above set forth, and thereby induced to purchase same, thus packed and sold by it, in preference to that offered and sold by its competitors who do not use such or equivalent methods, and with tendency and capacity, because of said game of chance, to divert to it trade and custom from its said competitors who do not use same or equivalent methods, exclude from said trade all competitors who are unwilling to and do not use such or equivalent methods as unlawful, lessen competition in said trade and tend to create a monopoly thereof in it and in such other competitors as use same or equivalent methods, deprive purchasing public of benefit of free competition therein, and eliminate from said trade all actual, and exclude therefrom all potential, competitors who do not adopt and use such or equivalent methods; and

(b) Represented to customers and prospective customers, through use of words "manufacturers of novelty candy products," that it was the manufacturer of the candy or merchandise sold and distributed by it, notwithstanding fact it neither owned, controlled, nor operated any factory whatsoever, and did not make any of its candy or merchandise;

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With effect of misleading and deceiving many of its customers into the erroneous belief that it was a business concern which controlled and operated a factory in which the candy and other merchandise sold by it was made, and that persons dealing with it were buying said products directly from the manufacturer thereof, and thereby eliminating profits of a selling agency or middleman and obtaining various advantages not had by those buying goods therefrom, and of unfairly diverting trade to it from its competitors, including many who do not falsely represent that they manufacture merchandise or candy sold by them:

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

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

Mr. Charles W. Jablon, of New York City, for respondent.

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 Winthrop Novelty 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, 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:

PARAGRAPHS 1. Respondent is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 35-37 Claver Place, in the city of Brooklyn, State of New York. Respondent is now, and for more than one year last past has been, engaged in the sale and distribution of candy to wholesale dealers and jobbers and to retail dealers located at points in the various States of the United States. Respondent causes and has caused its said products when sold to be transported from its principal place of business in Brooklyn, N. Y., to purchasers thereof in the State of New York and in other States of the United States at their respective places of business. There is now, and has been for more than one year 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 individuals and partnerships engaged in the sale and distribution of candy in commerce between and among the various States of the United States.

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PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale dealers and jobbers and to retail dealers assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

One of said assortments is composed of 150 pieces of caramel candy of uniform size and shape, together with 12 Radio Star Jig Saw puzzles. The majority of the caramels in said assortment have the same color throughout, but a small number of said caramels have a red center. The said caramels are wrapped in non-transparent wrappers, and the color of the center of said caramels is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. The said caramels retail at the price of 1¢ each, and the purchaser procuring one of the caramels having a red center is entitled to receive, and is to be given free of charge, one of the Radio Star Jig Saw puzzles heretofore referred to. The said Jig Saw puzzles are thus distributed to purchasers of said caramels wholly by lot or chance, and the consuming public is induced to purchase said candies because of the chance of obtaining one of the said Jig Saw puzzles. *

The respondent sells and distributes several assortments of candy involving a game of chance or lottery scheme when sold and distributed to the consuming public, but respondent's method of packing and assembling the said assortments and the sales plan involved are similar in all major respects to that described above.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments of candy resell the same to retail dealers, and the said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale and sell the same 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 products in accordance with the sales plan hereinabove set forth. Such sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure a Jig Saw puzzle.

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 tendency unduly to hinder competition or create monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude competitors of respondent 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 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 an equivalent method. 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 in such other competitors of respondent 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 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. In the course and conduct of its said business, respondent has caused and causes the representation to be made to its customers and prospective customers, by the use of the words "manufacturers of novelty candy products," that it is the manufacturer of the candy or merchandise which it sells and distributes. A substantial portion of the wholesale and retail dealers have expressed, and have, a preference for dealing direct with the manufacturer of candy or candy products

being purchased, such purchasers believing that they secure lower prices, superior quality, and other advantages that are not obtained when they purchase from a selling agency or middleman.

The use by respondent of said representation that it is a manufacturer has the capacity and tendency to, and does, mislead and deceive many of respondent's said customers into the erroneous belief that respondent is a business concern which controls and operates a factory in which the candy and other merchandise sold by respondent is manufactured, and that persons dealing with respondent are buying said candy or merchandise directly from the manufacturer thereof, thereby eliminating the profits of a selling agency or middleman and obtaining various advantages that are not obtained by persons purchasing goods from a selling agency or middleman. The truth and fact is that respondent neither owns, controls, nor operates any factory whatsoever and does not manufacture any candy or merchandise sold by it. There are many competitors of respondent who do not falsely represent that they manufacture the merchandise or candy sold by them. The use of said representation by respondent has the tendency and capacity to, and does, unfairly divert trade to respondent from its said competitors.

PAR. 7. The aforementioned method, acts and practices of respondent are all to the prejudice of the public and of respondent's competitors, as hereinabove alleged. Said methods, acts, and practices 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."

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 20, 1937, issued and on April 22, 1937, served its complaint in this proceeding upon the respondent, Winthrop Novelty Company, Inc., a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint, the respondent filed answer thereto admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and answer thereto, briefs

and oral argument of counsel having been waived; and the Commission having duly considered the same and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 35-37 Claver Place, in the city of Brooklyn, State of New York. Respondent is now, and for more than one year last past has been, engaged in the sale and distribution of candy to wholesale dealers and jobbers and to retail dealers located at points in the various States of the United States. Respondent causes and has caused its said products when sold to be transported from its principal place of business in Brooklyn, N. Y., to purchasers thereof in the State of New York and in other States of the United States at their respective places of business. There is now, and has been for more than one year 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 individuals and partnerships engaged in the sale and distribution of candy in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale dealers and jobbers and to retail dealers assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

One of said assortments is composed of 150 pieces of caramel candy of uniform size and shape, together with 12 Radio Star Jig Saw puzzles. The majority of the caramels in said assortment have the same color throughout but a small number of said caramels have a red center. The said caramels are wrapped in non-transparent wrappers, and the color of the center of said caramels is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. The said caramels retail at the price of 1¢ each, and the purchaser procuring one of the caramels having a red center is entitled to receive, and is to be given free of charge, one of the Radio Star Jig Saw puzzles heretofore referred to. The said Jig Saw puzzles are thus distributed to pur-

chasers of said caramels wholly by lot or chance, and the consuming public is induced to purchase said candies because of the chance of obtaining one of the said Jig Saw puzzles.

The respondent sells and distributes several assortments of candy involving a game of chance or lottery scheme when sold and distributed to the consuming public, but respondent's method of packing and assembling the said assortments and the sales plan involved are similar in all major respects to that described above.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments of candy resell the same to retail dealers, and the said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale and sell the same 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 products in accordance with the sales plan hereinabove set forth. Such sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of candy to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure a Jig Saw puzzle. 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 tendency unduly to hinder competition or create monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude competitors of respondent 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 respondent, as above described, are unwilling to offer for sale or sell candy so packed and assembled, 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 an equivalent method. 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 in such other competitors of respondent 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 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. In the course and conduct of its said business, respondent has caused and causes the representation to be made to its customers and prospective customers by the use of the words "manufacturers of novelty candy products," that it is the manufacturer of the candy or merchandise which it sells and distributes. A substantial portion of the wholesale and retail dealers have expressed, and have a preference for dealing direct with the manufacturer of candy or candy products being purchased, such purchasers believing that they secure lower prices, superior quality, and other advantages that are not obtained when they purchase from a selling agency or middleman. The use by respondent of said representation that it is a manufacturer has the capacity and tendency to, and does mislead and deceive many of respondent's said customers into the erroneous belief that respondent is a business concern which controls and operates a factory in which the candy and other merchandise sold by respondent is manufactured, and that persons dealing with respondent are buying said candy or merchandise directly from the manufacturer thereof, thereby eliminating the profits of a selling agency or middleman and obtaining various advantages that are not obtained by persons purchasing goods from a selling agency or middleman. The truth and fact is that respondent neither owns, controls, nor operates any factory whatsoever and does not manufacture any candy or merchandise sold by it. There are many competitors of respondent who do not falsely represent that they manufacture the merchandise or candy sold by them. The use of said representation by respondent has the tendency and capacity to, and does, unfairly divert trade to respondent from its said competitors.

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CONCLUSION

The aforesaid acts and practices of the respondent, Winthrop Novelty Company, Inc., a corporation, are to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer filed herein on May 22, 1937, by the respondent admitting all the material allegations of the complaint to be true, and the respondent by its counsel having waived filing of briefs and oral argument, 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, Winthrop Novelty Company, Inc., a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of candy in interstate commerce, do forthwith 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 assortments of candy which are used, or which may be used, without alteration or rearrangement of the contents of such 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 package or assortment of candy for sale to the public at retail, pieces of candy of uniform size and shape having centers of a different color, together with Jig Saw puzzles or other articles of merchandise, which said Jig Saw puzzles or other articles of merchandise are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

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4. Representing, directly or indirectly, that respondent is the manufacturer of the merchandise which it sells.

It is further ordered, That the respondent, Winthrop Novelty Company, Inc., a corporation, shall within 60 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 the order to cease and desist hereinabove set forth.

IN THE MATTER OF
JAMES CLARK DISTILLING CORPORATION AND D. & B.
PRODUCTS CORPORATION

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 2411. Complaint, May 24, 1935—Decision, June 26, 1937

Where a corporation and its selling agency engaged, under common control and, as the case might be, in purchasing, rectifying, blending, bottling, and selling whiskies, gins, and other spirituous beverages, and in the making of gin with a still used therefor by said first-named corporation, by redistillation of purchased alcohol, not produced by it, over juniper berries and other aromatics, and in transporting their aforesaid products into and through various States to the wholesale and retail purchasers thereof in States other than State of origin, and in the District of Columbia, in substantial competition with those engaged in the manufacture, by original and continuous distillation from mash, wort, or wash, of whiskies, gins, and other spirituous beverages, and in selling same in trade and commerce among the various States and in said District, and with those engaged in purchasing, rectifying, blending, and bottling such various beverages and 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," "distilling," or "distillers" as a part of their corporate or trade names and on their stationery and catalogs and on the labels of the bottles in which they sell and ship their said products, and those who, engaged in purchasing, rectifying, blending, bottling, and selling such various products, do not use aforesaid words as above set forth—

Represented, through use of word "Distilling" in corporate name of said first corporation, printed on stationery and catalogs and on the labels attached to the bottles in which they sold and shipped their said various products and in various other ways to their customers, and furnished same with a means of representing to their vendees, both retailers and ultimate consuming public, that said first-named corporation was a distiller and that the whiskies, gins, cordials, brandies, and other alcoholic beverages contained in such bottles were by it made through process of distillation from mash, wort, or wash, notwithstanding fact it did not distill said various beverages, thus bottled, labeled, sold, and transported, by 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" used in connection with liquor industry and products thereof in the trade and by the ultimate purchasing public, and did not own, operate, or control any place or places where such beverages are made

¹ Count Two of the complaint, under the National Industrial Recovery Act, dismissed.