

IN THE MATTER OF
SCHWABACHER BROTHERS & 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 2861. Complaint, June 30, 1936—Decision, June 29, 1937

Where a corporation engaged in manufacture, sale, and distribution, to retail dealers in State of Washington and Territory of Alaska, of assortments of candy so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and consisting of a number of boxes of assorted chocolates, additional article of merchandise, and a punchboard, for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser received, for five cents paid, one of said boxes, value of which exceeded said amount, or nothing other than privilege of making a punch, depending upon number thus secured by chance, and under which purchaser of last punch on board received said article of merchandise, and last five punches in each sections into which board was divided were without cost to person making same—

Sold, to retailers for display and resale to purchasing public, in accordance with aforesaid plan, such assortments, and thereby supplied to and placed in the hands of others 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 and sell candy so packed and assembled, or otherwise arranged and packed for sale to purchasing public, as to involve a game of chance, refrain therefrom, and with many who are unwilling to adopt and use said or any method involving game of chance or sale of a chance to win by chance, or other method contrary to public policy;

With result that many dealers in and ultimate purchasers of candy were attracted by said method and manner of packing the same and by element of chance involved in sale thereof as above set forth, and thereby induced to purchase such candy, so 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 and custom from its said competitors who do not use such or equivalent practice or method, exclude from candy trade all competitors who are unwilling to and do not use such or equivalent method as unlawful, lessen competition in said trade and tend to create a monopoly thereof in it and such other distributors as used same or equivalent practice or method, and 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:

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.

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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 Schwabacher Brothers & Company, 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 this complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Schwabacher Brothers & Company, Inc., is a corporation organized and operating under the laws of the State of Washington, with its principal office and place of business located at 304 Occidental Avenue, Seattle, Wash. Respondent is now, and for several years last past has been, engaged in the sale and distribution of candy to retail dealers located in the State of Washington and the Territory of Alaska, and causes and has caused its said product, when sold, to be transported from its principal place of business in Seattle, Wash., to purchasers thereof in the Territory of Alaska 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 the State of Washington and the Territory of Alaska. 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, and between such States and the Territory of Alaska.

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

Said assortment, distributed by the respondent, is composed of a number of boxes of assorted chocolate candies and another article of merchandise, together with a device commonly called a "punch-board." The said boxes of candy and additional article of merchandise are distributed to the consuming public by means of said punchboard in the following manner: The sales by means of said punchboard are 5 cents each, and when a punch is made from said board a number is disclosed. The numbers begin with 1 and continue

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to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears a statement or statements informing the prospective customer as to which numbers receive a box of candy. The purchaser of the last punch on the board receives the additional article of merchandise. The last five punches on each of ten sections of a 1,200 hole board are free. On a so-called twelve hundred hole board thirty-four numbers call for a prize box of candy. A purchaser who does not qualify by obtaining one of the numbers calling for one of the boxes of candy or by punching the last number on the board receives nothing for his money other than the privilege of punching a number from the board. The boxes of candy are worth more than 5 cents each, and a purchaser who obtains one of the numbers calling for a box of candy receives the same for the price of 5 cents. The numbers on said boards are effectively concealed from the purchasers or prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The boxes of candy and the additional article of merchandise in said assortment are thus distributed to purchasers of punches from said board wholly by lot or chance.

PAR. 3. Retail dealers to whom respondent sells said assortment 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, and said 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 said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure a box 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 June 30, 1936, issued and served

its complaint in this proceeding upon the respondent, Schwabacher Brothers & 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 and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's request for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission. Thereafter this proceeding regularly came on for final hearing before the Commission on the said complaint and the substitute answer, 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 under the laws of the State of Washington, with its principal office and place of business located at 304 Occidental Avenue, in the city of Seattle, State of Washington. Respondent is now, and for several years last past has been, engaged in the sale and distribution of candy to retail dealers located in the State of Washington and the Territory of Alaska. It causes and has caused its said products when sold to be transported from its principal place of business in Seattle, Wash., to purchasers thereof in the Territory of Alaska at their respective places of business. There is now, and has been for several years last past, a course of trade and commerce by said respondent in such candy between the State of Washington and the Territory of Alaska. 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, and between such States and the Territory of Alaska.

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

Said assortment distributed by the respondent is composed of a number of boxes of assorted chocolate candies and another article of

merchandise, together with a device commonly called a "punch-board." The said boxes of candy and additional article of merchandise are distributed to the consuming public by means of said punch-board in the following manner: Sales are 5¢ each, and when a punch is made from said board a number is disclosed. The numbers begin with one and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears a statement or statements informing customers and prospective customers as to which numbers receive a box of candy, and the statement that the purchaser of the last punch on the board receives the other article of merchandise. The punches on said board are arranged in sections, and the last five punches in each section are free. A purchaser who does not qualify by obtaining one of the numbers calling for one of the boxes of candy, or by punching the last number on the board, receives nothing for his money other than the privilege of punching a number from the board. The boxes of candy are worth more than 5¢ each, and a purchaser obtaining one of the numbers calling for a box of candy receives the same for the price of 5¢. The numbers on said board are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The boxes of candy and the additional article of merchandise in said assortment are thus distributed to purchasers of punches from said board wholly by lot or chance.

PAR. 3. Retail dealers to whom respondent sells said assortment 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 products in accordance with the sales plan hereinabove set forth, and said 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 said candy to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure a box of candy or another article of merchandise. 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

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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 respondent, as above described, are unwilling to offer for sale or sell candy so packed and assembled as above described, 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.

CONCLUSION

The aforesaid acts and practices of the respondent, Schwabacher Brothers & Company, Inc., a corporation, are 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, 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 of respondent dated August 10, 1936, admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, 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, Schwabacher Brothers & 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 and between the State of Washington and the Territory of Alaska, do forthwith cease and desist from:

1. Selling and distributing 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 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. Supplying to or placing in the hands of retail dealers assortments of candy, together with a device commonly called a "punch-board," for use, or which may be used, in distributing or selling candy to the public at retail.

4. Furnishing to retail dealers a device commonly called a "punch-board," either with assortments of candy or separately, bearing a legend or legends or statements informing the purchasing public 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, Schwabacher Brothers & Company, Inc., a corporation, 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 the order to cease and desist hereinabove set forth.

IN THE MATTER OF
GLENN LABORATORIES, INC.

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

Docket 3061. Complaint, Feb. 16, 1937—Decision, June 29, 1937

Where a corporation engaged in manufacture, sale and distribution of "Dr. Thomas' $\frac{1}{2}$ 157" obesity treatment, composed of several ingredients, including, undisclosed, as only one effective in ridding body of fat, powerful and dangerous drug desiccated thyroid, which (1) is indicated only in relatively rare cases of obesity due to deficiency of thyroid gland, (2) is dangerous to use, in quantities contained in said preparation and in dosage suggested, in all other cases without examination and advice and direction of a competent physician, (3) may not be taken by some people in their natural and normal state without harmful results, (4) is harmful to take, present certain conditions or defects or abnormalities, and (5) possibility of use of which, in a given case, without harmful results, is contingent upon thorough examination by competent physician, or experimental use by person in question under medical supervision, or both—

Represented, in advertising aforesaid preparation and treatment in newspapers and periodicals of general circulation, and by radio broadcasts, and in pamphlets and by other methods, directly or by implication, that aforesaid product was new and constituted a simple new method, use of which converted food into fuel and energy, and that it could be taken safely by members of the laity without direction from a physician, and that it was safe, harmless and efficacious in all types or classes of obesity, without disclosing presence, as hereinbefore set forth, of said desiccated thyroid and implications of such presence in quantity and dosage involved in preparation in question, and notwithstanding fact that such thyroid has been used by physicians in type of obesity due to defective thyroid glands for many years, use thereof does not always convert food into fuel and energy, or either of them, inability of the laity, unskilled in medical science and necessarily dependent, in many cases, when seeking a remedy for excess weight, for their information as to what treatment, remedy, method or system they may safely purchase, take or use, upon statements and representations, largely, of makers and sellers thereof, to tell whether or not their obesity is due to deficient thyroid gland, which may only be ascertained by examination of competent physician, and notwithstanding facts implicit in aforesaid nondisclosure;

With tendency and capacity to induce members of the public and prospective purchasers to form the mistaken and erroneous belief that such representations were true, and that said product was a safe, harmless and competent remedy or treatment for all classes and types of obesity, and to induce them to purchase said preparation in preference to, and to the exclusion of, preparations, systems, methods or other means of treatment offered for sale in commerce by competitors thus engaged, and with result of unfairly diverting thereby trade to it from its said competitors; to the injury of competition in commerce: