

Syllabus

IN THE MATTER OF

GEORGE C. MILLER & 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 3106. Complaint, Apr. 15, 1937—Decision, June 29, 1937

Where a corporation engaged in manufacture and sale of candy, including assortments 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 or packages of candy of varying size, together with punch-board, 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 or packages as a prize and without additional charge, or, except as hereinbelow set forth, nothing other than privilege of making a punch, depending upon number secured by chance, and purchaser of last punch in each section, and purchaser of last punch on board, similarly received specified box or package without additional charge—

Sold, to wholesalers and jobbers for display and resale to purchasing public by their retailer-vendees, in accordance with aforesaid plan, such assortments, and thereby supplied to and placed in the hands of others means of conducting lotteries in sale of 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 the purchasing public, as to involve game of chance, refrain therefrom;

With capacity and tendency of inducing purchasers to buy its said products in preference to candy offered and sold by its competitors, and 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 above set forth, 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 scheme of chance, to divert to it trade and custom from its said competitors who do not use same or equivalent methods, exclude from such trade all competitors who are unwilling to and do not use such or an equivalent method as unlawful, lessen competition therein and tend to create a monopoly thereof in it and such other competitors as use same or equivalent method, deprive purchasing public of benefits 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 equivalent method:

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.

Complaint

25 F. T. C.

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 the George C. Miller & Co., Inc., 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:

PARAGRAPH 1. Respondent is a corporation organized and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 927 Washington Street, in the city of Boston, State of Massachusetts. 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 and jobbers located at points in the various States of the United States. It causes and has caused its said products when sold to be transported from its principal place of business in Boston, Mass., to purchasers thereof in the State of Massachusetts and in other States of the United States 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 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 to wholesale dealers and jobbers assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

Such assortments are composed of a number of boxes or packages of candy of varying size, together with a device commonly called a "punchboard." The boxes or packages of candy contained in said assortments are distributed to purchasers in substantially the following manner:

Said punchboards contain a number of holes divided into sections. In each hole a slip of paper bearing a printed number is secreted.

The punchboard also bears at the top thereof a number of printed legends or statements informing customers and prospective customers which numbers receive a box of candy and the size thereof. Sales are 5¢ each, and a purchaser who obtains one of the numbers calling for a box of candy is entitled to receive the same as a prize without additional charge. The purchaser of the last punch in each section and the purchaser of the last punch on the board are entitled to receive a specified box or package of candy as a prize and without additional charge. Purchasers of punches who do not procure one of the numbers calling for a box of candy receive nothing for their money other than the privilege of punching a number from said board. The numbers on said printed slips secreted in said punchboard are effectively concealed from purchasers and prospective purchasers until a selection has been made and the printed slip separated from the board. The boxes or packages of candy are thus distributed to the consuming public wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments resell the same to retail dealers, and such retail dealers expose said assortments for sale and sell said packages of 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. 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 box or package 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 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 the respondent, as above alleged, are unwilling to offer for sale or sell candy so packed and assembled as above

Findings

25 F. T. C.

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 competitors 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 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. 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 method, 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 15, 1937, issued and on April 16, 1937, served its complaint in this proceeding upon the respondent, George C. Miller & Co., 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 allega-

tions 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 complaints 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 Massachusetts, with its principal office and place of business located at 927 Washington Street, in the city of Boston, State of Massachusetts. 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 and jobbers located at points in the various States of the United States. It causes and has caused its said products when sold to be transported from its principal place of business in Boston, Mass., to purchasers thereof in the State of Massachusetts and in other States of the United States 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 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 to wholesale dealers and jobbers assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

Such assortments are composed of a number of boxes or packages of candy of varying size, together with a device commonly called a "punchboard." The boxes or packages of candy contained in said assortments are distributed to purchasers in substantially the following manner: Said punchboards contain a number of holes divided into sections. In each hole a slip of paper bearing a printed number is secreted. The punchboard also bears at the top thereof a number of printed legends or statements informing customers and prospective customers which numbers receive a box of candy and

the size thereof. Sales are 5¢ each, and a purchaser who obtains one of the numbers calling for a box of candy is entitled to receive the same as a prize without additional charge. The purchaser of the last punch in each section and the purchaser of the last punch on the board are entitled to receive a specified box or package of candy as a prize and without additional charge. Purchasers of punches who do not procure one of the numbers calling for a box of candy receive nothing for their money other than the privilege of punching a number from said board. The numbers on said printed slips secreted in said punchboard are effectively concealed from purchasers and prospective purchasers until a selection has been made and the printed slip separated from the board. The boxes or packages of candy are thus distributed to the consuming public wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments resell the same to retail dealers, and such retail dealers expose said assortments for sale and sell said packages of 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. 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 box or package 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 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 the respondent 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.

Order

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 such other competitors 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 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.

CONCLUSION

The aforesaid acts and practices of the respondent, George C. Miller & Co., 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 April 29, 1937 by the respondent admitting all the material allegations of the complaint to be true, and the respondent 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."

Order

25 F. T. C.

It is ordered, That the respondent, George C. Miller & Co., 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 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 or jobbers 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 wholesale dealers or jobbers assortments of candy, together with a device commonly called a "punchboard" for use, or which may be used, in distributing or selling said candy to the public at retail.

4. Furnishing to wholesale dealers or jobbers a device commonly called a "punchboard," 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, George C. Miller & Co., 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.

Syllabus

IN THE MATTER OF

WOLF CREEK SOAP COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3116. Complaint, Apr. 26, 1937—Decision, June 29, 1937*

Where a corporation engaged in manufacture, sale, and distribution of soap to retailers and peddlers and direct to consuming public, in substantial competition with those engaged in manufacture and distribution of like and similar products and sale thereof in commerce among the various States and in the District of Columbia—

- (a) Described many articles and items listed in its price lists as possessing retail values or prices many times in excess of their actual selling price to retailer or other purchaser, and many times in excess of actual retail price thereof, and thus included items and articles such as soaps and cold creams and combinations with retail prices stamped or printed thereon, or on labels attached thereto, or on containers in which offered and sold to public, which similarly exceeded actual selling price of particular item or article sold by peddler or retailer to consuming public, and were many times in excess of true and actual value, and constituted false and fictitious retail prices representing in no sense either true value or selling price of articles thus marked, and thus placed in hands of aforesaid peddler and retailer purchasers instrument and means enabling them to commit a fraud upon substantial portion of consuming public through representing and offering said articles as genuinely superior products produced by manufacturers for sale in usual course of trade to general consuming public at and for retail price stamped thereon or on containers thereof; and
 - (b) Falsely represented, through use of abbreviation "Dr.", and name of individual, and word "Medicated" in name of one of its aforesaid products or offerings, that medical doctor was connected with derivation of formula from which said soap combination was made, and that it had ingredients of such a character as to give it substantial therapeutic value as a true medicated soap, facts being no physician was in any way connected with such formula or manufacture of said product, which contained no ingredients of the therapeutic nature in such quantities, if present at all, as to give such soap any such value;
- With effect of misleading substantial portion of consuming public in the several States and in said District by inducing them mistakenly and erroneously to believe that items of merchandise described as aforesaid were of superior value and sold and distributed by it with intent that they should be resold at retail prices closely approximating those stamped thereon, and that such products, because of prices thus affixed or stamped, were composed of superior ingredients and ordinarily retailed, in usual course of trade, for prices closely approximating those marked thereon as aforesaid, and that a doctor of medicine derived formula from which aforesaid soap combination was made, or was connected with manufacture thereof, and with tendency and capacity to mislead and deceive distributors and