

IN THE MATTER OF
MELSTER 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 3045. Complaint, Jan. 30, 1937—Decision, Aug. 9, 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 which consisted of a number of candy bars, a number of loaf candies and a box of candy, together with push card, for sale and distribution to purchasing public under a plan, and in accordance with said card's explanatory legend, by which purchaser received, for five cents paid, and in accordance with number pushed by chance, one or two bars of candy, or package of loaf candy, and purchaser of last push on card was entitled to receive, free of charge, in addition to one of said bars, aforesaid box of candy—

Sold, to wholesalers and jobbers, 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 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 said method or any method involving 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 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 such or an equivalent method, and with tendency and capacity, because of said game of chance, to divert to it trade from its aforesaid competitors who do not use such or equivalent method, exclude from such trade all competitors who are unwilling to and do not use any such method as unlawful, lessen competition in said trade and tend to create a monopoly thereof in it and such other distributors as do use same or equivalent practice or method, and deprive purchasing public of 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 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

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 Melster Candy Company, 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, Melster Candy Company, is a corporation organized and operating under the laws of the State of Wisconsin, with its principal office and place of business located at Cambridge, Wis. Respondent is now, and for more than one year 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, and causes and has caused its said products, when so sold, to be transported from its principal place of business in Cambridge, Wis., to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for 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 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 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 manufactured and distributed by respondent is composed of a number of candy bars, a number of loaf candies, and a box of candy, together with a device commonly called a push card. Candy contained in said assortment is distributed to purchasers in the following manner:

The push card has a number of partially perforated discs, and when a push is made and the disc separated from the card, a number is disclosed. Sales are 5¢ each and the card bears statements informing customers and prospective customers that certain specified

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numbers entitle the customer to one bar of candy, that certain other specified numbers entitle the customer to two bars of candy, and that certain other specified numbers entitle the customer to a package of loaf candy. The purchaser of the last disc on said push card is entitled to receive, and is to be given free of charge, in addition to one of said bars of candy, the box of candy heretofore referred to. The numbers on the discs or pushes are effectively concealed from the purchaser and prospective purchaser until a selection has been made and the disc separated from the card. The number of bars of candy which a customer receives for the price of 5¢ is thus determined 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 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 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 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 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 January 30, 1937, issued and on February 3, 1937, served its complaint in this proceeding upon the respondent, Melster Candy Company, 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

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complaint, 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, Melster Candy Company, is a corporation organized and operating under the laws of the State of Wisconsin, with its principal office and place of business located at Cambridge, Wis. Respondent is now, and for more than one year 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 Cambridge, Wis., to purchasers thereof in other States of the United States at their respective places of business. There is now, and has been for 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 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 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 manufactured and distributed by respondent is composed of a number of candy bars, a number of loaf candies, and a box of candy, together with a device commonly called a push card. The candy contained in said assortment is distributed to purchasers in the following manner: The push card has a number of partially perforated discs, and when a push is made and the disc separated from the card a number is disclosed. Sales are 5¢ each, and the card bears statements informing customers and prospective customers that certain specified numbers entitle the customer to one bar of candy, that certain other specified numbers entitle the cus-

tomer to two bars of candy, and that certain other specified numbers entitle the customer to a package of loaf candy. The purchaser of the last disc on said push card is entitled to receive, and is to be given free of charge, in addition to one of said bars of candy, the box of candy heretofore referred to. The numbers on the discs or pushes are effectively concealed from the purchaser and prospective purchaser until a selection has been made and the disc separated from the card. The number of bars of candy which a customer receives for the price of 5¢ is thus determined 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 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. 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 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 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

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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 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 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 method, acts, and practices of respondent, Melster Candy Company, 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 of respondent dated June 4, 1937, 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, Melster Candy Company, a corporation, its officers, representatives, agents, and employees, in con-

nection 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 are designed to 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 assortments of candy which are used, or which are designed to 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, bars of candy, together with a device commonly called a "push card," which push card is for use, or which is designed to be used, in distributing or selling said candy to the public at retail.

4. Furnishing to wholesale dealers and jobbers, for distribution to retail dealers, a device commonly called a "push card," either with packages or 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, Melster Candy Company, a corporation, shall, within 30 days after service upon it or 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
**ISRAEL ZAVELOFF AND HARRY BERNSTEIN, TRADING
AS EVERLAST SUIT CASE & BAG COMPANY**

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

Docket 2887. Complaint, Aug. 4, 1936—Decision, Aug. 11, 1937

Where two partners engaged in manufacture of leather luggage, and in use in such manufacture of all four general types of leather employed in making leather luggage, namely, solid, top grain, and split leathers and buffin, and in sale and distribution of such leather luggage in commerce among the various States and in the District of Columbia, in substantial competition with those engaged in manufacture, sale, and distribution of leather goods in commerce, as above set forth, and including many competitors who sell leather luggage made from top grain, and also that made from split leather and properly describe former, as variously known by manufacturers, dealers, and purchasing public, as "cowhide," "genuine cowhide," "leather," "genuine leather," "warranted leather," and "top grain," and properly describe latter, as similarly generally known, as "split leather" luggage—

Labeled and branded their goods of split leather "WARRANTED GENUINE LEATHIER" or "WARRANTED LEATHIER," notwithstanding fact luggage in question, thus branded, was not made from outside or top side hide, or from top grain, as understood in trade and by purchasing public, but was made from split leather, i. e., lower portion of the hide from which top grain portion has been cut away;

With capacity and tendency to mislead and deceive purchasing public and substantial portion of trade into erroneous belief that their said luggage, thus branded and labeled, was made from top grain leather, for goods of which purchasing public has generally pronounced and distinct preference, and with result of placing in hands of wholesalers and retailers means whereby said luggage, made of split leather as above set forth, goods of which can be made to resemble those of the other in appearance, is passed off to purchasing public as top grain leather luggage, and consuming public purchased substantial volume of their aforesaid product, and trade was unfairly diverted to them from their competitors, likewise engaged in manufacture, sale and distribution of leather luggage, and who truthfully brand and represent kind of leather used in manufacture of their products; to the substantial injury of competition in commerce:

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

Before *Mr. John L. Hornor*, trial examiner.

Mr. DeWitt T. Puckett for the Commission.

Mr. Joseph D. Tarlowe, of New York City, for respondents.