

Syllabus

IN THE MATTER OF

F. W. WASHBURN CANDY CORPORATION

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

Docket 3163. Complaint, June 29, 1937—Decision, Aug. 21, 1937

Where a corporation engaged in manufacture and sale of candy, including certain assortments of candies which were so packed and assembled as to involve, or were designed to involve, use of a lottery scheme when sold and distributed to ultimate consumer thereof, and which were composed of a number of individually wrapped penny pieces, together with number of articles of merchandise to be given as prizes to chance purchasers of a relatively few of aforesaid uniform individually wrapped pieces, concealed colored centers of which differed from those of the majority, and entitled, as aforesaid, said chance purchasers and purchaser of last piece in assortment to one of said articles of merchandise as a prize—

Sold, to wholesalers and jobbers, and to retail dealers for display and resale to purchasing public in accordance with said sales 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 long recognized by 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 or sell candy so packed and assembled as above described, or otherwise arranged and packed for sale to purchasing public, so as to involve a game of chance, refrain therefrom;

With capacity and tendency to induce 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 product and by element of chance involved in sale thereof as above set forth, and were thereby induced to buy its said candy, so packed and sold by it, in preference to that offered and sold by its said competitors who do not use same or equivalent method, and with tendency and capacity, by reason of said game of chance, to divert to it trade and custom from its said competitors who do not use such or equivalent method, exclude from said candy 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 in such other competitors as do use such or an equivalent method, deprive purchasing public of benefit of free competition in said trade, and eliminate therefrom all actual, and exclude therefrom all potential, competitors who do not adopt and use such or equivalent method:

Held, That such methods, 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

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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 the F. W. Washburn Candy Corporation, 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:

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 in the city of Brockton, 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, and retail dealers, located at points in the various States of the United States. It causes and has caused its said candy when sold to be transported from its principal place of business in Brockton, 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 various 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, and to retail dealers, assortments of candies so packed and assembled as to involve, or which are designed to involve the use of a lottery scheme when sold and distributed to the ultimate consumer thereof. Such assortments are composed of a number of pieces of candy of uniform size and shape, together with a number of other articles of merchandise, which other articles of merchandise are to be given as prizes to purchaser of the pieces of candy of uniform size and shape in the following manner: The pieces of candy of uniform size and shape are each contained within wrappers and retail at the price of 1¢ each. The majority of the said pieces of candy of uniform size and shape are of the same color throughout, but a small

number of said pieces of candy have centers of a color different from the majority. The color of the centers of said pieces of candy of uniform size and shape is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. Purchasers procuring one of the pieces of candy having a center colored differently from the majority are entitled to receive free of charge and are to be given as a prize one of the other articles of merchandise included in said assortment, and the purchaser of the last piece of candy of uniform size and shape in said assortment is entitled to receive free of charge and is to be given as a prize one of the said other articles of merchandise. The other articles of merchandise contained in said assortment are thus distributed to purchasers of candy from said assortment wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments resell said assortments to retail dealers, and said retail dealers, and the retail dealers to whom respondent sells direct, expose said assortments for sale and sell said assortments 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 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 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 unduly to hinder competition or create monopoly in the candy trade in this, to wit: that the use thereof has the tendency and capacity to exclude from said trade 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 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 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. The aforementioned methods, 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 June 29, 1937, issued and on June 30, 1937, served its complaint in this proceeding upon the respondent, F. B. Washburn Candy Corporation, a corporation, erroneously named in said complaint as F. W. Washburn Candy Corporation, charging said respondent with the use of unfair

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methods of competition in commerce in violation of the provisions of said act. Thereafter, respondent filed in the office of the Commission its answer admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure. In said answer respondent waived any rights it might have had by reason of the misnomer above described and consented that any action taken by the Commission would be against the F. B. Washburn Candy Corporation. After the filing of said answer, this proceeding regularly came on for final hearing before the Commission on the said complaint and answer thereto; and the Commission, having duly considered the matter 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, F. B. Washburn Candy Corporation, erroneously named in the complaint as F. W. Washburn Candy Corporation, is a corporation organized and doing business under the laws of the State of Massachusetts, with its principal office and place of business located in the city of Brockton, 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 the wholesale dealers and jobbers and retail dealers located at points in the various States of the United States. It causes and has caused its said candy when sold to be transported from its principal place of business in Brockton, 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 various 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, the respondent sells and has sold to wholesale dealers and jobbers, and to retail dealers, assortments of candies so packed and assembled as to involve, or which are designed to involve, the use of a lottery scheme when sold and distributed to the ultimate consumer thereof. Such assortments are composed of a number of

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pieces of candy of uniform size and shape, together with a number of other articles of merchandise, which other articles of merchandise are to be given as prizes to purchasers of the pieces of candy of uniform size and shape in the following manner: The pieces of candy of uniform size and shape are each contained within wrappers and retail at the price of 1¢ each. The majority of the said pieces of candy of uniform size and shape are of the same color throughout, but a small number of said pieces of candy have centers of a color different from the majority. The color of the centers of said pieces of candy of uniform size and shape is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. Purchasers procuring one of the pieces of candy having a center colored differently from the majority are entitled to receive free of charge and are to be given as a prize one of the other articles of merchandise included in said assortment, and the purchaser of the last piece of candy of uniform size and shape in said assortment is entitled to receive free of charge and is to be given as a prize one of the said other articles of merchandise. The other articles of merchandise contained in said assortment are thus distributed to purchasers of candy from said assortment wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments resell said assortments to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale and sell said assortments 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 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 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 unduly to hinder competition or create monopoly in the candy trade in this, to wit: that the use thereof has the tendency and capacity to exclude from said

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Order

trade 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 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 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.

CONCLUSION

The aforesaid method, acts and practices of the respondent, F. B. Washburn Candy Corporation, 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, F. B. Washburn Candy Corporation, erroneously named in the complaint as F. W. Washburn Candy Corporation, filed herein on August 10, 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 further waiving any rights it might have by reason of the misnomer above described and consenting that any action taken by the Commission will be against the F. B. Washburn Candy Corporation, 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, F. B. Washburn Candy Corporation, a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution in interstate commerce of candy, 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 of different colors, or having centers of a different color, together with other articles of merchandise, which said other articles of merchandise are to be given as prizes to the purchaser procuring a piece of candy of a particular color, or having a center of a particular color.

It is further ordered, That the respondent, F. B. Washburn Candy Corporation, 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

OLIVER L. VON BACHELLE, DOING BUSINESS AS
H. SHADE'S LABORATORIES, AND BUREAU OF EDU-
CATION, SHADE'S LABORATORIESCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3101. Complaint, Apr. 9, 1937—Decision, Aug. 25, 1937*

Where an individual engaged in sale and distribution of certain medical preparations for use in meeting so-called problems of feminine hygiene, and for use in prevention and treatment of diseases, ailments, and conditions to which women are particularly susceptible, in substantial competition with those engaged in sale and distribution, in commerce among the States and in the District of Columbia, of products intended, designed, and used and useful for the purposes for which said individual represented and implied that his said products were effective, and including, among his competitors in said commerce, many who truthfully represent their products and the nature of their organization—

(a) Falsely represented, in advertising his "Cones," "Suppositories," and "Antiseptic Powder," as variously known and described, in certain advertising literature, such as books, pamphlets, and circulars, distributed to purchasing public through boxes in which products were marketed, and through druggists and the United States mails, direct to prospective purchasers, and in newspaper and magazine advertising, that the particular product, as the case might be, was efficacious for use in prevention, treatment, and cure of diseases, ailments, and conditions peculiar to women, arising out of so-called problems of feminine hygiene, and was safe for general use and solved problems of aforesaid hygiene, and constituted an efficient prophylactic where possibility of venereal infection was present, and was more effective than carbolic acid or chlorine in prevention and treatment and cure of aforesaid diseases, etc., and constituted an efficient treatment for certain specified ailments and conditions, and promoted cleanliness and good health, and misrepresented, in various specific particulars, the functioning and qualities or properties of said products; and

(b) Made use, in his advertisements, of name "Bureau of Education" in connection with other statements in said advertising matter, in such a manner as to represent and imply, and thereby lead purchasing public to believe, that such "Bureau of Education" was a separate organization or institution, in no wise connected with his business, organized to carry on scientific research in methods of preventing, treating, or curing maladies peculiar to women, and that his products had been tested or approved by said organization or institution, facts being there was no such organization created to carry on scientific research in such methods, his products had not been tested by such an organization, and so-called "Bureau of Education" was simply a name adopted in furtherance of the sale thereof;

With effect of misleading and deceiving many members of the purchasing public and causing them erroneously to believe that said representations