

Syllabus

IN THE MATTER OF

HEIDELBERGER CONFECTIONERY COMPANY

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

Docket 1772. Complaint, Aug. 25, 1937¹—Decision, Sept. 10, 1937

Where a corporation engaged in manufacture and sale of candy, including certain assortments which were so packed and assembled as to involve, or which were designed to, or might, involve, use of a lottery scheme when sold and distributed to ultimate consumers thereof, and which included assortments composed of (1) number of one-pound boxes of candy, together with push card, for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser pushing by chance number concealed under card's perforated disk paid for box of candy in accordance with such number pushed by chance; (2) number of penny chocolate covered candies of uniform size and shape, together with number of larger pieces and other articles of merchandise, to be given as prizes to purchasers of said pieces of uniform size, etc., selecting by chance one of a small number of said pieces, colored centers of which differed from those of the majority; and of (3) similar assortment, but without larger pieces or other merchandise, of uniform pieces, majority, but not all, of which had centers of same color, through which dealers were enabled to select from their stock other pieces for sale and distribution along with aforesaid assortment as a lottery or game of chance—

Sold, to wholesalers and retailers for display and resale to purchasing public in accordance with aforesaid sales plans, said assortments, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of its products, in accordance with aforesaid plans, enabling purchasing public, through game of chance, to procure said boxes at varying prices, or to procure larger pieces or other articles of merchandise, 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, 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 methods and manner of packing said product and by element of chance involved in sale thereof as above set forth, and thereby induced to purchase said 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 game of chance, to divert to it trade and custom from its said competitors as aforesaid, exclude from said trade all competitors who are unwilling to and do not

¹ Amended and supplemental complaint herewith followed the vacating on August 24, 1937 of the original findings and order which issued on April 3, 1934 (18 F. T. C. 281).

Complaint

25 F. T. C.

use such or equivalent methods as unlawful, lessen competition therein, and tend to create a monopoly thereof in it and such other distributors as use same or equivalent methods, deprive purchasing public of benefit of free competition in trade in question, 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 for the Commission.

Gartner & Lemisch, of Philadelphia, Pa., for respondent.

AMENDED AND SUPPLEMENTAL COMPLAINT

Whereas, The Federal Trade Commission did heretofore, to wit, on March 11, 1930, issue its complaint herein charging and alleging that respondent was and had been guilty of unfair methods of competition in interstate 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"; and

Whereas, This Commission having reason to believe that respondent herein has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, other than and in addition to those in relation to which the Commission issued its complaint as aforesaid, and it appearing to said Commission that a further proceeding by it in respect thereof would be in the public interest;

Now, therefore, Acting in the public interest, pursuant to the provisions of the Act of September 26, 1914, aforesaid, the Federal Trade Commission charges that Heidelberger Confectionery Company, a corporation, has been and now is using unfair methods of competition in commerce, as "commerce" is defined in said act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 1720 North Second Street, Philadelphia, Pa. Respondent is now, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to wholesale and retail dealers located at points in the various States of the United States. Respondent causes and has caused its said products when sold to be transported from its principal place of business in the city of Philadelphia, State of Pennsylvania, to purchasers thereof in Pennsylvania and in other States of the United States at their respective points of location.

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 and retail dealers assortments of candy so packed and assembled as to involve, or which are designed to or may involve, the use of a lottery scheme when sold and distributed to the ultimate consumers thereof.

(a) One of said assortments is composed of 24 one-pound boxes of candy, together with a device commonly called a "push card." The boxes of candy contained in said assortment are sold and distributed to the consuming public by means of said push card in the following manner: The push card is a paper card having 24 partially perforated discs. Concealed within each disc is a number. The numbers concealed within each disc are 39 or lower. Customers push or separate one of the discs from the card, and when such disc is separated the number is disclosed, and such customers pay in cents the amount of such number. Each purchaser receives one of the said boxes of candy. The numbers under the discs are concealed from purchasers and prospective purchasers, and they do not know how much they will have to pay for one of the boxes of candy until a selection has been made and the disc removed from the card. The amount which customers pay for said boxes of candy is thus determined wholly by lot or chance. The push card bears legends informing purchasers and prospective purchasers of the plan or method by which said candy is being sold or distributed.

(b) Another of said assortments of candy is composed of a number of boxes of chocolate covered candy of uniform size and shape, together with a number of larger pieces of candy and other articles of merchandise, which larger pieces of candy and other articles of merchandise are to be given as prizes to purchasers of said chocolate covered candies in the following manner: The majority of the said chocolate covered candies in said assortment have centers of the same color, but a small number of said chocolate covered candies have centers of a different color. The said pieces of candy of uniform size and shape in said assortment retail at the price of 1¢ each, but the purchaser who procures one of the said candies having a center of a color different from the majority of the said pieces of candy is entitled to receive and is to be given free of charge one

of the said larger pieces of candy or one of the other articles of merchandise. The aforesaid purchasers of said candy who procure a piece of candy having a center colored differently from the majority of said pieces of candy thus procure one of the said larger pieces of candy or one of the other articles of merchandise wholly by lot or chance.

(c) Another assortment of candy manufactured, sold and distributed by respondent is composed of a number of pieces of chocolate covered candy of uniform size and shape, the majority of which have centers of the same color but a small number of which have centers of a different color, similar to the pieces of candy of uniform size and shape in subparagraph (b) above but with which respondent does not pack and assemble the larger pieces of candy or the other articles of merchandise to be given as prizes. The said assortment, however, enables dealers to select other pieces of candy from their stock, to be sold along with said assortment containing pieces of candy of uniform size and shape, and to distribute the candy purchased from respondent and the candy taken from their stock as a lottery or game of chance.

PAR. 3. The wholesale dealers to whom respondent sells and has sold its assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose and have exposed said assortments for sale and sell and have sold said candy to the purchasing public in accordance with the aforesaid sales plans. 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 plans hereinabove set forth. Said sales plans have 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) boxes of candy at varying prices, or (b) and (c) larger pieces of candy or other articles of merchandise. The use by respondent of said methods in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said methods, 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 methods 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 candy trade competitors who do not adopt and use the same methods or equivalent or

similar methods involving the same or equivalent or similar elements of chance or lottery schemes. Many persons, firms, and corporations who make and sell candy in competition with respondent, as above alleged, are unwilling to offer for sale or sell candy so packed and assembled as above alleged, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said methods 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 methods 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 equivalent methods; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are 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 equivalent methods; and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said methods 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 methods or equivalent methods.

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 August 25, 1937, issued and on August 26, 1937, served its amended and supplemental complaint in this proceeding upon the respondent Heidelberg Confectionery

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 amended and supplemental complaint, the respondent filed answer thereto admitting the averments of said amended and supplemental complaint and waived hearing on the said charges contained therein. Thereafter this proceeding regularly came on for final hearing before the Commission on the said amended and supplemental complaint and the answer thereto 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 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 Pennsylvania, with its principal office and place of business located at 1720 North Second Street, Philadelphia, Pa. Respondent is now, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to wholesale and retail dealers located at points in the various States of the United States. Respondent causes and has caused its said products when sold to be transported from its principal place of business in the city of Philadelphia, State of Pennsylvania, to purchasers thereof in Pennsylvania and in other States of the United States at their respective points of location.

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 and retail dealers assortments of candy so packed and assembled as to involve, or which are designed to or may involve, the use of a lottery scheme when sold and distributed to the ultimate consumers thereof.

(a) One of said assortments is composed of 24 one-pound boxes of candy, together with a device commonly called a "push card." The boxes of candy contained in said assortment are sold and dis-

tributed to the consuming public by means of said push card in the following manner: The push card is a paper card having 24 partially perforated discs. Concealed within each disc is a number. The numbers concealed within each disc are 39 or lower. Customers push or separate one of the discs from the card, and when such disc is separated the number is disclosed, and such customers pay in cents the amount of such number. Each purchaser receives one of the said boxes of candy. The numbers under the discs are concealed from purchasers and prospective purchasers, and they do not know how much they will have to pay for one of the boxes of candy until a selection has been made and the disc removed from the card. The amount which customers pay for said boxes of candy is thus determined wholly by lot or chance. The push card bears legends informing purchasers and prospective purchasers of the plan or method by which said candy is being sold or distributed.

(b) Another of said assortments of candy is composed of a number of pieces of chocolate covered candy of uniform size and shape, together with a number of larger pieces of candy and other articles of merchandise, which larger pieces of candy and other articles of merchandise are to be given as prizes to purchasers of said chocolate covered candies in the following manner: The majority of the said chocolate covered candies and said assortment have centers of the same color, but a small number of said chocolate covered candies have centers of a different color. The said pieces of candy of uniform size and shape in said assortment retail at the price of 1¢ each, but the purchaser who procures one of the said candies having a center of a color different from the majority of the said pieces of candy is entitled to receive and is to be given free of charge one of the said larger pieces of candy or one of the other articles of merchandise. The aforesaid purchasers of said candy who procure a piece of candy having a center colored differently from the majority of said pieces of candy thus procure one of the said larger pieces of candy or one of the other articles of merchandise wholly by lot or chance.

(c) Another assortment of candy manufactured, sold, and distributed by respondent is composed of a number of pieces of chocolate covered candy of uniform size and shape, the majority of which have centers of the same color but a small number of which have centers of a different color, similar to the pieces of candy of uniform size and shape in subparagraph (b) above but with which respondent does not pack and assemble the larger pieces of candy or the other articles of merchandise to be given as prizes. The said assortment, however, enables dealers to select other pieces of candy

Findings

25 F. T. C.

from their stock, to be sold along with said assortment containing pieces of candy of uniform size and shape, and to distribute the candy purchased from respondent and the candy taken from their stock as a lottery or game of chance.

PAR. 3. The wholesale dealers to whom respondent sells and has sold its assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose and have exposed said assortments for sale and sell and have sold said candy to the purchasing public in accordance with the aforesaid sales plans. 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 plans hereinabove set forth. Said sales plans have 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 described involves a game of chance or the sale of a chance to procure (a) boxes of candy at varying prices, or (b) and (c) larger pieces of candy or other articles of merchandise. The use by respondent of said methods in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said methods, 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 methods 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 candy trade competitors who do not adopt and use the same methods or equivalent or similar methods involving the same or equivalent or similar elements of chance or lottery schemes. 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 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 methods 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 methods by respondent has the tendency and capacity, because of said game of

1027

Order

chance to divert to respondent trade and custom from its said competitors who do not use the same or equivalent methods; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are 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 equivalent methods; and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said methods 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 methods or equivalent methods.

CONCLUSION

The aforesaid acts and practices of the respondent Heidelberg Confectionery 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 amended and supplemental complaint of the Commission and the answer filed herein on September 2, 1937, by the respondent admitting all the averments contained in said amended and supplemental complaint and the respondent having waived hearing on the charges contained in said amended and supplemental complaint and the Commission having made its findings as to the facts and its conclusion that the 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 Heidelberg Confectionery Company, 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 wholesale dealers for resale to retail dealers or to retail dealers direct candy so packed and assembled

Order

25 F. T. C.

that sales of such candy 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 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 packages of candy together with a device commonly called a push card which push card is for use or which may be used in distributing or selling said candy to the public at retail.

4. 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 but having centers of different colors together with larger pieces of candy or other articles of merchandise which said larger pieces of candy or other articles of merchandise are to be given as prizes to the purchaser procuring a piece of candy having a center of a particular color.

5. 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 but having centers of different colors which said package or assortment of candy by reason of the difference in the colors of the centers of said pieces of candy is used or may be used without alteration or rearrangement of the contents of such package or assortment to conduct a lottery, gaming device, or gift enterprise.

It is further ordered, That the respondent Heidelberger Confectionery Company, 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
BERNARD M. WOLF, TRADING AS KODICON PRODUCTS
COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 2910. Complaint, Aug. 26, 1936—Decision, Sept. 14, 1937

Where an individual engaged in distribution and sale, in interstate commerce, of "Kodicon" medicinal preparation for relief, or asserted relief, of arthritic and rheumatic pains, etc., in substantial competition with those likewise similarly engaged in distribution and sale of medicinal preparations and treatments similar to it for same ailments for which said individual represented it as an effective remedy, in advertising his said "Kodicon" in newspapers and pamphlets of general circulation through the United States, and through various circulars, advertising folders, and literature distributed to customers and prospective customers, and through testimonial reproduction of purported purchaser thereof, and through leaflets, as case might be—

Represented that said "Kodicon" constituted an effective and reliable remedy or treatment for arthritis, neuritis, neuralgia, and gout, and for rheumatism, rheumatic fever, and other rheumatic ailments, and was a competent treatment for prevention of head colds and would stop pain, facts being product in question, principle ingredient of which was aspirin, recognized analgesic for temporary relief of minor forms of pain, was not a remedy or competent or effective treatment for said various ailments, and would not prevent head colds nor stop pain, and representations made by said individual with respect thereto were grossly exaggerated, false, misleading and untrue;

With tendency and capacity to mislead and deceive a substantial portion of purchasing public into the erroneous belief that all of said representations were true, and with result that a number of the consuming public, by reason of such mistaken and erroneous belief thus engendered, purchased substantial volume of his said product, and trade was unfairly diverted to him from those likewise engaged in sale of similar preparations and treatments for same ailments for which said individual represented said "Kodicon" as an effective remedy, and who truthfully advertise 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. Edward M. Averill* and *Mr. Robert S. Hall*, trial examiners.

Mr. George Foulkes for the Commission.

Mr. Harold Singer of *Jacobs & Jacobs*, of Boston, Mass., for respondent.