

Syllabus

IN THE MATTER OF
MELLS MANUFACTURING COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 3059. Complaint, Feb. 15, 1937—Decision, Nov. 13, 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 ultimate consumers thereof, and several of which, so packed and assembled that they might be resold to consuming public as single assortment, were contained in two separate boxes, composed of (1) number of small penny pieces of candy, of uniform size and shape, the flavor of a small number of which differed from that of majority, and (2) number of larger pieces or bars, to be given free of charge, or as prizes, to chance purchasers of such uniform penny pieces, flavor of which differed as aforesaid from that of majority—

Sold, to wholesale and retail dealers 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, and under which they did conduct, 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, 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 method and manner of packing same and by element of chance involved in sale thereof as above described, and were thereby induced to purchase its said candy, so packed and sold by it, in preference to that offered and sold by its competitors who do not use same or equivalent method, and with tendency and capacity, because of said game of chance, to divert trade and custom from its competitors as aforesaid, exclude from candy 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 distributors as do use same or equivalent method, 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 an equivalent method:

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

Complaint

25 F. T. C.

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank and *Mr. P. C. Kolinski* for the Commission.
Mr. Nathan Feldman, of New York City, for respondent.

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 Mells Manufacturing 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. The respondent, Mells Manufacturing Company, is a corporation organized and operating under the laws of the State of New Jersey, with its principal office and place of business located at 250 Park Avenue, in the city of Brooklyn, State of New York. The respondent is now, and for several years last past has been, engaged in the manufacture of candies and in the sale and distribution thereof to retail and wholesale dealers 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 the city of Brooklyn, N. Y., to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for several years last past, a course of trade and commerce by said respondent in such candies 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 candies 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 the use of a lottery scheme when sold and distributed to the ultimate consumers thereof.

Several of said assortments manufactured and distributed by respondent are contained in two separate boxes but are so packed

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and assembled that they may be resold to the consuming public as a single assortment. One of said boxes contains a number of small pieces of candy of uniform size and shape, the majority of which are of one flavor but a small number of which are of a different flavor. The other box contains a number of larger pieces or bars of candy which are to be given free of charge or as prizes to purchasers of the pieces of candy of uniform size and shape in the following manner: The small pieces of candy of uniform size and shape retail at the price of 1¢ each, but the purchaser who procures one of the small pieces of candy of uniform size and shape having a flavor different from the majority is entitled to receive, and is to be given free of charge, one of the said larger pieces or bars of candy. The flavor of the said small pieces of candy of uniform size and shape is effectively concealed from said purchasers and prospective purchasers until a selection has been made and the particular piece of candy broken open. The larger pieces or bars of candy are thus distributed to purchasers of said small pieces of candy of uniform size and shape wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells its assortments to 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 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 larger piece or bar 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

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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 or 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. 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 February 15, 1937, issued and on February 17, 1937, served its complaint in this proceeding upon

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respondent, Mells Manufacturing Company, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's request for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the substitute answer; 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. The respondent, Mells Manufacturing Company, is a corporation organized and operating under the laws of the State of New Jersey, with its principal office and place of business located at 250 Park Avenue, in the city of Brooklyn, State of New York. The respondent is now, and for several years last past has been, engaged in the manufacture of candies and in the sale and distribution thereof to retail and wholesale dealers 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 the city of Brooklyn, N. Y., to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for several years last past, a course of trade and commerce by said respondent in such candies 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 candies 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 the use of a lottery scheme when sold and distributed to the ultimate consumers thereof.

Several of said assortments manufactured and distributed by respondent are contained in two separate boxes but are so packed and assembled that they may be resold to the consuming public as a single assortment. One of said boxes contains a number of small pieces of candy of uniform size and shape, the majority of which are of one flavor but a small number of which are of a different flavor. The other box contains a number of larger pieces or bars of candy which are to be given free of charge or as prizes to purchasers of the pieces of candy of uniform size and shape in the following manner: The small pieces of candy of uniform size and shape retail at the price of 1¢ each, but the purchaser who procures one of the small pieces of candy of uniform size and shape having a flavor different from the majority is entitled to receive, and is to be given free of charge, one of the said larger pieces or bars of candy. The flavor of the said small pieces of candy of uniform size and shape is effectively concealed from said purchasers and prospective purchasers until a selection has been made and the particular piece of candy broken open. The larger pieces or bars of candy are thus distributed to purchasers of said small pieces of candy of uniform size and shape wholly by lot or chance.

PAR. 3. The wholesale dealers 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 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 described involves a game of chance or the sale of a chance to procure a larger piece or bar 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 equiva-

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lent 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, 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.

CONCLUSION

The aforesaid acts and practices of the respondent Mells Manufacturing Company 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 substitute answer of the respondent filed herein on October 4, 1937, admitting all the material allegations of the complaint to be true and waiving

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the taking of further evidence and all the 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 Mells Manufacturing Company, its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution in interstate commerce of candy do 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 for sale to the public at retail an assortment of candy consisting of two packages; one package containing a number of small pieces of candy, the majority of which have one flavor, and the remaining pieces having a different flavor, and the second package containing a number of larger pieces or bars of candy, the number of which correspond to the number of pieces of candy in the first package, having a flavor different from the majority, which larger pieces or bars of candy in the second package are or may be given as prizes to purchasers procuring a small piece of candy having a flavor different from the majority.

It is further ordered, That the respondent Mells Manufacturing 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
WALLY FRANK, LTD.

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

Docket 3148. Complaint, June 9, 1937—Decision, Nov. 13, 1937

Where a corporation engaged in sale and distribution of pipes and smokers' supplies to purchasing and consuming public in various States and in the District of Columbia, from its place of business in New York City, in substantial competition with those engaged in similar sale and distribution, or manufacture, sale, and distribution, of such products; in advertising in newspapers and periodicals and through depictions and labels and its own monthly publication, and in various other ways—

(a) Represented that it was a British or English concern with place of business in London, and that it dealt exclusively in goods imported from foreign countries, and that some of its pipes were prepared in accordance with and in conformity to certain famous and well-known processes, and that it offered and sold well-known and established brands at prices greatly reduced from the standard prices at which such pipes were customarily sold, facts being it did not sell any standard brand pipes, free from imperfections, at less than their usual and customary selling prices; and

(b) Represented that it was a manufacturer, through display in catalog mailed by it to prospective customers of reproduction of sign on its store in aforesaid city displaying, along with its corporate name, words "Pipe Manufacturers and Tobacconists," notwithstanding fact it did not manufacture pipes offered and sold by it, nor own, operate, or directly and absolutely control, a factory wherein such pipes are made;

With tendency and capacity to mislead and deceive purchasers of its said products into belief that in buying from it they were dealing with the manufacturer of pipes involved and thereby obtaining bargain by saving middleman's profit and other advantages, as commonly believed by purchasing public through association of such and other advantages, including superior merchandise, with such direct purchase, and with the effect of misleading and deceiving substantial portion of such public into erroneous belief that such representations were true, and into purchase of substantial quantities of pipes and smokers' supplies by reason thereof, and of unfairly diverting thereby trade to it from competitor-manufacturers and distributors of such products who advertise, sell and distribute their said products in commerce as above set forth, and do not misrepresent the status or nature of their business, origin or character of their products, or price at which sold, or otherwise publish untrue claims therefor; 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. W. W. Sheppard*, trial examiner.

Mr. DeWitt T. Puckett for the Commission.