

IN THE MATTER OF
PHOEBE PHELPS CARAMEL COMPANY

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

Docket 3079. Complaint, Mar. 16, 1937—Decision, Nov. 16, 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 one of which consisted of number of individually wrapped penny caramels of uniform size and shape, with small number thereof having different colored stripe, and of number of small packages of candy, to be given as prizes to chance purchasers of such striped penny caramels—

Sold, to wholesalers and to retailers 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 the means of conducting, and under which they did conduct, lotteries in the sale of its said product 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, and with many who are unwilling to adopt and use said method or any method involving game of chance for sale of a chance to win by chance, or any other method contrary to public policy;

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.

Mr. Henry C. Lank and Mr. P. C. Kolinski for the Commission.

Complaint

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 Phoebe Phelps Caramel 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, Phoebe Phelps Caramel Company, is a corporation organized and operating under the laws of the State of Massachusetts, with its principal office and place of business located at 74 Fulton Street, in the city of Boston, State of Massachusetts. 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 retail and wholesale dealers and jobbers located at points in the various States of the United States, and causes and has caused its said products when sold to be transported from its principal place of business in the State of Massachusetts 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 in 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 retail and wholesale dealers and jobbers certain assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One such assortment offered for sale, sold, and distributed by respondent is composed of a number of pieces of caramel candy of uniform size and shape, together with a number of small packages of candy, which small packages of candy are to be given as prizes to purchasers of said pieces of caramel candy of uniform size and shape in the following manner:

The majority of the said caramel candies of uniform size and shape in said assortment are plain or have the same color, but a small num-

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ber of said caramel candies bear a stripe of a different color. The said caramels of uniform size and shape retail at the price of 1¢ each, but the purchaser who procures one of the said caramels bearing a colored stripe is entitled to receive, and is to be given free of charge, one of the small packages of candy heretofore referred to. The pieces of caramel candy of uniform size and shape are individually wrapped in non-transparent wrappers, and the fact as to whether the caramel is plain or has a stripe thereon is thus effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper is removed. The aforesaid purchasers of said caramels, who procure one bearing a stripe, thus procure one of the small packages of candy wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells its assortments resell the same 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 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 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 small package of candy.

The use by respondent of said method in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said method, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has a 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.

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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 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 respondent are all to the prejudice of the public and respondent's competitors, as hereinabove alleged. Said method, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on March 16, 1937 issued, and on March 17, 1937 served, its complaint in this proceeding upon respondent Phoebe Phelps Caramel 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, the respondent duly filed in the office of the Commission its answer admitting all the

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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, 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, Phoebe Phelps Caramel Company, is a corporation organized and operating under the laws of the State of Massachusetts, with its principal office and place of business located at 74 Fulton Street, in the city of Boston, State of Massachusetts. 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 retail and 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 the State of Massachusetts to purchasers thereof 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 retail and wholesale dealers and jobbers certain assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One such assortment offered for sale, sold and distributed by respondent, is composed of a number of pieces of caramel candy of uniform size and shape, together with a number of small packages of candy, which small packages of candy are to be given as prizes to purchasers of said pieces of caramel candy of uniform size and shape in the following manner:

The majority of the said caramel candies of uniform size and shape in said assortment are plain or have the same color, but a small number of said caramel candies bear a stripe of a different color. The said caramels of uniform size and shape retail at the price of 1¢

each, but the purchaser who procures one of the said caramels bearing a colored stripe is entitled to receive, and is to be given free of charge, one of the small packages of candy heretofore referred to. The pieces of caramel candy of uniform size and shape are individually wrapped in non-transparent wrappers, and the fact as to whether the caramel is plain or has a stripe thereon is thus effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper is removed. The aforesaid purchasers of said caramels who procure one bearing a stripe, thus procure one of the small packages of candy wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells its assortments resell the same 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 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 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 found, involves a game of chance or the sale of a chance to procure a small package of candy.

The use by respondent of said method in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said method, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has a 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 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

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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 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.

CONCLUSION

The aforesaid acts and practices of the respondent Phoebe Phelps Caramel 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 answer filed herein on October 1, 1937 by respondent 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."

Order

It is ordered, That the respondent Phoebe Phelps Caramel Company, 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, the majority of which are plain or the same color but a small number of which bear a stripe of a different color, together with a number of small packages of candy which said small packages of candy are or may be given as prizes to the purchaser procuring a piece of candy bearing a stripe.

It is further ordered, That the respondent Phoebe Phelps Caramel 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.

IN THE MATTER OF

NELSON E. WOOLMAN AND LYLE G. JACKSON, TRADING
AS POWER SEAL COMPANY

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

Docket 3014. Complaint, Dec. 11, 1936—Decision, Nov. 19, 1937

Where partners engaged in manufacture and sale of their "Power Seal" pellet form preparation for use in internal combustion engine—

Represented, in newspaper and other advertising, through pamphlets and cards distributed to customers and prospective customers, and in extensive radio advertising of their aforesaid product under its aforesaid trade-mark and name, that said "Power Seal" would restore compression in such engines and completely rejuvenate sluggish motors through sealing and reseating leaky and pitted valves, and would restore efficiency and increase power and effect savings in oil and gas, facts being use thereof had no effect upon performance of engines in which used, power and efficiency of engine would not be changed thereby, as represented by it, and aforesaid various representations were false, misleading, and deceptive;

With capacity and tendency to mislead purchasing public into erroneous and untrue belief that said "Power Seal" would produce in such engines results claimed as aforesaid, and into purchase thereof by reason of such belief, and to divert trade to it from competitors engaged in sale of similar products for similar purposes in interstate commerce and who do not misrepresent the same:

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

Before *Mr. Charles P. Vicini*, trial examiner.

Mr. Reuben J. Martin for the Commission.

Mr. Lawrence W. Allen, of Hollywood, Calif., for respondents.

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 Nelson E. Woolman and Lyle G. Jackson, copartners, trading and doing business under the name of Power Seal Company, have been and are 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: