

Syllabus

IN THE MATTER OF
M. H. SOBEL, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2686. Complaint, Jan. 15, 1936—Decision, Jan. 12, 1938*

Where a corporation engaged in manufacture and sale of candy, including certain assortments which were so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, and which were composed of a number of penny caramels of uniform size, shape, and quality, together with a number of larger pieces of candy and a number of still larger pieces of candy and another article of merchandise, to be given as prizes, respectively, to those purchasers respectively selecting, by chance, one of a relatively small number of said caramels, centers of which were pink, and to those securing, by chance, one of a still smaller number of such caramels, centers of which were white—

Sold, to wholesalers and to retailers, for display and resale to purchasing public in accordance with aforesaid sales plan, said assortments, together with explanatory display cards for retailers' use, 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 sales 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 and sell candy so packed and assembled as above described, or otherwise arranged and packed for sale to purchasing public as to involve a game of chance, refrain therefrom;

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 aforesaid, and thereby induced to purchase said candy thus packed and sold by it, in preference to that offered and sold by said competitors, 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 use same or equivalent method as unlawful, lessen competition therein and tend to create a monopoly thereof in it and such other distributors as 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 equivalent method:

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

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

Mr. Henry C. Lank for the Commission.

Beach, Fathchild & Scofield, of Chicago, Ill., for respondent.

Complaint

26 F. T. C.

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 M. H. Sobel, Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Illinois with its principal office and place of business in the city of Chicago. Respondent is now and for several months 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, and causes said products when so sold to be transported from its place of business in the city of Chicago, State of Illinois, 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 months 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 the said business, respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy and candy products 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 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.

Said assortment is composed of a number of pieces of caramel candy of uniform size, shape, and quality, a number of larger pieces of candy and a number of still larger pieces of candy, together with another article of merchandise, which larger pieces of candy and the other article of merchandise are to be given as prizes to purchasers of said pieces of candy of uniform size, shape, and quality in the following manner:

The majority of said pieces of caramel candy of uniform size, shape, and quality, are plain caramels, that is, have the same color throughout, but a small number of the said pieces of caramel candy

have pink centers and a smaller number of said caramels have white centers. The fact as to whether the caramels are of the same color throughout or have a pink or a white center is effectively concealed from the prospective purchaser until a selection has been made and the caramel broken open. The said pieces of caramel candy of uniform size, shape, and quality, retail at the price of one cent each, but the purchaser who procures one of the said caramel candies having a pink center is entitled to receive and is to be given free of charge one of the said larger pieces of candy heretofore referred to, and the purchaser who procures one of the caramel candies having a white center is entitled to receive and is to be given free of charge one of the still larger pieces of candy heretofore referred to. The aforesaid purchasers procuring a caramel candy having a white or pink center, and the purchaser of the last piece of caramel candy in said assortment thus procure a larger piece of candy or other article of merchandise wholly by lot or chance. The respondent furnishes with said assortment a circular or display card stating that the assortment is to be sold and distributed in accordance with the above described sales plan.

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 products in accordance with the sales plan hereinabove set forth, as a means 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 larger pieces of candy or another article of merchandise.

The use by respondent of said method of the sale of candies, and the sale of candies 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 dangerous 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.

Wherefore, many persons, firms, and corporations who make and sell candy in competition with the respondent, as above alleged, are unwilling to offer for sale or sell candy so packed and assembled as above alleged, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said method and manner of packing said candy, and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent, in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by the respondent has the capacity and tendency to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or an equivalent method.

PAR. 6. Many of said competitors of respondent are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance or any other method that is contrary to public policy.

PAR. 7. The aforementioned method, acts and practices of the respondent are all to the prejudice of the public and of respondent's competitors as hereinabove alleged. Said method, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Com-

mission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on January 15, 1936 issued, and on January 16, 1936 served, its complaint in this proceeding upon the respondent, M. H. Sobel, Inc., 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 amended 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 amended 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 amended answer; 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 is a corporation organized under the laws of the State of Illinois with its principal office and place of business located at 2309 South Keeler Avenue in the city of Chicago, Ill. Respondent is now and for some time 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, and causes said products when so sold to be transported from its place of business in the city of Chicago, State of Illinois, to purchasers thereof in other States of the United States at their respective places of business. There is now and has been for several months 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 the said business, respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy and candy products 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 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.

Said assortments are composed of a number of pieces of caramel candy of uniform size, shape and quality, a number of larger pieces of candy and a number of still larger pieces of candy, together with another article of merchandise, which larger pieces of candy and the other article of merchandise are to be given as prizes to purchasers of said pieces of candy of uniform size, shape, and quality in the following manner:

The majority of said pieces of caramel candy of uniform size, shape, and quality, are plain caramels, that is, have the same color throughout, but a small number of the said pieces of caramel candy have pink centers and a smaller number of said caramels have white centers. The fact as to whether the caramels are of the same color throughout or have a pink or a white center is effectively concealed from the prospective purchaser until a selection has been made and the caramel broken open. The said pieces of caramel candy of uniform size, shape, and quality, retail at the price of one cent each, but the purchaser who procures one of the said caramel candies having a pink center is entitled to receive and is to be given free of charge one of the said larger pieces of candy heretofore referred to, and the purchaser who procures one of the caramel candies having a white center is entitled to receive and is to be given free of charge one of the still larger pieces of candy heretofore referred to. The aforesaid purchasers procuring a caramel candy having a white or pink center, thus procure a larger piece of candy or other article of merchandise wholly by lot or chance. The respondent furnishes with said assortments a circular or display card stating that the assortment is to be sold and distributed in accordance with the above described sales plan.

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 products in accordance with the sales plan hereinabove set forth.

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 larger pieces of candy.

The use by respondent of said method in the sale of candies, and the sale of candies 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 dangerous 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 as above described, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, or any other method of sale that is contrary to public policy, 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 capacity and tendency 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, M. H. Sobel, Inc., 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

26 F. T. C.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the amended answer of respondent, M. H. Sobel, Inc., admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

It is ordered, That the respondent, M. H. Sobel, Inc., its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of candy in interstate commerce or in the District of Columbia, do forthwith cease and desist:

1. Selling and distributing 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 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 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.

It is further ordered, That the respondent, M. H. Sobel, Inc., 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
HARTZ MOUNTAIN PRODUCTS, INC.

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

Docket 2867. Complaint, June 30, 1936—Decision, Jan. 12, 1938

Where a corporation engaged in the sale of pet shop products, including foods and remedies for birds, fish, and turtles, bird perches, and various other products and accessories pertaining to pets, and in distribution thereof through chain stores, department stores, drug stores, and other media of distribution, in substantial competition with others similarly engaged in sale and distribution, in commerce among the States, of other products and preparations recommended or used for pet foods and remedies, including foods and remedies for canaries; in extensively advertising its said pet foods, remedies, and accessories in various newspapers and other mediums of interstate circulation, and through broadcasts having interstate transmission and reception—

- (a) Designated certain of its pet shop products, including canary foods and remedies, as "Dr. Brehm's Bird Tonic," "Dr. Brehm's Bird Wash," "Dr. Brehm's Bird Bitters," and "Dr. Brehm's Revelenta," notwithstanding fact it did not appear that the famous German naturalist ever prescribed formulas for bird foods and remedies, or was connected with the formulas used by it on products and preparations distributed and sold by it, and none of its said products either were or had ever been made or prepared under direction of a doctor, or a Dr. Brehm, and representation thus made was false; and
- (b) Represented that its "Perfect-Grip" sand perch contained a vibrating spring or embodied a spring action and soothing sensation comparable, in use, to swaying of a tree branch as the canary alighted or jumped from its surface, facts being said product contained no vibrating spring and had no spring action comparable to swaying of a tree branch when used by a bird;

With capacity and tendency to mislead and deceive public into erroneous and mistaken belief that its said products had, in truth and in fact, been prepared by, or under the direction, or according to the formula of, a doctor or a Dr. Brehm, and that its said "Perfect-Grip" sand perch contained a vibrating spring which enabled such perch to simulate the swaying of a tree branch as the canary alighted or left its surface, and to induce such purchasing public to buy its said products in preference to other pet shop products and accessories, including canary foods and remedies, and with result of unfairly diverting trade to it from its aforesaid competitors who do not misrepresent the character and quality of their respective products nor the results to be obtained from the use thereof:

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. T. H. Kennedy and *Mr. John F. Richter* for the Commission.