

IN THE MATTER OF
DILLING & COMPANY

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

Docket 2915. Complaint, Aug. 28, 1936—Decision, Jan. 20, 1938

Where a corporation engaged in manufacture and sale of candy, including various packages or assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and which included assortments composed of (1) number of pieces of candy, together with number of larger pieces and push card, for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser received, for penny paid, one of smaller pieces or one of larger pieces, in accordance with number pushed by chance, and purchaser of last push received one of aforesaid larger pieces, and (2) number of candy bars, together with box of chocolate and punchboard, for sale under a plan, and in accordance with said board's explanatory legend, pursuant to which purchaser received one or two additional bars of candy, in accordance with number punched by chance, and purchaser of last punch received box of candy, and, thereby, value in excess of 5 cents paid, as did chance procurers of bars of candy as aforesaid—

Sold to 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 said products in accordance with aforesaid sales plans, 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 as above described, or otherwise arranged and packed for sale to purchasing public, so as to involve a game of chance or any other method of sale contrary to public policy, refrain therefrom;

With result that many dealers in and ultimate purchasers of candy were attracted by its said method and manner of packing same 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 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 use such or equivalent method as unlawful, lessen competition in said trade 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 and *Mr. P. C. Kolinski* for the Commission.
Mr. Oren S. Hack, of Indianapolis, Ind., 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 Dilling & 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. Respondent is a corporation, organized under the laws of Indiana, with its principal office and place of business at Dakota and Morris Streets and Chocolate Avenue, in the city of Indianapolis, State of Indiana. 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 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 Indianapolis, State of Indiana, 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 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 retail dealers various packages or assortments of candy, so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. Certain of said packages are hereinafter described for the purpose of showing the methods used by respondent, but this list is not all inclusive of the various packages, nor does it include all the details of the several sales plans which respondent has been or is using in the distribution of candy by lot or chance:

(a) One of said assortments manufactured and distributed by respondent is composed of a number of pieces of candy and a number of larger pieces of candy, together with a device commonly called a push card. The candy contained in said assortment is distributed to purchasers in the following manner:

The push card has a number of partially perforated discs, and when a push is made and the disc separated from the card, a legend or number is disclosed. Sales are 1 cent each, and the card bears statements informing customers and prospective customers that certain specified legends or numbers entitle the purchaser to one of the small pieces of candy, and that certain other specified legends or numbers entitle the purchaser to one of the larger pieces of candy. The purchaser of the last push from said card is also entitled to one of the larger pieces of candy. The legends or numbers on the discs or pushes are effectively concealed from the purchaser and prospective purchaser until a selection has been made and the disc separated from the card. The fact as to whether a purchaser receives one of the small bars of candy or one of the larger bars of candy for the price of 1 cent is thus determined wholly by lot or chance.

(b) Another assortment manufactured and distributed by respondent is composed of a number of bars of candy and a box of chocolate, together with a device commonly called a punch board. The said bars of candy and box of chocolate are distributed to the consuming public by means of said punch board in the following manner:

The bars of candy are offered for sale at a price of 5 cents each. Each purchase of a bar entitles the purchaser to one push on the punch board. When punch is made from said board, a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears a statement informing the customer as to which numbers receive one or two additional bars of candy. The numbers on said board are effectively concealed from the purchasers until a selection has been made and the particular punch separated from the board. The purchaser qualifying for the last punch on the board receives the box of chocolate. The several bars of candy and box of chocolate are worth more than 5 cents, and a purchaser who obtains one of the numbers calling for additional bars of candy, or the box of chocolate, receives the same for the price of 5 cents. The bars of candy and the box of chocolate are thus distributed from punches on said board wholly by lot or chance.

PAR. 3. The retail dealers to whom respondent sells its assortments expose said assortments for sale, and sell said candy to the purchas-

ing 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, with 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) larger pieces of candy, (b) additional bars of candy, or (c) boxes of chocolate.

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 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 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 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 August 28, 1936, issued, and on August 31, 1936, served, its complaint in this proceeding upon the respondent, Dilling & 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 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 Indiana, with its principal office and place of business at

Dakota and Morris Streets and Chocolate Avenue, in the city of Indianapolis, State of Indiana. 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 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 Indianapolis, State of Indiana, 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 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 retail dealers various packages or 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 of said assortments manufactured and distributed by respondent is composed of a number of pieces of candy and a number of larger pieces of candy, together with a device commonly called a push card. The candy contained in said assortment is distributed to purchasers in the following manner:

The push card has a number of partially perforated discs, and when a push is made and the disc separated from the card, a legend or number is disclosed. Sales are 1 cent each and the card bears statements informing customers and prospective customers that certain specified legends or numbers entitle the purchaser to one of the small pieces of candy, and that certain other specified legends or numbers entitle the purchaser to one of the larger pieces of candy. The purchaser of the last push from said card is also entitled to one of the larger pieces of candy. The legends or numbers on the discs or pushes are effectively concealed from the purchaser and prospective purchaser until a selection has been made and the disc separated from the card. The fact as to whether a purchaser receives one of the small bars of candy or one of the larger bars of candy for the price of 1 cent is thus determined wholly by lot or chance.

Another assortment manufactured and distributed by respondent is composed of a number of bars of candy and a box of chocolate, together with a device commonly called a punch board. The said bars of candy and box of chocolate are distributed to the consuming public by means of said punch board in the following manner:

The bars of candy are offered for sale at a price of 5 cents each. Each purchase of a bar entitles the purchaser to one push on the punch board. When a punch is made from said board, a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears a statement informing the customer as to which numbers receive one or two additional bars of candy. The numbers on said board are effectively concealed from the purchasers until a selection has been made and the particular punch separated from the board. The purchaser qualifying for the last punch on the board receives the box of chocolate. The several bars of candy and box of chocolate are worth more than 5 cents each, and a purchaser who obtains one of the numbers calling for additional bars of candy, or the box of chocolate, receives the same for the price of 5 cents. The bars of candy are thus distributed from punches on said board wholly by lot or chance.

PAR. 3. The retail dealers to whom respondent sells its assortments 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 or additional bars 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 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, Dilling & 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 amended answer of respondent, Dilling & Company, 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, Dilling & Company, its officers, representatives, agents, and employees, in connection with the offer-

Order

26 F. T. C.

ing 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. Supplying to or placing in the hands of dealers assortments of candy together with a device commonly called a push card, or a device commonly called a punch board, for use or which may be used in distributing or selling the said candy to the public at retail;

4. Furnishing to dealers a device commonly called a push card, or a device commonly called a punch board, either with packages or assortments of candy or separately, which push card or punch board is to be used or may be used in distributing or selling said candy to the public.

It is further ordered, That the respondent, Dilling & 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

ARABIAN TOILET GOODS COMPANY, INC.

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

Docket 2981. Complaint, Nov. 13, 1936—Decision, Jan. 20, 1938

Where a corporation engaged in manufacture, sale, and distribution of face powders, skin tonics, and skin creams—

- (a) Represented, through expression "CERTIFIED COSMETICS" displayed on labels of practically all of its products, that its said cosmetics had been certified by some governmental or official authority;
- (b) Represented, through such expressions on labels of its "Wrinkle Eradicator" or "Wrinkle Creme" as "Combined with 100% Pure Turtle Oil" or "Combined with pure turtle oil," and "Rejuvenates the skin and removes lines and wrinkles * * *," and "Will soften and nourish the skin. * * *," that its said skin cream, as thus variously designated, had such qualities or properties and would accomplish said results, and contained turtle oil; and
- (c) Represented, through sales girls or demonstrators employed by it for such purposes at appropriate places in department stores handling its said products, that its said "Wrinkle Creme" was guaranteed by the United States Government to contain pure turtle oil, and that such oil had been successfully used by the Government in removing scar tissue and wrinkles from wounded soldiers, and that use thereof was indorsed by the Government as a skin food and rejuvenator;

Facts being products in question had not been certified in any respect by any government or official authority, said cream would not rejuvenate the skin or nourish the same, or remove or eradicate wrinkles and lines, and did not contain turtle oil, and had not been guaranteed by the Government as so doing, and such oil had not been successfully used thereby as above represented, and Government had not indorsed use thereof as aforesaid, and use of creams or oils, notwithstanding certain temporary effects, cannot eliminate or eradicate lines and wrinkles or accomplish other results as aforesaid represented;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous belief that its said cosmetics had been certified as above set forth, and that its said "Wrinkle Creme" was composed as above claimed, and would accomplish results as above specified, and had been guaranteed by the Government to contain pure turtle oil, successfully used and indorsed by said Government as aforesaid, and with result, further, that public, acting under mistaken and erroneous beliefs induced by such false and misleading statements and representations, purchased substantial volume of its said products and trade was unfairly diverted to it from competitors likewise engaged in manufacture, sale and distribution, or in sale and distribution, of cosmetics, and who truthfully represent the character and nature of their products and the efficacy and beneficial value thereof:

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