

Syllabus

IN THE MATTER OF
CONSOLIDATED CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2969. Complaint, Nov. 6, 1936—Decision, Jan. 27, 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 were composed of (1) number of penny pieces of candy of uniform size and shape, together with number of larger pieces, to be given as prizes to purchasers of relatively few of said pieces, enclosed centers of which were pink, and together with two articles of merchandise, to be given as prizes, respectively, to purchaser procuring by chance yellow center penny piece and purchaser of last of said penny pieces in assortment; (2) number of small pieces of candy, together with number of larger pieces or bars, and push cards, for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser received for penny paid one of said smaller, or one of said larger, pieces of candy, in accordance with number pushed by chance from aforesaid card, and purchaser of last push or sale was similarly entitled to one of said larger pieces; and (3) number of bars of candy, together with number of boxes of candy and push card, for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser received for 5 cents paid one of said bars or boxes of candy, in accordance with number pushed by chance, and purchaser of last piece was entitled to one of said boxes—

Sold to wholesalers and 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 means of conducting lotteries in the sale of its said product in accordance with said sales plan, involving game of chance or sale of a chance to procure large pieces or other articles, 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 or sell candy so packed and assembled as above described, or otherwise arranged and packed for sale to purchasing public, so as to involve 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 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, so packed and sold by it, in preference to that offered and sold by said competitors who do not use same or equivalent methods, and with tendency and capacity, because of said game of chance, to divert to it trade and custom from its said competitors, as aforesaid, who do not use any such method, exclude from said trade all competitors who are unwilling to and do not use such or equivalent method as unlawful, lessen competition therein, and tend to create monopoly thereof in it and such other distributors as do, deprive purchasing public of benefit of free competition

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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. Hugo Swan, of Dallas, Tex., 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 Consolidated Candy 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 the State of Texas, with its principal office and place of business located at 826 Exposition Avenue, Dallas, Tex. Respondent is now, and for 1 year 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 principal place of business in the city of Dallas, Tex., to purchasers thereof in the State of Texas and in other States of the United States at their respective places of business; and there is now, and has been for 1 year 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, 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.

(a) One of said assortments of candy is composed of a number of pieces of candy of uniform size and shape, together with a number of

larger pieces of candy and two other articles of merchandise, which larger pieces of candy and other articles of merchandise are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner:

The majority of said pieces of candy of uniform size and shape have white centers, but a small number of the said pieces of candy have pink centers and one piece of the said candy has a yellow center. The said pieces of candy of uniform size and shape retail at the price of 1 cent each, but the purchaser who procures one of the said 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. The purchaser who procures one of the said candies having a yellow center is entitled to receive, and is to be given free of charge, one of the other articles of merchandise heretofore referred to; and the purchaser of the last piece of candy is to be given free of charge the other article of merchandise contained in said assortment heretofore referred to. The color of the center of said pieces of candy is effectively concealed from purchasers and prospective purchasers until a selection has been made and the piece of candy broken open. The aforesaid purchasers of said candy obtaining a piece of candy having a pink or yellow center, or purchasing the last piece of candy in said assortment, thus procure one of the said larger pieces of candy or one of the other articles of merchandise wholly by lot or by chance. The respondent manufactures and distributes several assortments involving the above described sales plan in which there is some variation as to the details.

(b) Another assortment manufactured and distributed by the respondent is composed of a number of small pieces of candy, a number of larger pieces or bars 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 disks, and when a push is made and the disk separated from the card a number is disclosed. Sales are 1 cent each, and the card bears statements informing purchasers and prospective purchasers that certain specified numbers entitle the customers to one of the larger pieces or bars of candy, and that the last sale from said assortment entitled the purchaser to one of the larger pieces or bars of candy, and that all other numbers entitled the purchaser to one of the small pieces of candy. The numbers on the disks or pushes are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the disk separated from the card. The fact as to whether a purchaser receives one of the larger pieces or bars of candy

or one of the small pieces of candy for the price of 1 cent is thus determined wholly by lot or chance.

The respondent manufactures and distributes several assortments involving the above described sales plan, some of which vary in detail; namely, with some assortments articles of merchandise other than candy are included and the purchaser obtaining certain specified numbers are entitled to one of these articles.

(c) Another assortment manufactured and distributed by the respondent is composed of a number of bars of candy, a number of boxes of candy, and a device commonly called a "push card." The candy bars and the boxes of candy contained in said assortments are distributed to purchasers in the following manner:

The push card has a number of partially perforated disks, and when a push is made and the disk separated from the card a number is disclosed. Sales are 5 cents each, and the card bears statements informing purchasers and prospective purchasers that certain specified numbers entitle the purchaser to one of the boxes of candy, and that all other numbers receive one of the bars of candy, and that the last purchase from said assortment entitles the purchaser thereof to one of the boxes of candy. The numbers on the disks are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the disk separated from the card. The fact as to whether a purchaser receives one of the boxes of candy or one of the bars of candy for the price of 5 cents is thus determined 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 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, and said sales plans have the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure larger pieces of candy, or other articles of merchandise, larger pieces of candy, and a box of candy.

The use by respondent of said methods in the sale of candy, and the sale of candy by and through the use thereof, and by the aid of said methods is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy; and

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

PAR. 6. Many of said competitors of respondent are unwilling to adopt and use said methods 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 methods, acts, and practices of the respondent are all to the prejudice of the public and of respondent's competitors as hereinabove alleged. Said methods, acts, and practices constitute unfair methods of competition in commerce within

the intent and meaning of Section 5 of an Act of Congress, 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 November 6, 1936 issued, and on November 9, 1936 served, its complaint in this proceeding upon the respondent, Consolidated Candy 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, respondent filed in the office of the Commission an answer admitting all the material allegations of the complaint to be true and waiving the taking of further testimony 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 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 Texas, with its principal office and place of business located at 826 Exposition Avenue, Dallas, Tex. Respondent is now, and for more than 1 year 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 principal place of business in the city of Dallas, Tex., to purchasers thereof in the State of Texas and in various other States of the United States at their respective places of business. There is now, and has been for more than 1 year 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, 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.

(a) One of said assortments of candy is composed of a number of pieces of candy of uniform size and shape, together with a number of larger pieces of candy and two other articles of merchandise, which larger pieces of candy and other articles of merchandise are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner:

The majority of said pieces of candy of uniform size and shape have white centers, but a small number of the said pieces of candy have pink centers and one piece of the said candy has a yellow center. The said pieces of candy of uniform size and shape retail at the price of 1 cent each, but the purchaser who procures one of the said 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. The purchaser who procures one of the said candies having a yellow center is entitled to receive, and is to be given free of charge, one of the other articles of merchandise heretofore referred to; and the purchaser of the last piece of candy is to be given free of charge the other article of merchandise contained in said assortment heretofore referred to. The color of the center of said pieces of candy is effectively concealed from purchasers and prospective purchasers until a selection has been made and the piece of candy broken open. The aforesaid purchasers of said candy obtaining a piece of candy having a pink or yellow center thus procure one of the said larger pieces of candy or one of the other articles of merchandise wholly by lot or by chance. The respondent manufactures and distributes several assortments involving the above described sales plan in which there is some variation as to the details.

(b) Another assortment manufactured and distributed by the respondent is composed of a number of small pieces of candy, a number of larger pieces or bars 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 disks, and when a push is made and the disk separated from the card a number is disclosed. Sales are 1 cent each, and the card bears statements informing purchasers and prospective purchasers that certain specified numbers entitle the customer to one of the larger pieces or bars

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of candy, and that the last sale from said assortment entitles the purchaser to one of the larger pieces or bars of candy, and that all other numbers entitle the purchaser to one of the small pieces of candy. The numbers on the disks or pushes are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the disk separated from the card. The fact as to whether a purchaser receives one of the larger pieces or bars of candy or one of the small pieces of candy for the price of 1 cent is thus determined wholly by lot or chance.

(c) Another assortment manufactured and distributed by the respondent is composed of a number of bars of candy, a number of boxes of candy, and a device commonly called a "push card." The candy bars and the boxes of candy contained in said assortments are distributed to purchasers in the following manner:

The push card has a number of partially perforated disks, and when a push is made and the disk separated from the card a number is disclosed. Sales are 5 cents each, and the card bears statements informing purchasers and prospective purchasers that certain specified numbers entitle the purchaser to one of the boxes of candy, and that all other numbers receive one of the bars of candy and that the last purchase from said assortment entitles the purchaser thereof to one of the boxes of candy. The numbers on the disks are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the disk separated from the card. The fact as to whether a purchaser receives one of the boxes of candy or one of the bars of candy for the price of 5 cents is thus determined 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 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 other articles of merchandise.

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, Consolidated Candy 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."

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ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of respondent, Consolidated Candy 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, Consolidated Candy Company, 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;

4. 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 punchboard, for use or which may be used in distributing or selling the said candy to the public at retail;

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

It is further ordered, That the respondent, Consolidated Candy Company, 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.

Complaint

IN THE MATTER OF

JOSEPH H. ROBINSON AND S. J. ROBINSON, TRADING AS
J. ARTHUR WARREN COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3044. Complaint, Jan. 29, 1937—Decision, Jan. 27, 1938*

Where two partners engaged in sale and distribution of clocks, radios, vacuum cleaners, razors, and fountain pen sets, and other merchandise—

Furnished and distributed to members of the general public in practically all States and in the District of Columbia, push cards, order blanks, and advertisements depicting merchandise thus being offered, and instructions, suggestions, and circulars describing their said plan of selling such merchandise, by which chance purchaser paid for chance varying amount, dependent upon number disclosed within various disks of aforesaid cards, and received rotary clock (or other articles or merchandise as aforesaid), or nothing, depending upon success or failure in selecting feminine names corresponding to those concealed under card's two master seals, and they compensated by one or more items of merchandise operator or representative, and thereby placed in the hands of others means of conducting lotteries, games of chance, or gift enterprises in distribution of their said merchandise, with knowledge and intent that said cards had been, were, and would be used in sale and distribution of their said products to public by lot or chance, contrary to public policy, and in competition with many who are opposed to use of such cards in sale and distribution of their merchandise and refrain from furnishing same;

With result that sale of similar or like merchandise by such competitors was thereby injuriously affected, and trade was diverted from them to said partners by reason of said furnishing of such cards or like devices, and there was a restraint upon and detriment to the freedom of fair and legitimate competition; to the prejudice and injury of the public and competitors:

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.

Nash & Donnelly, of Chicago, Ill., 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 Joseph H. Robinson and S. J. Robinson, copartners, trading as J. Arthur Warren Company, hereinafter referred to as respondents, have been and