

IN THE MATTER OF

IRA W. MINTER AND CLAYTON A. MINTER, INDIVIDUALLY, AND TRADING AS MINTER BROTHERS AND DOUGLASS CANDY COMPANY

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

Docket 3138. Complaint, May 23, 1937—Decision, Mar. 30, 1938

Where a firm engaged in manufacture and sale of candy, including so-called "break and take," "draw," or "deal" merchandise, composed, among others, of (a) assortments of marbles, candy bars, fudge squares and 216-hole punchboards, concealed within various holes of which boards said marbles, in accordance with color thereof as disclosed by chance punches at a penny each, and with advisory legend on said boards displayed, entitled purchaser to marble without charge, to marble only, to marble and bar of candy, or to marble and fudge square, and (b) assortments of 200 penny pieces of chocolate-covered candy of uniform size and shape, enclosed, concealed brown or chocolate centers of some of which, as distinguished from white centers of majority, entitled chance purchaser, without further charge, to one of cream bars therewith, while chance purchaser of one of still smaller numbers of pink squares was similarly entitled to one of candy bars included, with purchaser of last piece similarly entitled, without further charge, to assortment's small package of candy—

Sold said assortments to dealers knowingly so assembled and packed that they could be displayed and used by retailers for distribution to purchasing public by lot or chance without alteration or rearrangement, in competition with many manufacturers who do not make and sell such "break and take," "draw," or "deal" assortments, but only "straight" merchandise, sales of which have materially decreased whenever and wherever said other goods have appeared in their markets, due to latter's gambling or lottery feature, and in competition with many who regard sale and distribution of such lottery candy as morally bad and as teaching and encouraging gambling among children, substantial purchasers and consumers of such candy, and as injurious to the candy industry, and therefore refuse to sell candy so packed that it can be resold to public by lot or chance;

With result of placing in hands of retail merchants who purchase, from them and from others employing same methods, such "break and take," "draw," or "deal" goods as more salable in view of consumer preference therefor because of gambling feature connected with sales thereof, means of violating the laws of the several States in sale of such candy by lot or chance and operation thereby of a lottery, gambling device, or gift enterprise, and of putting to a competitive disadvantage aforesaid competitors, and with effect of diverting thereby unfairly trade from said competitors to themselves and others using similar methods:

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

Before *Mr. Miles J. Furnas* and *Mr. John L. Hornor*, trial examiners.

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

Mr. David H. Kinley, of Philadelphia, Pa., 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 *Ira W. Minter* and *Clayton A. Minter*, individually and as copartners doing business under the firm names and styles of *Minter Brothers* and *Douglass Candy Company*, hereinafter referred to as respondents, have been and are using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to the 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 respondents, *Ira W. Minter* and *Clayton A. Minter*, are individuals and are doing business as copartners under the firm names and styles of *Minton Brothers* and *Douglass Candy Company*, and have their principal office and place of business located at 3917 Lancaster Avenue, in the city of Philadelphia, State of Pennsylvania. Respondents are now, and for several years last past have been, engaged in the manufacture of candies and in the sale and distribution thereof to wholesale and retail dealers located at points in the various States of the United States. Respondents cause and have caused their said candy when sold to be transported from their principal place of business in Philadelphia, Pa., to purchasers thereof in the State of Pennsylvania and in other States of the United States at their respective points of location. There is now, and has been for several years last past, a course of trade and commerce by said respondents in such candy between and among the various States of the United States. In the course and conduct of said business, respondents are in competition with other partnerships and with corporations 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 their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesale and retail dealers assortments of candy so packed and assembled

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as to involve, or which are designed to or may involve, the use of a lottery scheme when sold and distributed to the ultimate consumers thereof.

(a) One of said assortments is composed of a number of candy balls, a number of marbles, a number of candy bars, and four packages of candy. The said candy balls and marbles are concealed in a device commonly known as a "punchboard." The punchboard has a number of holes containing marbles and candy balls. The holes are clearly indicated, but the contents thereof are effectively concealed by a piece of paper which is pasted over the said board. The area on the board occupied by the said holes is divided into four sections. The marbles and candy balls are effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular marble or candy ball separated from the board. The board has legends stating that sales are 1 cent each, and that the purchaser obtaining a marble receives only that particular marble for his money; that a purchaser obtaining a white candy ball receives another punch or selection free; that a purchaser obtaining a black candy ball receives, without additional charge, one of the candy bars contained in said assortment; and that the purchaser of the last punch in each section receives one of the packages of candy contained in said assortment. The fact as to whether a purchaser receives one of the marbles, one of the candy balls free with the privilege of making another selection, one of the candy balls and a bar of candy, or a package of candy, for the price of 1 cent, is thus determined wholly by lot or chance.

(b) Another assortment manufactured and distributed by respondents is composed of a number of pieces of chocolate covered candy of uniform size and shape, together with a number of larger pieces of candy and a package of candy, which larger pieces of candy and package of candy are to be given as prizes to purchasers of said chocolate covered candies of uniform size and shape in the following manner: The majority of the said chocolate covered candies contained in said assortment have centers of the same color, but a small number of said chocolate covered candies have centers of a different color. Said pieces of candy of uniform size and shape retail at the price of 1 cent each, but the purchasers who procure one of the said pieces of candy having a center of a different color than the majority of said candies are entitled to receive and are to be given free of charge one of the said larger pieces of candy heretofore referred to. The purchaser of the last piece of chocolate covered candy of uniform size and shape in said assortment is entitled to receive and is to be given free of charge the package of

candy heretofore referred to. The color of the center of said pieces of candy of uniform size and shape is effectively concealed from purchasers and prospective purchasers until a selection has been made and the piece of candy selected broken open. The aforesaid purchasers of said candies who procure a piece of candy having a center colored differently from the majority, and the purchaser of the last piece of candy in said assortment, thus procure the larger pieces of candy and the package of candy wholly by lot or chance.

Respondents manufacture, sell, and distribute numerous assortments involving the features of the above described sales plans, but varying in detail.

PAR. 3. The wholesale dealers to whom respondents sell their assortments resell and have resold said assortments to retail dealers, and said retail dealers and the retail dealers to whom respondents sell and have sold direct expose said assortments for sale and sell the same to the purchasing public in accordance with the aforesaid sales plans. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their 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 respondents' said products in preference to candy offered for sale and sold by their competitors.

PAR. 4. The sale of candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure (a) candy balls, marbles, candy bars, or a package of candy, and (b) larger pieces of candy, or a package of candy. The use by respondents 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 respondents of said methods 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 candy trade 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 schemes. Many persons, firms, and corporations who make and sell candy in competition with respondents, 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 respondents' 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 respondents in preference to candy offered for sale and sold by said competitors of respondents who do not use the same or equivalent methods. The use of said methods by respondents has the tendency and capacity, because of said game of chance, to divert to respondents trade and custom from their 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 respondents 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 respondents 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. The aforementioned methods, acts and practices of respondents are all to the prejudice of the public and of respondents' 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, 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 May 28, 1937, issued and served its complaint upon the respondents, Ira W. Minter and Clayton A. Minter, individually, and doing business under the firm names and styles of Minter Brothers and Douglass Candy Company, charging them 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 respondents' answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Henry C. Lank, attorney for the Commission, and in opposition thereto by David H. Kinley, attorney for the respondents, before Miles J. Furnas and John L. Hornor, examiners of

the Commission theretofore duly designated by it. The said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter this proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, and briefs in support of the complaint and in opposition thereto (oral argument not having been requested), 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. The respondents are individuals doing business under the firm names and styles of Minter Brothers and Douglass Candy Company, with their principal offices and place of business located in the city of Philadelphia, State of Pennsylvania. Respondents are now, and for several years last past have been, engaged in the manufacture of candies and in the sale and distribution thereof to dealers located in States in the eastern part of the United States, including, among others, the New England States, States bordering on the State of Pennsylvania, and States as far south as North Carolina. Respondents cause, and have caused, their products when so sold to be transported from their principal place of business in the city of Philadelphia, State of Pennsylvania, to purchasers thereof in the State of Pennsylvania, and in other States of the United States as above mentioned, 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 respondents in such candy between and among the various States of the United States. In so carrying on said business, respondents are, and have been, engaged in active competition with other partnerships and other individuals and with corporations 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. The approximate annual volume of sales of the respondents to wholesale dealers and jobbers is \$1,300,000, and the approximate total annual volume of sales to retail dealers is \$600,000.

PAR. 2. In the course and conduct of their business, as described in paragraph 1 above, the respondents have sold in commerce between and among the States of the United States various assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. The said assortments were described by one of the respondents called as

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a witness at the instance of the Commission, and certain of said assortments are hereinafter described for the purpose of showing the methods used by the respondents, but these descriptions do not include all of the assortments or the details of the several sales plans which the respondents have been or are using in the distribution of candy by lot or chance.

(a) One of said assortments is composed of a number of marbles, a number of candy bars and a number of fudge squares. The said marbles are concealed in a device commonly known as a punchboard. The punchboard has 216 holes in which the said marbles are concealed. The locations of the holes are clearly indicated, but the color of the marbles is effectively concealed by a piece of paper which is pasted over said board. Sales are 1 cent each and a purchaser punches one of the holes so as to separate the marble from the board. The board has legends advising purchasers and prospective purchasers that the purchaser obtaining a marble of a particular color receives the same free of charge, that a purchaser obtaining a marble of a different but specified color receives only the marble for the price of 1 cent, that the purchaser obtaining a marble of a different but specified color receives the marble and a bar of candy for the price of 1 cent, that the purchaser obtaining a marble of a different but specified color obtains the marble and a fudge square for the price of 1 cent. The fact as to whether a purchaser receives one of the marbles free or pays 1 cent therefor, or receives a marble and a candy bar or a marble and a fudge square for the price of 1 cent is thus determined wholly by lot or chance.

(b) Another assortment manufactured and distributed by respondents is composed of 200 pieces of chocolate-covered candy of uniform size and shape, together with 48 larger pieces of candy known as cream squares and 16 larger pieces of candy known as candy bars and a small package of candy, which larger pieces of candy and small package of candy are distributed as prizes to purchasers of said candy in the following manner: 130 of the said chocolate-covered candies contained in said assortment have white centers, 48 of the said chocolate-covered candies have brown or chocolate centers and 16 of the said chocolate-covered candies have pink centers. Said pieces of candy of uniform size and shape retail at the price of 1 cent each, but the purchasers who procure one of the said pieces of candy having a brown or chocolate center are entitled to receive, and are to be given free of charge, one of the said cream squares, and the purchasers who procure one of the said pieces of candy having a pink center are entitled to receive, and are to be given free of charge, one of the said candy bars. The purchaser of the last piece of choc-

olate-covered candy of uniform size and shape is entitled to receive, and is to be given free of charge, the small package of candy heretofore referred to. The color of the center of said pieces of candy of uniform size and shape is effectively concealed from purchasers and prospective purchasers until a selection has been made and the piece of candy selected broken open. The aforesaid purchasers of said candy who procure a piece of candy having a center colored differently from the majority pieces of candy thus procure the larger pieces or bars of candy wholly by lot or chance.

PAR. 3. Candy assortments involving the lottery or chance features, as described in paragraph 2 above, are generally referred to in the candy trade or industry as "break and take," "draw," or "deal" assortments. Assortments of candy without any lottery or chance feature in connection with their resale to the public are generally referred to in the candy trade or industry as "straight" merchandise. These terms will be used hereafter in these findings to distinguish the various types of assortments.

PAR. 4. The dealers to whom respondents sell their assortments resell the same to the public or to other dealers and said assortments are displayed for sale to the public as packed by the respondents and sold to the public in accordance with the above described sales plans.

PAR. 5. All sales made by respondents to dealers are absolute sales and respondents retain no control over said assortments after they are delivered to their customers. The assortments are assembled and packed in such manner that they are and have been used and may be used by retail dealers for distribution to the purchasing public by lot or chance without alteration or rearrangement.

In the sale and distribution of the assortments of candy hereinbefore described, respondents have knowledge that the said assortments are to be resold to the purchasing public by retail dealers by lot or chance, and respondents pack such candy in the way and manner described so that without alteration, addition thereto, or rearrangement thereof it will be and may be resold to the public by lot or chance by said retail dealers. Such packing and distribution are contrary to public policy.

PAR. 6. There are in the United States many manufacturers of candy who do not manufacture and sell "break and take," "draw," or "deal" assortments of candy and who sell their "straight" merchandise in interstate commerce in competition with the "break and take," "draw," or "deal" assortment candy, and manufacturers of straight merchandise have noted a marked decrease in the sales of their products whenever or wherever the "break and take," "draw," or

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"deal" assortments have appeared in their markets. This decrease in the sale of "straight" merchandise is due to the gambling or lottery feature connected with the "break and take," "draw," or "deal" candy.

Consumers prefer to purchase the "break and take," "draw," or "deal" candy because of the gambling feature connected with its sales. The sale and distribution of "break and take," "draw," or "deal" assortments of candy or of candy which has connected with its sale to the public the means or opportunity of obtaining a prize or becoming a winner by lot or chance teaches and encourages gambling among children, who comprise a substantial number of the purchasers and consumers of this type of candy.

PAR. 7. The sale and distribution of candy by the methods described herein is the sale and distribution of candy by lot or chance and constitutes a lottery, gambling device, or gift enterprise. Many competitors regard such sale and distribution as morally bad and as encouraging gambling, especially among children, and injurious to the candy industry. The sale and distribution by respondent of such assortments of candy supplies to and places in the hands of retail merchants a means of violating the laws of the several States. Because of these reasons some competitors of respondents refuse to sell candy so packed that it can be resold to the public by lot or chance. These competitors are thereby put to a competitive disadvantage. The retailers, finding that they can dispose of more candy by the "break and take," "draw," or "deal" method, buy from respondents and others employing the same methods of sale and thereby trade is unfairly diverted from said competitors to respondents and others using similar methods.

CONCLUSION

The aforesaid acts and practices of the respondents, Ira W. Minter and Clayton A. Minter, individually and doing business under the firm names and styles of Minter Brothers and Douglass Candy Company, are to the injury and prejudice of the public and of respondents' 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, the answer of respondents, testimony and other evidence taken before Miles J. Furnas

and John L. Hornor, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein by Henry C. Lank, counsel for the Commission, and by David H. Kinley, counsel for the respondents (oral argument not having been requested), and the Commission having made its findings as to the facts and its conclusion that said respondents have 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 respondents, Ira W. Minter and Clayton A. Minter individually, and doing business under the firm names and styles of Minter Brothers and Douglass Candy Company, or under any other firm names and styles, their agents, representatives, and employees, in connection with the offering for sale, sale and distribution in interstate commerce, and in the District of Columbia, of candy, do forthwith cease and desist from:

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, gambling device, or gift enterprise.

2. Supplying to or placing in the hands of dealers packages or assortments of candy which are used or may be used, without the alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gambling device or gift enterprise in the sale or distribution of the candy contained in the said assortments to the public.

3. Supplying to or placing in the hands of dealers assortments of candy, together with a punchboard or other lottery device, for use or which may be used in distributing or selling such candy to the public at retail.

- (4) Supplying to or placing in the hands of dealers a punchboard, or other lottery device, either with assortments of candy or separately, which punchboard or other lottery device is to be used or may be used in distributing or selling such candy to the public, or which punchboard or other lottery device bears legends or statements informing the purchasing public that the candy contained in said assortments is being sold to the public by lot or chance in accordance with a sales plan which constitutes a lottery device or gift enterprise.

5. 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 a different color, together with larger pieces of candy or small boxes of candy, which said larger pieces of candy or small boxes of candy are to be given as prizes to pur-

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chasers procuring a piece of candy having a center of a particular color.

It is further ordered, That the respondents shall, within 30 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Syllabus

IN THE MATTER OF

WILLIAM W. CUMMINGS, ARTHUR W. LAWTON, AND
EVERETT BUCK, INDIVIDUALLY, AND TRADING AS
UNITED STATES 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 3336. Complaint, Feb. 14, 1938—Decision, Mar. 30, 1938

Where a firm engaged in manufacture and sale of candy assortment, among others, consisting of a number of individually wrapped penny pieces of uniform size and shape, the enclosed, concealed differing color of a minority of which pieces entitled chance purchaser, without additional charge, to one of licorice pops included with assortment—

Sold said assortments for display by retail dealer vendees and sale to purchasing public in accordance with aforesaid plan and thereby supplied to and placed in hands of others means of conducting lotteries in sale of its products, in accordance with such plan, and in violation of long-standing public policy of the common law and criminal statutes, and that of United State Government;

With tendency and capacity to induce purchasers to buy said candy in preference to that offered and sold by competitors and unduly to hinder competition or create monopoly in excluding from candy trade competitors, including those who do not or are unwilling to offer or sell their products so packed and assembled or otherwise arranged and packed for sale to purchasing public as to involve a game of chance or other method of sale contrary to public policy, and refrain therefrom, and to divert trade unfairly to themselves, and with result that many dealers in and ultimate consumers of candy, by reason of such method and manner of packing aforesaid candy and element of chance involved in sale thereof, were induced to purchase same, thus packed, etc., in preference to that offered and sold by said competitors, who do not use same or equivalent methods, and with tendency and capacity to divert unfairly to themselves trade and custom from such competitors, exclude from candy trade all such competitors and lessen competition therein, tend to create a monopoly thereof in themselves and in such other distributors as use same or equivalent methods, and deprive purchasing public of benefit of free competition, and with capacity and tendency to eliminate from said trade all actual competitors and exclude therefrom all potential competitors, who do not use same or equivalent methods:

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

*Mr. Henry C. Lank and Mr. D. C. Daniel for the Commission.
Perry, Saunders & Cheney, of Boston, Mass., for respondents.*