

Syllabus

IN THE MATTER OF
MARCELLE CANDIES, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2913. Complaint, Aug. 29, 1936—Decision, Apr. 13, 1938*

Where a corporation engaged in manufacture and sale of "draw" or "deal" candy, including assortments composed of number of half-pound trays, number of one-pound boxes; and punchboard or push card with punches or pushes divided into sections, through use of which boards or cards said candy was sold to ultimate consumer-purchaser under scheme by which, in accordance with explanatory statement thereon displayed, purchaser of one of 5-cent chances received, or failed to receive, one of said trays, in accordance with chance selection, or failure to select, one of various designated, concealed numbers, as announced on card or board, and received, by punching or pushing last number in section, one of pound boxes, and thus secured, by lot or chance and in event of correct selection for tray, merchandise exceeding 5-cent cost of chance—

Sold said assortments and cards or boards to wholesale dealers and jobbers, so assembled and packed that they could be and were used and displayed by numerous retail dealer buyers, for distribution to purchasing public by lot or chance, without alteration or rearrangement, and with knowledge that majority of said assortments, as thus packaged by it, were to be, and could be, thus resold to public by lot or chance by said retail dealers, in violation of public policy; in competition with other manufacturers and dealers, many of whom regard such sale and distribution as morally bad and as encouraging gambling and injurious to candy industry as merchandising chance or lottery instead of candy, and some of whom refuse, for reasons set forth, to sell candy so packed that it can be resold to public by lot or chance;

With result of supplying to and placing in the hands of retail merchants means of violating the laws of the several States in sale and distribution of such "draw" or "deal" assortments of candy, preferentially purchased by consumers because of gambling feature connected with sale thereof, and which, in providing means or opportunity of obtaining a prize or becoming a winner by lot or chance, teach and encourage gambling among children, comprising substantial number of purchasers and consumers of such candy, and sale of which in same market with "straight" goods is followed by marked decrease in sales of latter, due to gambling or lottery feature connected with other, and with effect of unfairly diverting from such refusing competitors, thereby put to competitive disadvantage, trade to it and others using similar methods, by reason of retailers' purchase of such candy from it and such others as more salable under "draw" or "deal" method:

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

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

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

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Mr. Ernest P. Rogers of Hirsch & Smith, of Atlanta, Ga., 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 Marcelle Candies, 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. The respondent, Marcelle Candies, Inc., is a corporation organized and operating under the laws of the State of Georgia, with its principal office and place of business located at 223 Peachtree Street, N. W. Atlanta, Ga. The respondent is now and for more than 1 year last past has been engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers, located at points in the various States of the United States, and causes and has caused its said products, when so sold, to be transported from its principal place of business in the city of Atlanta, Ga., to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for more than 1 year last past, a course of trade and commerce by said respondent in such candies between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other corporations and with partnerships and individuals engaged in the manufacture of candies and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, respondent sells and has sold to wholesale and retail dealers assortments of candies so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the ultimate consumers thereof.

(a) Several of the said assortments manufactured and distributed by respondents are composed of a number of half-pound trays of candy and a number of 1 pound boxes of candy, together with a device commonly called a "punchboard" or "push card" with the punches or pushes divided into sections. The said boxes of candy are distributed to the consuming public by means of said "punch-

board" or "push card" in the following manner: Sales are 5 cents each, and when a punch or push is made from said "punchboard" or "push card" a number is disclosed. The numbers begin with one and continue to the number of punches or pushes there are on the board or card but the numbers are not arranged in numerical sequence. The board or card bears a statement or statements informing purchasers and prospective purchasers as to which numbers receive the half-pound trays of candy and a statement or statements informing purchasers and prospective purchasers that the last punch or push in each section receives one of the one pound boxes of candy. A purchaser who does not qualify by obtaining one of the numbers calling for one of the half-pound trays of candy or by punching or pushing the last number in a section receives nothing for his money other than the privilege of punching or pushing a number from the board or card. The trays and boxes of candy are worth more than 5 cents each and a purchaser who obtains one of the numbers calling for a tray or box of candy receives the same for the price of 5 cents. The numbers on said board or card are effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular punch or push separated from the board or card. The trays and boxes of candy in said assortment are thus distributed to purchasers of punches or pushes from said board or card wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers, 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 product in accordance with the sales plan hereinabove set forth, and said sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said product in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure a tray or box of candy.

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

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gerous tendency unduly to hinder competition or create monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the branch of the candy trade involved in this proceeding competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme.

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

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.

Findings

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 29, 1936, issued and served its complaint upon the respondent, Marcelle Candies, 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 thereto, testimony and other evidence in support of the allegations of said complaint were introduced by P. C. Kolinski and Henry C. Lank, attorneys for the Commission, and in opposition thereto by Ernest P. Rogers, attorney for the respondent, before Miles J. Furnas, an examiner 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 brief in support of the complaint (brief in opposition thereto having been waived, and 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 respondent Marcelle Candies, Inc., is a corporation, organized and operating under the laws of the State of Georgia, with its principal office and place of business located at 223 Peachtree Street, N. W., Atlanta, Ga. Respondent is now, and for several years last past has been, engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers and jobbers located in the States in the southeastern part of the United States, including, among others, the States of Florida, Georgia, Alabama, North Carolina, South Carolina, Mississippi, Tennessee, and Louisiana. It causes its said products, when so sold, to be transported from its principal place of business in Atlanta, Ga., to purchasers thereof in the State of Georgia and in such 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 States of the United States. In so carrying on said business, respondent is, and has been, engaged in active competition with

other corporations and with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States. The gross annual volume of respondent's business is approximately \$200,000.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent has sold in commerce between and among the States of the United States to wholesale dealers and jobbers, 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. The said assortments were described by an official of the respondent called as a witness at the instance of the Commission, and are described in the circular distributed by the respondent which was offered as an exhibit. One of said assortments is hereinafter described for the purpose of showing the method used by the respondent, but this description does not include all of the assortments, nor the details of the several sales plans which respondent has been 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 half pound trays of candy, and a number of 1 pound boxes of candy, together with a device commonly called a "punchboard" or a "push card," with the punches or pushes divided into sections. The said trays and packages of candy are distributed to the consuming public by means of said "punchboard" or "push card" in the following manner:

Sales are 5 cents each and when a punch or push is made from said punchboard or push card, a number is disclosed. The numbers begin at 1 and continue to the number of punches or pushes there are on the board or card, but the numbers are not arranged in numerical sequence. The board or card bears a statement or statements informing purchasers and prospective purchasers as to which numbers receive the half pound trays of candy and a statement or statements informing purchasers and prospective purchasers that the last punch or push in each section receives two of the 1-pound boxes of candy. A purchaser who does not qualify by obtaining one of the numbers calling for one of the half pound trays of candy or by punching or pushing the last number in a section receives nothing for his money other than the privilege of punching or pushing a number from the board or card. The trays and boxes of candy are worth more than 5 cents each and a purchaser who obtains one of the numbers calling for a tray or box of candy receives the same for the price of 5 cents. The numbers on said board or card are effectively concealed from

purchasers and prospective purchasers until a selection has been made, and the particular punch or push separated from the board or card. The trays of candy in said assortment are thus distributed to purchasers of punches or pushes from said board or card wholly by lot or chance.

PAR. 3. Candy assortments involving the lot or chance feature as described in paragraph 2 above are generally referred to in the candy trade or industry as "draw" or "deal" assortments. Assortments of candy without any lot 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 wholesale dealers and jobbers, to whom respondent sells its assortments, resell the same to retail dealers. Numerous retail dealers purchase the said assortments from wholesale dealers and jobbers, and the majority of such retail dealers display said assortments for sale to the public as packed by the respondent, and the candy contained in the majority of said assortments is sold and distributed to the consuming public by means of said push cards or punch boards in the manner hereinbefore described.

PAR. 5. All sales made by respondent to wholesale dealers and jobbers are absolute sales and respondent retains no control over said assortments after they are delivered to the wholesale dealer or jobber. 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 to wholesale dealers and jobbers of the assortments of candy hereinbefore described, respondent had knowledge that the majority of said assortments were to be resold to the purchasing public by retail dealers by lot or chance, and it packaged such candy in the way and manner described so that, without alteration, addition thereto, or rearrangement thereof, it would be, and could be, resold to the public by lot or chance by said retail dealers. Such packing and distribution is contrary to public policy.

Consumers prefer to purchase the "draw" or "deal" candy, because of the gambling feature connected with its sale. The sale and distribution of "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.

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PAR. 6. There are, in the United States, many manufacturers of candy who do not manufacture and sell "draw" or "deal" assortments of candy and who sell their "straight" merchandise in interstate commerce in competition with the "draw" or "deal" candy, and manufacturers of "straight" merchandise have noted a marked decrease in the sales of their products whenever or wherever the "draw" or "deal" assortments have appeared in their market. This decrease in the sale of "straight" merchandise is due to the gambling or lottery feature connected with the "draw" or "deal" 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, gaming device, or gift enterprise. Many competitors regard such sale and distribution as morally bad and as encouraging gambling, and as injurious to the candy industry, because it results in the merchandising of a chance or lottery, instead of candy. The sale and distribution of candy, by respondent in assortments as hereinabove found 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 respondent 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 "draw" or "deal" method, buy from respondent and others employing the same methods of sale, and thereby trade is unfairly diverted from said competitors to respondent and others using similar methods.

CONCLUSION

The aforesaid acts and practices of the respondent Marcelle Candies, Inc., are to the injury and 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, answer of respondent, testimony and other evidence in support of the allegations of said complaint and in opposition thereto, taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, and brief of counsel for the Commission (brief for the re-

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spondent having been waived and oral argument not having been requested); 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 Marcelle Candies, Inc., a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of candy in interstate commerce, and in the District of Columbia, 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, gaming device, or gift enterprise;

2. Supplying to or placing in the hands of dealers packages or assortments of candy which are used, or which may be used, without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale and 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 punchboard or push card 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 punchboard or push card, together with packages or assortments of candy, or separately, which punchboard or push card is to be used, or may be used, in distributing or selling said candy to the public.

It is further ordered, That the respondent Marcelle Candies, Inc., 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 and is complying with the order to cease and desist hereinabove set forth.

IN THE MATTER OF
DERMAY PERFUMERS, INC.

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

Docket 3257. Complaint, Nov. 1, 1937—Decision, Apr. 13, 1938

Where a corporation engaged in sale and distribution of perfumery and toilet articles to purchasing and consuming public—

- (a) Represented through word "Factory" on letterheads and invoices, and otherwise, that it was manufacturer of products offered and sold by it, facts being it neither made nor compounded same, nor owned, operated nor controlled a factory or mill so doing; with capacity and tendency to mislead and deceive purchasers into erroneous belief that in buying such products from it they were dealing with manufacturer thereof and thereby saving middleman's profit and obtaining other advantages;
- (b) Displayed word "Paris" on its merchandise and on labels of packaged products, and represented through matter appearing on letterheads and labels of products and in other ways, that they originated in, or were imported from, France, facts being it had no Paris place of business and its said products were made and compounded in United States; with tendency and capacity to mislead and deceive purchasers into erroneous belief that in buying same they were purchasing perfumes or toilet articles made or compounded in France and imported therefrom, such as long in great demand among trade and consuming public and considered superior by many to the domestic product, and purchased in preference thereto;
- (c) Represented that its said products had values greatly in excess of their actual retail selling prices and values, through price-marks placed thereon which were greatly in excess of such actual prices and values and in no sense represented either, with result that members of purchasing public were led into erroneous and mistaken belief that said products' actual values and selling prices were stamped or marked thereon, in accordance with custom of marking or stamping such actual retail price or value on commodities, as understood and relied on by public as indication of quality to extent of purchasing merchandise in substantial volume in dependence thereon;

With effect of misleading substantial portion of purchasing public into erroneous belief that such representations were true and into purchase of substantial quantities of said products as result thereof, and of unfairly diverting trade to it from competitor manufacturers and distributors who do not misrepresent status or nature of their respective businesses, the origin of their products, or prices at which same are sold, or otherwise publish untrue claims therefor, in their advertisement, sale and distribution of competitive products in commerce among the various States and in the District of Columbia:

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

Before *Mr. W. W. Sheppard*, trial examiner.

Mr. DeWitt T. Puckett for the Commission.

Mr. Elliot B. Paley, of New York City, for respondent.