

Syllabus

IN THE MATTER OF
DERAN CONFECTIONERY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3111. Complaint, Apr. 24, 1937—Decision, June 3, 1938*¹

Where a corporation engaged in manufacture and sale of candy, including such "break and take," "draw," or "deal" assortments as 150 penny, chocolate-covered balls, together with 24 packages or boxes of candy, secured without further charge by chance purchasers of those balls, concealed center of which, unlike majority, were colored pink, and together with two still larger packages or boxes, secured by purchaser of last chocolate-covered ball in assortment—

- (a) Sold said assortments to dealers, so assembled and packed that they could be and were displayed for sale to public, without alteration or rearrangement, in accordance with aforesaid sales plan, by said dealers or their customer-vendees, and with knowledge and intent that said assortments should thus be resold without alteration or rearrangement to purchasing public by retail dealer by lot or chance, in violation of public policy and in competition with concerns, many of whom do not manufacture and sell such "break and take," "draw," or "deal" assortments, but sell their "straight" merchandise in competition with the other;

With result of putting at a disadvantage competitors, many of whom regard such sale or distribution by lot or chance as morally bad, as encouraging gambling among children, as injurious to the industry, and as placing in the hands of retail merchants a means of violating the laws of the several States, and some of whom refuse, for such reasons, to sell candy so packed that it can be resold to public by lot or chance, and from whom trade was unfairly diverted, due to retailers' purchase of said "draw" or "deal" candy from it and others employing the same or similar methods, as more readily salable; and

- (b) Represented to customers and prospective customers that certain of its products were composed of malted milk covered with chocolate, through use of words "chocolate malted milk balls," notwithstanding fact some of said balls were not made in substantial part of said product, but contained only sufficient malted milk to give a malted milk flavor;

With effect of unfairly diverting trade to it from competitors selling and distributing confections made of malted milk and from those dealing in products similar to its own who do not falsely thus designate their said similar products, and of enabling it and its dealers to mislead and deceive the consuming public into purchasing its said product in the erroneous belief that it was made from malted milk:

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

¹ Order published as modified August 3, 1938.

Complaint

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

Mr. Henry C. Lank, Mr. P. C. Kolinski, and Mr. D. C. Daniel for the Commission.

Lubets, Wainer, Goloboy & Levenson, of Boston, Mass., 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 the *Deran Confectionery Co.*, 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, 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 and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 134 Cambridge Street, in the city of Cambridge, State of Massachusetts. It 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 at points in the various States of the United States. It causes and has caused its said candy when sold to be transported from its principal place of business in Cambridge, Mass., to purchasers thereof in the State of Massachusetts and 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 said business, respondent is in 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.

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

Such assortments are composed of 150 chocolate covered balls, together with 24 small packages or boxes of candy and 2 larger packages or boxes of candy. The candy contained in said assortments is

distributed to the consuming public in substantially the following manner:

The majority of the chocolate covered balls have cream colored centers, but 24 of said balls have pink centers. The chocolate covered balls retail at the price of 1 cent each. The color of the centers of said balls is effectively concealed from purchasers and prospective purchasers until a selection has been made and the chocolate covered ball broken open. Purchasers procuring one of the chocolate covered balls having a pink center are entitled to receive, and are to be given free of charge, one of the said small packages or boxes of candy. Purchasers of the last chocolate covered ball in said assortments are entitled to receive, and are to be given free of charge, the two larger packages or boxes of candy contained in said assortments. The boxes or packages of candy are thus distributed to the consuming public wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments resell the same to retail dealers, and such retail dealers expose said assortments for sale and sell said assortments 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. Such sales plan has 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 candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure a box or package 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 tendency unduly to hinder competition or create monopoly in the candy trade in this, to wit: That the use thereof has the tendency and capacity to exclude from said trade competitors of respondent 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

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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 in such other competitors of respondent 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 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. In the course and conduct of its said business, respondent has caused and causes the representation to be made to its customers and prospective customers, by the use of the words "chocolate malted milk balls," that the said candy products are malted milk balls covered with chocolate. In truth and in fact, certain of the candy products so designated by respondent are not in substantial part manufactured from or made of malted milk, such candy products containing only sufficient malted milk to give the said candy products a malted milk flavor. The above designation by respondent is thus false and misleading.

A substantial portion of the purchasing public believe that malted milk has a peculiar food value and prefer to purchase true malted milk confections in preference to confections only flavored with malted milk.

There are many competitors of respondent selling and distributing confections manufactured from or made of malted milk, and there are other competitors selling a product similar to respondent's product who do not falsely represent and designate such product as a malted milk ball; and the use by respondent of the said designation

"chocolate covered malted milk balls" has the capacity and tendency to and does divert trade to respondent from its said competitors who do not falsely represent the composition or ingredients of their said products.

PAR. 7. The aforementioned method, acts and practices of 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, 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 the Federal Trade Commission Act, the Federal Trade Commission, on April 24, 1937, issued and thereafter served its complaint in this proceeding upon the respondent, Deran Confectionery Co., a corporation, 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 Henry C. Lank, attorney for the Commission, and in opposition thereto by Mark Wainer, 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 and on the said complaint, the answer thereto, testimony and other evidence, and briefs in support of the complaint and in opposition thereto and oral argument of counsel as aforesaid, 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 and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 134 Cambridge Street, in the city of Cambridge, State of Massachusetts. It is now and for several years last past has been engaged in the manufacture of candies and in the sale and distribution thereof to dealers located in various States of the United States, including, among others, the States of Massachusetts, New York, New Jersey, Pennsylvania, and

Maryland. Respondent causes and has caused its products, when so sold, to be transported from its principal place of business in the city of Cambridge, State of Massachusetts, to purchasers thereof in the State of Massachusetts, and in other States of the United States as above mentioned, at their respective places of business. There is now and for several years last past has been a course of trade and commerce by said respondent in such candy between and among various 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 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, the respondent has sold in commerce between and among the various 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. One of said assortments is hereinafter described in detail for the purpose of showing the method used by the respondent; but this description does not include all of the details of the several sales plans which the respondent has been or is using in the distribution of its assortments of candy by lot or chance. Such assortment is composed of 150 chocolate-covered balls, together with 24 packages or boxes of candy and two larger packages or boxes of candy. The candy contained in said assortment is distributed to the consuming public in substantially the following manner: The majority of the chocolate-covered balls have cream-colored centers, but 24 of said balls have pink centers. The chocolate-covered balls retail at the price of 1 cent each. The color of the centers of said balls is effectively concealed from purchasers and prospective purchasers until a sale has been made and the chocolate-covered ball is broken open. Purchasers procuring one of the chocolate-covered balls having pink center are entitled to receive and are to be given without additional cost, one of the small size packages or boxes of candy. Purchasers of the last chocolate-covered ball in said assortment are entitled to receive and are to be given free of charge the two larger boxes of candy contained in said assortment. The boxes or packages of candy are thus distributed to the consuming public wholly by lot or chance.

PAR. 3. Candy assortments involving the lottery or chance features as described in paragraph 2 hereof 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 are being used hereinafter in these findings to distinguish the various types of assortments.

PAR. 4. The dealers to whom respondent sells its 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 respondent, and sold to the public in accordance with the above described sales plan.

PAR. 5. The assortments hereinabove described are assembled and packed in such a 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 hereinabove described, respondent has knowledge that the said assortments are to be resold to the purchasing public by retail dealers by lot or chance and respondent packs such candy in the way and manner described so that without alteration, addition thereto, or rearrangement thereof, they may be resold to the public by lot or chance by said retail dealers. The packing and distributing of candy in the manner above found is 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 the manufacturers of "straight" merchandise have noted a marked decrease in the sales of their products whenever or wherever the "break-and-take," "draw," or "deal" assortment 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," "deal," or "draw" 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, or gift enterprise. Many competitors

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of respondent regard such sale or distribution as morally bad, as encouraging gambling 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 of the 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 "break-and-take," "draw," or "deal" method, buy from respondent and others employing the same or similar methods of sale, and thereby trade is unfairly diverted from said competitors to respondent and others using the same or similar methods.

PAR. 8. In the course and conduct of its said business, respondent has caused the representation to be made to its customers and prospective customers by use of the words "chocolate malted milk balls," that certain of its products are composed of malted milk covered with chocolate. In truth and in fact some of the so-called "chocolate malted milk balls" are not in substantial part manufactured from or made of malted milk, but contain only sufficient malted milk to give such candy products a malted milk flavor. The above designation by respondent is thus false and misleading. Respondent has competitors selling and distributing confections manufactured from or made of malted milk, and also has other competitors engaged in the sale and distribution of a product similar to respondent's product, who do not falsely represent and designate such product as "malted milk balls." The use by respondent of the said designation, "chocolate malted milk balls" has the capacity and tendency to and does unfairly divert trade to respondent from its said competitors selling and distributing balls manufactured from or made of malted milk and from its said competitors who do not falsely represent the composition or ingredients of their said products. The use by respondent of the said designation "chocolate malted milk balls" enables respondent and its dealers to mislead and deceive the consuming public into purchasing respondent's product in the erroneous belief that said product is manufactured from or made of malted milk.

CONCLUSION

The aforementioned acts and practices of respondent as herein alleged are all 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 the Federal Trade Commission Act.

MODIFIED ORDER TO CEASE AND DESIST¹

This proceeding having been heard by the Federal Trade Commission upon the motion of Mark Wainer, counsel for the respondent, to vacate and to modify the order to cease and desist as issued in this proceeding on June 3, 1938, and the Commission having considered the said motion and the record herein and being now fully advised in the premises:

It is ordered, That the motion to modify and amend the order to cease and desist issued herein on June 3, 1938, be, and the same hereby is, granted; and

It is further ordered, That the order to cease and desist issued herein on June 3, 1938, be, and the same hereby is, modified so as to read as follows:

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of the respondent, testimony and other evidence in support of the allegations of the complaint and in opposition thereto, briefs filed herein and oral arguments by Henry C. Lank, counsel for the Commission, and by Mark Wainer, counsel for the respondent, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act;

It is ordered, That the respondent, Deran Confectionery Co., a corporation, 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 from:

1. Selling and distributing to dealers, candies so packed and assembled that sales of such candy to the general public are to be made, or are designed to 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 are designed to 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 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 individually wrapped pieces of candy of uniform size and shape with different colored centers, to-

¹ Order published as modified August 3, 1938.

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gether with packages or boxes of candy or any other merchandise, which said packages or boxes of candy or other merchandise are to be given as prizes to the purchasers procuring pieces of candy with centers of a particular color.

4. Representing in any manner that certain of its products are composed of malted milk, when in fact, such products are not in substantial part manufactured from, or made of, malted milk.

It is further ordered, That the respondent shall, within 60 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 this order.

Syllabus

IN THE MATTER OF

G. M. MOSES AND J. AVERBACH DOING BUSINESS AS
SUPERWEAR HOSIERY COMPANY

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

Docket 3379. Complaint, Apr. 13, 1938—Decision, June 7, 1938

Where two individuals engaged in sale and distribution of men's and women's hosiery—

(a) Represented that they were making a bona fide offer to prospective salesmen of good paying jobs not requiring the expenditure of much time or effort, and that hosiery would be shipped to such salesmen by them without charge in the form of either money or service, and advertised, as a method of promoting and increasing their sales, in newspapers and periodicals and other widely circulated forms of printed matter, that they solicited the services of sales representatives in various localities throughout the several States, through such statements as "Make up to \$27 weekly * * * Build Big Daily Cash Income," "Men Everywhere, even without experience, are making from \$4 to \$6 daily," "No House-to-House Selling!," "Your own hose and samples Free," "Free Selling Outfit!";

The facts being they did not make a bona fide offer, as represented, or carry out their promises in the manner and form in which they had thus misled prospective salesmen to believe, but required house-to-house selling and canvassing on a commission basis from their salesmen who, after expenditure of much time and effort, did not succeed in having any such daily or weekly cash income for their services, and they did not send such persons hosiery without charge, as stated, but hosiery samples sent by them became the property of such persons only after they had sold a stipulated amount, and they were required to pay transportation charges incident to the shipment;

(b) Represented in advertisements, published and widely circulated to customers and prospective customers, and in newspapers, periodicals, circulars, folders, and other forms of printed matter, and through their sales representatives, that their hosiery was woven with a special lockstitch which prevented it from snagging, running, or developing holes, through such statements as "Inter-Lock Stitch hosiery must wear for a period up to 8 months," "Most sensational silk stocking invention ever developed," "* * * found exclusively in Inter-Lock Stitch hosiery," etc.;

(c) Represented, as aforesaid, that their said hosiery would wear better and last longer than that made, offered for sale and sold by competitors, through aforesaid statements and such representations as "Guaranteed against runs," etc., "Guarantees to cut hosiery bills in half," "We insure against everything and anything that could happen to a stocking," "* * * made different than ordinary hose," etc.; and

(d) Falsely represented, through their solicitors or salesmen, that order solicited would be filled according to aforesaid statements and representations;