

Syllabus

IN THE MATTER OF

ELBEE CHOCOLATE COMPANY, INC.

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

Docket 1864. Complaint, Sept. 24, 1936¹—Decision, July 14, 1938

Where a corporation engaged in manufacture of candy, sold and distributed nationally and resold in practically all stores where candy is offered for sale and sold to public including penny candy stores, school stores and neighborhood stores, and selling break-and-take assortments composed of a number of penny pieces of chocolate-covered candy of uniform size and shape, together with number of larger pieces or bars of candy and box of candy, to be given as prizes to chance purchasers of a minority of said pieces, enclosed concealed centers of which were colored, with purchaser of last of said pieces entitled to box without further charge, and other assortments employing substantially same method or sales plan—

Sold said assortments to jobbers, so packed and assembled that they could be displayed for sale and distribution to purchasing public without alteration or rearrangement by said jobbers' retailer vendees by lot or chance, and with knowledge and intent that they should thus be resold, in violation of public policy and in competition with many manufacturers who do not make and sell lottery or prize packages or assortments of candy and sell, in competition with its break-and-take assortments, straight goods or merchandise, in sales of which a marked decrease has been noted by the many candy manufacturers thereof who do not make and sell the break-and-take draw or deal assortments, whenever latter have appeared in their markets, due to gambling or lottery feature connected therewith, and consumers' preference therefor by reason of such feature;

With result that competitors, many of whom regard sale and distribution of candy by such method as morally bad and as encouraging gambling and especially among children, as injurious to candy industry through resulting in merchandising of a chance or lottery instead of candy, and as providing retail merchants with means of violating the laws of several States, and some of whom, for such reasons, refuse to sell candy so packed and assembled that it can be resold to consuming public, were put to a competitive disadvantage, and trade was unfairly diverted to it from its said competitors and there was a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry:

Held, That such acts and practices were all 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 for the Commission.

Mr. Victor W. Milch, of New York City, for respondent.

¹ Amended and supplemental.

AMENDED AND SUPPLEMENTAL COMPLAINT

Whereas, The Federal Trade Commission did heretofore, to wit, on August 18, 1936, issue its complaint herein, charging and alleging that respondent herein was guilty of unfair methods of competition in interstate 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; and

Whereas, This Commission having reason to believe that respondent herein is and has been using unfair methods of competition in commerce, as "commerce" is defined in said act, other than and in addition to those in relation to which the Commission issued its complaint as aforesaid, and it appearing to said Commission that a further proceeding by it in respect thereof would be in the public interest:

Now, therefore, Acting in the public interest, pursuant to the provisions of the Act of September 26, 1914, aforesaid, the Federal Trade Commission charges that Elbee Chocolate Co., Inc., a corporation, has been and now is using unfair methods of competition in commerce as "commerce" is defined in said act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of New York, with its principal office and place of business located at 32 South Ninth Street, in the city of Brooklyn, State of New York. 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 retail and wholesale dealers and jobbers 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 Brooklyn, State of New York, to purchasers thereof in other States of the United States, at their respective places of business; and there is now, and has been for several years last past, a course of trade and commerce by said respondent in such 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 retail and 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 ultimate consumers thereof.

(a) One of said assortments manufactured and distributed by respondent is composed of a number of pieces of chocolate-covered candies of uniform size and shape together with a number of larger pieces and larger bars of candy, together with a small package of candy, which larger pieces and bars and small package of candy are to be given as prizes to purchasers of said candies of uniform size and shape in the following manner:

The majority of the said chocolate-covered candies of uniform size and shape in said assortment have white centers but a small number of said pieces of candy have chocolate-colored centers and a small number of said pieces of candy have pink centers. The said pieces of candy of uniform size and shape in said assortment retail at the price of 1 cent each, but the purchaser who procures one of said candies having a chocolate center is entitled to receive and is to be given free of charge one of the larger pieces of candy, and the purchaser who procures one of said candies having a pink center is entitled to receive and is to be given free of charge one of the bars of candy hereinbefore referred to. The purchaser of the last piece of the aforesaid chocolate-covered candies 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 chocolate-covered pieces of candy of uniform size and shape is effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular piece of candy broken open. The aforesaid purchasers of said candies who procure a candy having a chocolate-colored center or pink center, and the purchaser of the last piece of candy in said assortment thus procure one of the said larger pieces of candy, one of the candy bars and the small package of candy wholly by lot or chance.

Respondent furnishes to said retail and wholesale dealers and jobbers with said assortment of candy heretofore referred to, a display card to be used by the retailer in offering said candies for sale to the public, which display card bears a legend or statement informing purchasers and prospective purchasers that the candy contained in said assortment is being sold and distributed in accordance with the above-described sales plan.

(b) Another assortment manufactured and distributed by respondent is composed of a number of pieces of candy of uniform size and shape, together with a number of small packages of candy, and a 1-pound box of candy, which small packages of candy and 1-pound

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box of candy are to be given as prizes to purchasers of said candy of uniform size and shape in the following manner:

The said pieces of candy of uniform size and shape have hollow centers in which are placed one or two pea-shaped green candies. The majority of the said pieces of candy of uniform size and shape having hollow centers, contain one pea-shaped green candy, but a small number of said candies contain two pea-shaped green candies. The said pieces of candy of uniform size and shape in said assortment retail at the price of 1 cent each, but the purchaser who procures one of the said candies containing two pea-shaped green candies in the hollow center, is entitled to receive, and is to be given free of charge one of the small packages of candy heretofore referred to. The purchaser of the last piece of aforesaid candies of uniform size and shape is entitled to receive and is to be given free of charge, the 1-pound box of candy heretofore referred to. The fact as to which pieces of candy contain one pea-shaped green candy and which contain two pea-shaped green candies is effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular piece of candy broken open. The aforesaid purchasers of said candies who procure a candy containing two pea-shaped green candies and the purchaser of the last piece of candy in said assortment thus procure the small packages of candy and the 1-pound box of candy 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) a larger piece or bar of candy or small package of candy, or (b) a small package of candy or a 1-pound 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 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 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 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 equivalent methods, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said methods 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 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 the Federal Trade Commission Act, the Federal Trade Commission, on August 18, 1930, issued and thereafter served its complaint in this proceeding upon the respondent, Elbee Chocolate Co., Inc., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. Respondent, on September 15, 1932, filed with the Commission an answer to the said complaint. On April 9, 1934, respondent filed with the Commission a motion to withdraw said answer and to file in lieu thereof a substitute answer. The said motion was granted and the substitute answer was duly filed. Thereafter, the matter came on to be heard on the complaint of the Commission and the substitute answer, and on April 11, 1934, the Commission made, entered, and issued against the respondent an order to cease and desist from the violations of the law charged in the complaint. The Commission on January 16, 1936, vacated the said order to cease and desist, and on September 24, 1936, issued its amended and supplemental complaint, to which the respondent filed its answer on October 23, 1936. Thereafter testimony and other evidence in support of the allegations of said amended and supplemental complaint were introduced by Henry C. Lank, attorney for the Commission, before Miles J. Furnas, an examiner of the Commission theretofore fully designated by it. Victor W. Milch entered his appearance as counsel for respondent, but did not offer any testimony or other evidence in opposition to the allegations of the complaint. The 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 amended and supplemental complaint, the answer thereto, testimony and other evidence in support of the amended and supplemental complaint and brief of counsel for the Commission (no brief having been filed by the respondent 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. Respondent is a corporation organized under the laws of the State of New York, with its principal office and place of business located at 32 South Ninth Street, in the city of Brooklyn, State of New York. It is now, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to jobbers located at points in the various States of the United States. Respondent causes and has caused its products, when sold, to be transported from its principal place of business in the city of Brooklyn, State of New York, to purchasers thereof in the 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 by said respondent in such candy in commerce between and among the 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. Respondent's annual volume of business is approximately \$750,000.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, respondent sells and 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, gift enterprise, or game of chance, when sold to the consumers thereof. One of said assortments is hereinafter described in detail, and illustrates substantially the method or sales plan employed by respondent in the sale and distribution of all of its said assortments. This assortment is composed of a number of pieces of chocolate-covered candy of uniform size and shape, together with a number of larger pieces or bars of candy and a box of candy, which larger pieces or bars and box of candy are to be given as prizes to purchasers of said candy of uniform size and shape in the following manner: The majority of the said pieces of candy of uniform size and shape in said assortment have white centers but a minority of said pieces of candy have colored centers. 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 said pieces of candy having a colored center is entitled to receive and is to be given without additional charge, one of the larger pieces or bars of candy. The purchaser of the last piece of candy of uniform size and shape is entitled to receive, and is to be given without additional charge, the box of candy

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heretofore referred to. The color of the centers 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 particular piece of candy broken open. The aforesaid purchasers of said pieces of candy who procure pieces of candy having colored centers thus procure one of said 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 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 features 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 jobbers to whom respondent sells its assortments resell the same to retail dealers, who in turn sell said assortments to the purchasing public, and said assortments are displayed for sale to the purchasing public as packed by the respondent, and sold to the purchasing 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 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 had knowledge that said assortments were to be resold to the purchasing public by lot or chance, and respondent packed such candy in the way and manner described so that without alteration, addition thereto, or rearrangement thereof, it might 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 the 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" 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" assortments have appeared in their markets. The 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 "break-and-take," "draw," or "deal" candy because of the gambling feature connected with its sale. Respondent's candy is sold and distributed nationally, and is resold in practically all stores where candy is offered for sale and sold to the public, including penny candy stores, school stores, and neighborhood stores.

PAR. 7. There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize packages or assortments of candy, and who sell their "straight goods" candy in interstate commerce in competition with the "break-and-take" assortments of respondent. Many competitors of respondent regard the sale and distribution of candy by the method described herein as morally bad, and as encouraging gambling, especially among children; as injurious to the candy industry because it results in the merchandising of a chance or lottery instead of candy, and as providing retail merchants with the means of violating the laws of several States. Because of these reasons, some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the consuming public by lot or chance. These competitors are thereby put to a competitive disadvantage. The use of such method by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and respondent's competitors and has resulted in the unfair diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

CONCLUSION

The aforesaid acts and practices of respondent 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.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended and supplemental complaint of the Commission and the answer of respondent, testimony and other evidence taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint, brief of counsel for the Commission filed herein (respondent having filed no brief and introduced no testimony or other evidence in opposition to the complaint, and oral argument not having

been requested), and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is now ordered, That the respondent, Elbee Chocolate Company, Inc., 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 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 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, pieces of candy of uniform size and shape with different colored centers, together with larger pieces or boxes of candy, or any other merchandise, which said larger pieces 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.

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 the order.

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IN THE MATTER OF

AMERICAN LAWN MOWER COMPANY, DOING BUSINESS
AS RICHMOND SCHOOL FURNITURE COMPANY

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

Docket 2785. Complaint, Apr. 24, 1936—Decision, July 14, 1938

Where a corporation engaged in the manufacture and sale of composition blackboards, including its so-called "Litho Plate" type, made by applying to a backing board of masonite or gypsum fiber board a varying number of coats of a mixture consisting of a varnish-like vehicle in which were suspended as insoluble ingredients powdered slate, lamp black, and carborundum, and made up chiefly into educational or toy blackboards in both easel desk style and wall style, and also made up as plain framed blackboards for commercial, school, and other uses, and, to a limited extent, made and sold in sizes and kinds for permanent installation in schoolhouses—

- (a) Represented, in advertising matter published in trade magazines and other publications circulated to the trade and public, and in advertising pamphlets and other advertising literature distributed to members of the purchasing public, that its said "Litho Plate" blackboards were superior to natural slate for blackboard usage, through such statements as "'Litho Plate' Better Than Slate," "* * * has a smooth velvet finish with a writing surface similar to natural slate, yet without the danger of breakage," "* * * Unbreakable Writing Surface," facts being that while said product undoubtedly had meritorious qualities, natural slate for use in blackboards has certain qualities that make it preferred by many users of such products, especially for permanent installation in schoolhouses, and, notwithstanding certain advantages of its said products, it was misleading to represent that same were "better than slate," and such general representations cast an unfair aspersion on natural slate as a blackboard material;
- (b) Falsely represented that its said blackboards, as well as the writing surfaces thereof, were unbreakable, and that the surfacing thereof was "slated," through such statements as "* * * This slated panel has all the smooth writing qualities of a slate board but it is not subject to breakage nor the excessive weight of solid slate," "* * * has a smooth velvet finish with a writing surface similar to natural slate, yet without the danger of breakage," "* * * Litho Plate slated surfaces will not break," facts being that said representations that the writing surface of its said blackboards was unbreakable or that the boards themselves were so, were exaggerated, unwarranted, and misleading, and notwithstanding fact that such boards would not shatter when dropped or struck with a hard object as would natural slate under like conditions, writing surface thereof was marred and injured for ordinary use by being struck with a hammer or other hard object and was also easily scratched and damaged by hard sharp instrument, and the backing boards used would bend and break under ordinary pressure or weight and the writing surface also would bend, crack, and break under like pressure at the same time;