

IN THE MATTER OF
J. W. PINCUS AND J. DAN SILVER, TRADING AS THE
NOVELCRAFTS COMPANY, AND LOU ROTH

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

Docket 3216. Complaint, Aug. 27, 1937—Decision, Aug. 8, 1938

Where two individuals and their employee engaged in sale and distribution of candy to wholesalers in various States, and in sale of so-called "break-and-take," "pick-and-take," "draw," or "deal" assortments, purchase of which candy is preferred by consumers because of the gambling feature connected with the sale thereof, and principal purchasers of which lot-or chance-sold candy are children, and sale of which, in competition with the "straight merchandise" of many candy manufacturers who do not make and sell the other, has been followed by a marked decrease in sale of such "straight merchandise" whenever or wherever other has appeared in its markets, due to said gambling or lottery feature connected therewith—

Sold to wholesalers certain assortments, which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and which were so packed, arranged, and designed as to be especially attractive to children, and included, as illustrative, penny pieces of uniform size and shape, the concealed colored center of a small number of which differed from that of the majority, together with certain articles of merchandise to be given as prizes to those procuring by chance such different colored centers, and together with still other articles of merchandise to be thus given to those procuring by chance certain other colored centers, relative number of which was even smaller; assembled and packed in such a manner that, with its knowledge and intent, they might be and were used by such wholesalers' retail-dealer customers for distribution to purchasing public by lot or chance without alteration or rearrangement; contrary to public policy, and in competition with many who regard such sale and distribution as injurious to the industry concerned, and some of whom, for such reason and because such sale and distribution supplies to and places in the hands of retailers means of conducting lotteries in violation of the laws of the several States, refuse to sell candy so packed that it can be resold to public by lot or chance; With result that such refusing competitors were placed at a competitive disadvantage, and purchasing public was deprived of the benefits of fair competition in trade in question, retailers, finding such "break-and-take," "pick-and-take," "draw," or "deal" candy more saleable, bought from them and others employing the same or an equivalent method of sale, and trade was unfairly diverted thereby from aforesaid competitors to them and to others using such or equivalent practice or method:

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

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

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

Mr. Herman W. Kaufmann, of Pittsburgh, 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 J. W. Pincus and J. Dan Silver, individually and as copartners trading as The Novelcrafts Co., and Lou Roth, an individual, hereinafter referred to as respondents, have been and are 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. The respondents, J. W. Pincus and J. Dan Silver, are individuals doing business as a partnership under the trade name The Novelcrafts Co. The respondent, J. W. Pincus, is located at 2020 Wylie Avenue, Pittsburgh, Pa., and the respondent, J. Dan Silver, is located at 319 Semple Street, Pittsburgh, Pa. The business carried on under the name of The Novelcrafts Co. is conducted at 1534 Center Avenue, Pittsburgh, Pa. The respondent, Lou Roth, is an individual and is in charge of and manages the business of the partnership carried on under the trade name The Novelcrafts Co., as described above, and is located at 1534 Center Avenue Pittsburgh, Pa.

The respondents, as above described, are now, and for some time last past have been, engaged in the sale and distribution of candy and chewing gum to wholesale dealers and jobbers and to retail dealers located at points in the various States of the United States. Respondents cause and have caused their said products when sold to be transported from their principal place of business in the city of Pittsburgh, State of Pennsylvania, to purchasers thereof in Pennsylvania and in other States of the United States at their respective points of location. There is now, and has been for some time last past, a course of trade and commerce by said respondents in such candy and chewing gum between and among the States of the United States. In the course and conduct of said business, respondents are in competition with other partnerships and with individuals and corporations engaged in the sale and distribution of candy and chewing

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gum 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 dealers and jobbers and to retail dealers assortments of candy and assortments of chewing gum so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

(a) One of said assortments of candy is composed of a number of pieces of candy of uniform size and shape, together with a number of other articles of merchandise, which other articles of merchandise are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner: The majority of said pieces of candy of uniform size and shape have centers of the same color, but a small number of said pieces of candy have centers of a different color and a still smaller number of said pieces of candy have centers of a still different color. The pieces of candy of uniform size and shape retail at the price of 1 cent each, but the purchaser who procures one of the pieces of candy having a center of a particular color is entitled to receive and is to be given free of charge one of the other articles of merchandise included in said assortment and 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 broken open. The other articles of merchandise included in said assortment are thus distributed to purchasers of the pieces of candy of uniform size and shape wholly by lot or chance.

(b) One of said assortments of chewing gum is composed of a number of sticks of chewing gum of uniform size and shape, together with a number of small pennants and one larger pennant, which said pennants are to be given as prizes to purchasers of the individual sticks of chewing gum in the following manner: The majority of the said sticks of chewing gum in said assortment are of the same color, but a small number of said sticks of chewing gum are of a different color. The said sticks of chewing gum retail at the price of 1 cent each, but the purchaser who procures one of the sticks of chewing gum of a color different from the majority is entitled to receive and is to be given free of charge one of the small pennants included in said assortment and heretofore referred to. The purchaser of the last stick of chewing gum in said assortment is entitled to receive and is to be given free of charge the larger pennant included in said assortment and heretofore referred to.

The said sticks of chewing gum in said assortment are wrapped in individual wrappers, and the color thereof is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. The said pennants contained in said assortment are thus distributed to purchasers of chewing gum from said assortment wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondents sell said assortments resell the same to retail dealers, and the said retail dealers and the retail dealers to whom respondents sell direct expose said assortments for sale and sell said candy and chewing gum 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 or chewing gum offered for sale and sold by their competitors.

PAR. 4. The sale of candy and chewing gum to the purchasing public by either one of the methods above described involves a game of chance or the sale of a chance to procure other articles of merchandise. The use by respondents of said methods in the sale of candy and chewing gum, and the sale of candy and chewing gum 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 and chewing gum 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 sell candy and chewing gum in competition with respondents, as above alleged, are unwilling to offer for sale or sell candy or chewing gum 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 or chewing gum are attracted by respondents' said methods and manner of packing said candy and chewing gum and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy and chewing gum so packed and sold by respondents in preference to candy or chewing gum offered

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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 or chewing gum 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 or chewing gum trade, and to tend to create a monopoly of said candy or chewing gum trade in respondents and in such other distributors of candy or chewing gum as use the same or equivalent methods; and to deprive the purchasing public of the benefit of free competition in said candy or chewing gum trade. The use of said methods by respondents has the tendency and capacity to eliminate from said candy or chewing gum 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 the Federal Trade Commission Act, the Federal Trade Commission on August 27, 1937, issued, and thereafter served, its complaint in this proceeding upon the respondents J. W. Pincus and J. Dan Silver, individually and as copartners trading as The Novelcrafts Co., and Lou Roth, an individual, 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 Herman W. Kaufmann, attorney for the respondents, 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 a brief in support of the complaint (no brief having been filed and oral argument not having been requested by attorney for respondents), 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. Respondents, J. W. Pincus and J. Dan Silver, are individuals doing business as a partnership under the trade name, The Novelcrafts Co. The respondent, J. W. Pincus, is located at 2020 Wylie Avenue, Pittsburgh, Pa., and the respondent, J. Dan Silver, is located at 319 Semple Street, Pittsburgh, Pa. The business carried on under the name of The Novelcrafts Co. is conducted at 1534 Center Avenue, Pittsburgh, Pa. Respondent, Lou Roth, is an individual whose principal office and place of business is the same as The Novelcrafts Co. He is an employee of The Novelcrafts Co. in charge of the shipping and receiving of the products sold by said partnership, and assists respondents, Pincus and Silver, in the general management of said partnership. Respondents are now, and for some time last past have been, engaged in the sale and distribution of candy to wholesale dealers located in Pennsylvania, Maryland, New Jersey, New York, Ohio, and in other States of the United States. Respondents cause, and have caused, their said candy, when sold, to be transported from their place of business aforesaid to purchasers thereof in the above-mentioned States and in other States of the United States at their respective points of location. There is now, and for some time last past has been, a substantial course of trade by respondents in such candy in commerce between and among the States aforementioned and other States of the United States. In carrying on said business as hereinabove described, respondents are in active competition with other partnerships and with individuals and corporations engaged in the sale and distribution of candy in commerce between and among various States of the United States.

PAR. 2. In the course and conduct of said business as above described, respondents sell, and have sold, to wholesale dealers in commerce a number of assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to consumers thereof. One of said assortments substantially illustrates the sales plan or method employed in connection with the sale and distribution to the consuming public of all of respondents' assortments of candy and is described in detail as follows:

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(a) One of said assortments of candy is composed of a number of pieces of candy of uniform size and shape, together with a number of other articles of merchandise, which other articles of merchandise are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner: The majority of said pieces of candy of uniform size and shape have centers of the same color, but a small number of said pieces of candy have centers of a different color, and a still smaller number of said pieces of candy have centers of a still different color. The pieces of candy of uniform size and shape retail at the price of 1 cent each, but the purchaser who procures one of the pieces of candy having a center of a particular color is entitled to receive, and is to be given free of charge, one of the other articles of merchandise included in said assortment and 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 broken open. The other articles of merchandise included in said assortment are thus distributed to purchasers of the pieces of candy of uniform size and shape 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 candy industries as "break-and-take," "pick-and-take," "draw," or "deal" assortments. Assortments of candy without any lottery or chance features used 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 hereafter in these findings to distinguish the various types of assortments.

PAR. 4. The wholesale dealers to whom respondents sell their assortments of candy resell the same to retail dealers who, in turn, sell said assortments to the consuming public, and said assortments are displayed for sale to the consuming public as packed by the respondents and sold to the consuming public in accordance with the above described sales plan.

PAR. 5. The assortments herein above described are assembled and packed in such a manner that they have been and are 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 herein above described, respondents had knowledge that said assortments were to be resold to the consuming public by retail dealers by lot or chance, and respondents packed such candy in the way and manner described herein so that, without alteration, addition thereto, or rearrangement thereof, it might be resold to the public by lot or chance by such 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," "pick-and-take," "draw," or "deal" assortments of candy and who sell their straight merchandise in interstate commerce in competition with the "break-and-take," "pick-and-take," "draw," or "deal" candy, and the manufacturers of "straight merchandise" have noted a marked decrease in the sale of their products whenever or wherever the "break-and-take," "pick-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," "pick-and-take," "draw," or "deal" candy. Consumers prefer to purchase "break-and-take," "pick-and-take," "draw," or "deal" candy because of the gambling feature connected with its sale.

Respondents' assortments of candy are so packed, arranged, and designed as to be especially attractive to children, who are the principal purchasers of candy sold by lot or chance. As a result of the chance feature employed by respondents in connection with the sale and distribution of their said assortments, children are taught and induced to gamble.

PAR. 7. The sale and distribution of candy by the sales plan or method described herein, is the sale and distribution of candy by lot or chance, and constitutes a lottery scheme, game of chance, or gift enterprise. The use by respondents of said sales plan or method in the sale of their candy has a tendency and capacity, because of said game of chance, to create a monopoly of said candy trade in respondents and in such other distributors of candy as use the same or an equivalent method. Many competitors of respondents regard such sale and distribution as being injurious to the candy industry. The sale and distribution by respondents of such assortments of candy supplies to and places in the hands of retail dealers a means of conducting lotteries, which are in violation of the laws of 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 placed at a competitive disadvantage and the purchasing public is thus deprived of the benefits of fair competition in said candy trade. The retailers, finding that they can dispose of more candy by "break-and-take," "pick-and-take," "draw," or "deal" methods, have bought from respondents and others employing the same or an equivalent method of sale, and thereby trade is unfairly diverted from said competitors to respondents and others using the same or an equivalent method.

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CONCLUSION

The aforesaid acts and practices of respondents are all to the prejudice of the public and of respondents' 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 complaint of the Commission and the answer of respondents, 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 and in opposition thereto, a brief in support of the complaint (no brief having been submitted and oral argument not having been requested by attorney for respondents), and the Commission having made its findings as to the facts and conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, J. W. Pincus and J. Dan Silver, individually and as copartners trading as The Novelcrafts Co., or trading under any other name, and Lou Roth, an individual, their representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of candy or other confections, in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Selling and distributing to dealers candy or other confections so packed and assembled that sales of such candy or other confections 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 or other confections which are used or which may be used without alteration or rearrangement of the contents of such packages or assortments to conduct a lottery, game of chance, or gift enterprise in the sale and distribution of candy or other confections contained in said assortments to the public;

3. Packing or assembling in the same assortment of candy for sale to the public at retail, pieces of candy of uniform size and shape with different colored centers, together with other articles of merchandise, which said articles of merchandise are to be given as prizes to the purchasers procuring pieces of candy with centers of particular colors.

It is further ordered, That the respondents shall, within 60 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
LETELLIER-PHILLIPS PAPER 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 3434. Complaint, May 21, 1938—Decision, Aug. 8, 1938

Where a corporation which was engaged in buying, packing, and selling waste paper, rags, and other waste materials, and had long had dominant control of the waste-paper business in the South and Southwest generally, and particularly in Louisiana, Texas, and Mississippi, so that large consumers of waste paper and waste materials in such section were dependent, to a large degree, upon it for their necessary supplies thereof, and other and smaller dealers therein were likewise dependent upon it for an outlet for their supplies of such materials; with intent, tendency, or effect of creating and maintaining in itself a monopoly in the trade territory in which it operated—

- (a) Threatened to discontinue all business relations with other waste-material dealers with whom it did a large business located in various States, should they continue purchasing from or selling to certain of its competitors located in the Southern States;
- (b) Threatened to cease supplying mills and other large consumers of waste products in the Southern States, dependent to a great extent upon it for their necessary supply thereof, with such materials in the event said consumers purchased such materials from certain of its competitors; and
- (c) Threatened to come into the territories of other dealers located in various States and enter into active competition with them if they persisted in purchasing from and selling to certain of its competitors located in such Southern States;

With capacity, tendency and effect, as a result of said acts and practices and others of similar nature, of monopolizing in its business of buying, packing, and selling waste paper, rags, and other waste materials in aforesaid States, unreasonably lessening, eliminating, restraining, and suppressing competition in industry in question, depriving purchasing and consuming public of advantages which they would receive and enjoy under conditions of normal and unobstructed or free and fair competition therein, and otherwise operating as a restraint of trade and a detriment to the freedom of fair and legitimate competition in industry in question, and of obstructing natural flow of trade in channels of commerce between and among the several States and in the District of Columbia:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of competitors and the public and hindered and prevented competition in sale of aforesaid products and dangerously tended so to do, and unreasonably restrained commerce therein and constituted unfair methods of competition.