

Syllabus

IN THE MATTER OF
THE NEWTON PRODUCTS COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 3599. Complaint, Sept. 21, 1938—Decision, Jan. 26, 1939.*

Where a corporation engaged in manufacture and sale of candy including 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 included assortments composed of (1) number of small penny pieces of uniform size and shape together with (a) number of candy bars for distribution without charge to those purchasers of said penny pieces securing by chance one of a relatively few thereof, enclosed colored centers of which differed from those of others, and (b) large piece to be given without charge to purchaser of last of said penny pieces, and (2) composed of number of penny pieces of uniform size and shape in small box enclosed, along with large candy piece, in larger box in which wholesaler, jobber, and retail purchasers included, along with other, number of candy bars for gifts as prizes to chance purchasers of said penny pieces, concealed colored centers of which differed from those of majority thereof and from which said large piece was given without charge to purchaser of last of penny pieces in assortment:

Sold to dealers for display and resale to purchasing public in accordance with aforesaid plans such assortments and thereby supplied to and placed in hands of others means of conducting lotteries in sale of its products in accordance with said plan, involving game of chance or sale of chance to procure additional pieces or bars of candy without additional cost; contrary to an established policy of the United States Government and in violation of the criminal laws and in competition with many who are unwilling to offer or sell their products so packed and assembled as aforesaid described or otherwise arranged and packed for sale to purchasing public so as to involve a game of chance or any other method contrary to public policy and refrain therefrom;

With result that many dealers in and ultimate consumers of candy were attracted by its said method of packing same and by element of chance involved in sale thereof as above set out and thereby induced to purchase such candy thus packed and sold by it in preference to that offered and sold by said competitors who do not use such or equivalent sales plans or methods, and with tendency and capacity because of said game of chance to divert unfairly trade and custom to it from its competitors who do not use such or equivalent methods, exclude from candy trade all competitors who are unwilling to and do not use such or equivalent methods as unlawful, lessen competition in said trade, create a monopoly thereof in it and in such other distributors of candy as do use such methods, deprive purchasing public of benefit of free competition and eliminate from said trade all actual, and exclude therefrom all potential, competitors who do not adopt or use such methods:

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

Mr. D. C. Daniel for the Commission.

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that The Newton Products Co., a corporation, has violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The respondent, The Newton Products Co. is a corporation organized and doing business under the laws of the State of Ohio, with its principal offices and place of business located at Third and Lock Streets, Cincinnati, Ohio. Respondent is now and for some time last past has been engaged in the manufacture of candy and in the sale and distribution thereof to dealers. Respondent causes and has caused its products, when sold, to be shipped or transported from its aforesaid place of business in the State of Ohio to purchasers thereof located in the various other States of the United States and in the District of Columbia at their respective places of business. There is now and has been for some time last past a course of trade by said respondent in such candy in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its business respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, respondent sells and has sold to dealers 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 sold and distributed to the purchasing public in the following manner: This assortment consists of a number of small pieces of candy of uniform size and shape, a number of bars of candy, and one large piece of candy. The said bars of candy and the large piece of candy are to be given as prizes to purchasers of certain of said small pieces of candy as follows: The majority of said pieces of candy of uniform size and shape in said assortment have centers of the same color but a minority of said pieces of candy of uniform size and shape have centers of a different color. The said pieces of candy of uniform size and shape retail at 1 cent each but the purchasers procuring pieces of the minority pieces of candy are entitled

to and are given, without charge, said bars of candy. The purchaser of the last piece of said small pieces of candy is entitled to receive and is given, without charge, the said large piece of candy. The colors of the centers of said small pieces of candy are effectively concealed from purchasers and prospective purchasers until a purchase is made and the said small pieces of candy broken open. The said bars of candy are thus distributed to the purchasing public wholly by lot or chance.

Another of respondent's assortments consists of a number of small pieces of candy of uniform size and shape contained in a small box, together with a large piece of candy, which box of candy and the large piece of candy are packed in a larger box. The wholesale dealers, jobbers, and retail dealers who purchase this assortment pack and assemble in said larger box, along with the large piece of candy and the box containing the said small pieces of candy, a number of bars of candy. The said bars of candy and the large piece of candy are to be given as prizes to the purchasers of certain of said small pieces of candy as follows: The majority of said pieces of candy of uniform size and shape in said assortment have centers of a same color but a minority of said pieces of candy of uniform size and shape have centers of a different color. The said small pieces of candy retail at 1 cent each but the purchasers procuring pieces of the minority pieces of candy are entitled to receive, and are given without charge, said bars of candy. The purchaser of the last piece of said small pieces of candy is entitled to receive, and is given without charge, the said large piece of candy. The colors of the centers of said small pieces of candy are effectively concealed from purchasers and prospective purchasers until purchases are made and the said small pieces of candy broken open. The said bars of candy are thus distributed to the purchasing public wholly by lot or chance.

PAR. 3. Retail dealers who purchase respondent's assortments of candy, directly or indirectly, expose and sell the same to the purchasing public in accordance with the aforesaid sales plans. 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 plans hereinabove set forth. Said sales plans have a tendency and capacity to induce purchasers of said candy to purchase respondent's candy 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 additional pieces or bars of candy without addi-

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tional cost. 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 is contrary to an established public policy of the Government of the United States and in violation of the criminal laws. The use by respondent of said methods has a tendency unduly to hinder competition or to create a monopoly in that the use thereof has a tendency and capacity to exclude from the candy trade competitors who do not use and adopt the same methods or equivalent methods involving the same or equivalent elements of chance or lottery. Many persons, firms, and corporations who make and sell candy in competition with respondent, as above alleged, are unwilling to offer for sale or to sell their products so packed and assembled as above described or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance or any other method which is contrary to public policy, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate consumers 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 alleged, and thereby are 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 sales plans or methods. The use of said methods by respondent has a tendency and capacity, because of said game of chance, to unfairly divert to respondent trade and custom from its competitors who do not use the same or equivalent methods; to exclude from the candy trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are unlawful; to lessen competition in the candy trade; to create a monopoly of said candy trade in respondent and in such other distributors of candy as use the same or equivalent methods and to deprive the purchasing public of the benefit of free competition. The use of said methods 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 the same or equivalent methods.

PAR. 6. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Findings

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on September 21, 1938, issued, and on September 22, 1938, served its complaint in this proceeding upon respondent, The Newton Products Co., charging it with the use of unfair methods of competition and deceptive acts and practices in commerce in violation of the provisions of said act. On October 25, 1938, the respondent filed its answer, in which answer it admitted all the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearings as to said facts. Thereafter, the proceeding regularly came on for final hearing before the Commission on said complaint and the answer thereto, 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, The Newton Products Co. is a corporation organized and doing business under the laws of the State of Ohio, with its principal office and place of business located at Third and Lock Streets, Cincinnati, Ohio. Respondent is now and for some time last past has been engaged in the manufacture of candy and in the sale and distribution thereof to dealers. Respondent causes and has caused its products, when sold, to be shipped or transported from its aforesaid place of business in the State of Ohio to purchasers thereof located in the various other States of the United States and in the District of Columbia at their respective places of business.

There is now and has been for some time last past a course of trade by said respondent in such candy in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its business respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, respondent sells and has sold to dealers 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 sold and distributed to the purchasing public in the following manner. This assortment consists of a number of small pieces of candy of uniform size and shape, a number of bars of candy and one large piece of candy. The said bars of candy and the large piece of candy are to be given as prizes to purchasers of certain of said small pieces of candy as follows: The majority of said pieces of candy of uniform size and shape in said assortment have centers of the same color but a minority of said pieces of candy of uniform size and shape have centers of a different color. The said pieces of candy of uniform size and shape retail at 1 cent each but the purchasers procuring pieces of the minority pieces of candy are entitled to and are given, without charge, said bars of candy. The purchaser of the last piece of said small pieces of candy is entitled to receive and is given, without charge, the said large piece of candy. The colors of the centers of said small pieces of candy are effectively concealed from purchasers and prospective purchasers until a purchase is made and the said small pieces of candy broken open. The said bars of candy are thus distributed to the purchasing public wholly by lot or chance.

Another of respondent's assortments consists of a number of small pieces of candy of uniform size and shape contained in a small box, together with a large piece of candy, which box of candy and the large piece of candy are packed in a larger box. The wholesale dealers, jobbers, and retail dealers who purchase this assortment pack and assemble in said larger box, along with the large piece of candy and the box containing the said small pieces of candy, a number of bars of candy. The said bars of candy and the large piece of candy are to be given as prizes to the purchasers of certain of said small pieces of candy as follows: The majority of said pieces of candy of uniform size and shape in said assortment have centers of a same color but a minority of said pieces of candy of uniform size and shape have centers of a different color. The said small pieces of candy retail at 1 cent each but the purchasers procuring pieces of the minority pieces of candy are entitled to receive, and are given without charge, said bars of candy. The purchaser of the last piece of said small pieces of candy is entitled to receive, and is given without charge, the said large piece of candy. The colors of the centers of said small pieces of candy are effectively concealed from purchasers and prospective purchasers until purchases are made and the said small pieces of candy broken open. The said bars of candy are thus distributed to the purchasing public wholly by lot or chance.

PAR. 3. The retail dealers who purchase respondent's assortments of candy, directly or indirectly, expose and sell the same to the pur-

chasing public in accordance with the aforesaid sales plans. 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 plans hereinabove set forth. Said sales plans have a tendency and capacity to induce purchasers of said candy to purchase respondent's candy 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 found involves a game of chance or the sale of a chance to procure additional pieces or bars of candy without additional cost. 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 is contrary to an established public policy of the Government of the United States and in violation of the criminal laws. The use by respondent of said methods has a tendency unduly to hinder competition or to create a monopoly in that the use thereof has a tendency and capacity to exclude from the candy trade competitors who do not use and adopt the same methods or equivalent methods involving the same or equivalent elements of chance or lottery. Many persons, firms, and corporations who make and sell candy in competition with respondent, as above found, are unwilling to offer for sale or to sell their products so packed and assembled in the manner in which respondent assembles, packs, and sells its products, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance or any other method which is contrary to public policy, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate consumers 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 found, and thereby are 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 sales plans or methods. The use of said methods by respondent has a tendency and capacity, because of said game of chance, to unfairly divert to respondent trade and custom from its competitors who do not use the same or equivalent methods; to exclude from the candy trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are unlawful; to lessen competition in the candy trade; to create a monopoly of said candy trade in respondent and in such other distributors of candy as use the same or equivalent methods and to deprive the purchasing public of the benefit of free competition. The use of said

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methods 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 the same or equivalent methods.

CONCLUSION

The aforesaid acts and practices of the respondent as hereinabove found are all to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition and unfair and deceptive acts and practices 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 respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that it waives all intervening procedure and further hearing as to said facts 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 ordered, That the respondent, The Newton Products Co., its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of candy or any other merchandise in commerce, as commerce is defined in the Federal Trade Commission Act, 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 to be used, or may be used, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of candy or any other articles of merchandise to the public.
3. Supplying to, or placing in the hands of dealers assortments of candy, or any other merchandise, together with a lottery device, which lottery device is to be used, or may be used, in selling or distributing such candy or other merchandise to the public.
4. Supplying to, or placing in the hands of dealers a lottery device either with assortments of candy or other merchandise or separately, which lottery device is to be used, or may be used, in selling or distributing such candy or other merchandise to the public.

5. Packing or assembling in the same package or packages of candy for sale to the public at retail, pieces of candy of uniform size and shape having centers of a different color, together with larger pieces of candy, or other articles of merchandise, which said larger pieces of candy or other articles of merchandise are to be given as prizes to purchasers procuring a piece of candy having a center 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 this order.

IN THE MATTER OF
JOSEPH C. BRADLEY ET AL.

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

Docket 3072. Complaint, Mar. 10, 1937—Decision, Jan. 27, 1939

Where an individual engaged as owner of an electromagnetic health appliance or belt, in sale and distribution thereof from his place of residence in Toronto, Canada, through agents and subagents in the United States, and said agents, engaged as aforesaid, along with others likewise engaged in manufacture and sale or sale of various appliances made and sold for operation with ordinary house current and used in therapeutic treatment for prevention of or relief from various ailments and pathological conditions, and in competition with others engaged in manufacture, sale, and distribution of magnetic appliances or devices for treatment of various diseases; in soliciting and causing their said agents to solicit sale of said so-called Harmony Electro-Magnetic Health Appliance or Harmony Belt to members of the public through advertising jointly prepared and used by them in radio broadcasts, in newspapers and letters, and by means of circulars, booklets, and other printed matter in furtherance of their common understanding, combination, and agreement and joint efforts directed to promoting the sale of said device or belt throughout the United States—

- (a) Represented that said appliance was an effective, safe, tested, and tried and proven therapeutic agent and that electromagnetism had a thoroughly relaxing effect and strengthened vitality, assisting oxidation, increasing circulation, aiding metabolism, stimulating the nerves, and building up the body, etc., and through stimulating circulation dissolved the poisons so that they could be removed, and through removing the cause of disease permitted the body to rebuild itself;
- (b) Represented that said appliance or belt created an intensified magnetic field and that use thereof would remove acidosis and toxicosis from the system and bring quick relief from and overcome such troubles as rheumatism, stiff joints, arthritis, lumbago, neuritis, high blood pressure, strokes, eczema, old-age troubles, phlebitis, and various others, and that it equalized and built up the circulation and had shown wonderful results in various ailments above set out and indicated;
- (c) Represented that said device or belt proved effective in cases of heart trouble and other ailments and resulted in the carrying away of poisons involved through their natural channels and that it assisted kidneys and bowels in performing their normal functions and aided in removing poisons from the body;

Facts being that said device would have no effect upon health by virtue of magnetic field created nor have any effect on diseases for which it was claimed as being remedial and curative as above set forth other than such temporary alleviation as it might afford in certain cases through heat produced, such as accomplished through hot-water bottle, and it would not be of any effect with respect to the functioning of the kidneys, bowels,