

Syllabus

IN THE MATTER OF

D. A. SCHULTE, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3676. Complaint, Dec. 23, 1938—Decision, Feb. 15, 1939*

Where a corporation engaged in sale and distribution of certain assortments of candy and other articles of merchandise which were (1) so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, and for use with which (2) it shipped to its wholesaler, jobber, and retailer customers punchboards, and one of which (3) consisted of a number of boxes of assorted candy and additional articles of merchandise, together with punchboards for disposition of said candy and merchandise to consuming public under a plan in accordance with which, and board's explanatory legend, certain specified numbers entitled purchaser to a box of candy or other articles, and purchaser of last punch in each of three sections into which board was arranged received a pound box of candy, and purchaser of last punch on board received article of merchandise, and purchaser who failed thus to qualify and thereby secure one of said boxes of candy or articles, value of which was in excess of the 5 cents or 10 cents charged for punch, received nothing for such 5 cents or 10 cents other than privilege of making punch;

Sold to wholesalers, jobbers, and retailers such assortments and furnished punchboards as aforesaid to such assortments' purchasers, by whom such boards were made use of in sale and distribution of its candy and merchandise in accordance with aforesaid sales plan, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its candy and other merchandise in accordance with such sales plan involving game of chance or sale of a chance to procure candy or article of merchandise at price much less than normal retail price thereof, contrary to an established public policy of the United States Government and in violation of the criminal laws, and in competition with many who are unwilling to adopt and use such or any method involving game of chance or sale of a chance to win by chance or any other method contrary to public policy and refrain therefrom;

With result that many persons were attracted by said sales plan or method employed by it in sale and distribution of its candy and other articles and element of chance involved therein and were thereby induced to buy and sell such candy and other articles in preference to such merchandise offered and sold by said competitors who do not use such or equivalent method, and of unfairly diverting trade because of said game of chance to it from its competitors who do not use such method, to the substantial injury of competition in commerce:

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

Mr. D. C. Daniel for the Commission.

Mr. Jerome Eisner, of New York City, for respondent.

Complaint

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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 D. A. Schulte, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, D. A. Schulte, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 384 Broadway, New York City. Respondent is now, and for some time last past has been, engaged in the sale and distribution of candy and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia. Respondent causes, and has caused, said products, when sold, to be transported from his place of business aforesaid to purchasers thereof in the various States of the United States other than New York and in the District of Columbia, at their respective points of location. There is now, and has been for some time last past, a course of trade by said respondent in such products in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business respondent is, and for some time last past has been, in competition with other corporations and individuals and with partnerships engaged in the sale and distribution of candy and other articles of merchandise 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 wholesale dealers, jobbers, and retail dealers, certain assortments of candy and other articles of merchandise so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. Respondent causes and has caused punchboards, which are designed to be, and are, used with the said assortments to be shipped to the aforesaid wholesale dealers, jobbers, and retail dealers. The wholesalers and jobbers, aforesaid, in turn, assemble the punchboards, candy and other articles of merchandise into one assortment and sell same to the retail trade. Respondent furnishes and has furnished various punchboards for use in the sale and distribution of its candy and other articles of merchandise by means of

a game of chance, gift enterprise or lottery scheme. The sales plan or method involved in connection with the sale of all of said candy or other articles of merchandise by means of said punchboard is the same as the one hereinafter described, varying only in detail.

One of said assortments consists of a number of boxes of assorted candy and additional articles of merchandise, together with a device commonly called a punchboard. Said boxes of candy and other articles of merchandise are distributed to the consuming public by means of said punchboard in the following manner: The sales are 5 or 10 cents each and when a punch is made from the board a number is disclosed. The numbers begin with one and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears the statement or statements informing prospective purchasers that certain specified numbers entitle the purchasers thereof to receive a box of candy or other articles of merchandise. The punches on the board are arranged in four sections and the purchaser of the last punch in each section, except the last, receives a pound box of candy and the purchaser of the last punch on the board receives an article of merchandise. A purchaser who does not qualify by obtaining one of the numbers calling for one of the boxes of candy or by punching the last number in one of the sections, or the last number on the board, receives nothing for his money other than the privilege of punching a number from the board. The boxes of candy are worth more than 5 or 10 cents each and the purchaser who obtains one of the numbers calling for a box of candy, or an article of merchandise, receives the same for the price of 5 or 10 cents. The numbers are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The boxes of candy and other articles of merchandise are thus distributed to purchasers of punches from the board wholly by lot or chance.

PAR. 3. The persons to whom respondent furnishes the said punchboards use the same in selling and distributing respondent's candy and merchandise 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 candy and merchandise in accordance with the sales plan hereinabove set forth. The use by respondent of said sales plan or method in the sale of its candy and merchandise and the sale of said candy and merchandise by and through the use thereof and by the aid of said sales plan or method is a practice of a sort which is contrary to an established public

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policy of the Government of the United States and in violation of the criminal laws.

PAR. 4. The sale of candy and other articles of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure candy or an article of merchandise at a price much less than the normal retail price thereof. Many persons, firms, and corporations, who sell or distribute candy and other articles of merchandise in competition with the respondent as above alleged, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance, or any other method that is contrary to public policy and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of its candy and other articles of merchandise and the element of chance involved therein, and are thereby induced to buy and sell respondent's candy and other articles of merchandise in preference to candy and other articles of merchandise offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method. The use of said method by respondent, because of said game of chance, has a tendency and capacity to and does unfairly divert trade to respondent from its said competitors who do not use the same or an equivalent method, and as a result thereof substantial injury is being and has been done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. The aforesaid 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 and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 23, 1938, issued and thereafter served its complaint in this proceeding upon respondent D. A. Schulte, Inc., charging it with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. On January 13, 1939, 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 hearing as to said facts. Thereafter the proceeding regularly came on for

final hearing before the Commission on the 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. Respondent, D. A. Schulte, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 384 Broadway, New York City. Respondent is now, and for some time last past has been, engaged in the sale and distribution of candy and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia. Respondent causes, and has caused, said products, when sold, to be transported from its place of business aforesaid to purchasers thereof in the various States of the United States other than New York and in the District of Columbia, at their respective points of location. There is now, and has been for some time last past, a course of trade by said respondent in such products in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business respondent is, and for some time last past has been, in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy and other articles of merchandise 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 wholesale dealers, jobbers, and retail dealers, certain assortments of candy and other articles of merchandise so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. Respondent causes and has caused punchboards, which are designed to be and are, used with the said assortments to be shipped to the aforesaid wholesale dealers, jobbers, and retail dealers. The wholesalers and jobbers, aforesaid, in turn, assemble the punchboards, candy, and other articles of merchandise into one assortment and sell same to the retail trade. Respondent furnishes and has furnished various punchboards for use in the sale and distribution of its candy and other articles of merchandise by means of a game of chance, gift enterprise, or lottery scheme. The sales plan or method involved in connection with the sale of all of said candy

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or other articles of merchandise by means of said punchboard is the same as the one hereinafter described, varying only in detail.

One of said assortments consists of a number of boxes of assorted candy and additional articles of merchandise, together with a device commonly called a punchboard. Said boxes of candy and other articles of merchandise are distributed to the consuming public by means of said punchboard in the following manner: The sales are 5 or 10 cents each and when a punch is made from the board a number is disclosed. The numbers begin with one and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears the statement or statements informing prospective purchasers that certain specified numbers entitle the purchasers thereof to receive a box of candy or other articles of merchandise. The punches on the board are arranged in four sections and the purchaser of the last punch in each section, except the last, receives a pound box of candy and the purchaser of the last punch on the board receives an article of merchandise. A purchaser who does not qualify by obtaining one of the numbers calling for one of the boxes of candy or by punching the last number in one of the sections, or the last number on the board, receives nothing for his money other than the privilege of punching a number from the board. The boxes of candy are worth more than 5 or 10 cents each and the purchaser who obtains one of the numbers calling for a box of candy, or an article of merchandise, receives the same for the price of 5 or 10 cents. The numbers are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The boxes of candy and other articles of merchandise are thus distributed to purchasers of punches from the board wholly by lot or chance.

PAR. 3. The persons to whom respondent furnishes the said punchboards use the same in selling and distributing respondent's candy and merchandise 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 candy and other merchandise in accordance with the sales plan hereinabove set forth. The use by respondent of said sales plan or method in the sale of its candy and other merchandise and the sale of said candy and other merchandise by and through the use thereof and by the aid of said sales plan or method is a practice of a sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws.

PAR. 4. The sale of candy and other articles of merchandise to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure candy or an article of merchandise at a price much less than the normal retail price thereof. Many persons, firms, and corporations, who sell or distribute candy and other articles of merchandise in competition with the respondent as above found, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance, or any other method that is contrary to public policy and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of its candy and other articles of merchandise and the element of chance involved therein and are thereby induced to buy and sell respondent's candy and other articles of merchandise in preference to candy and other articles of merchandise offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method. The use of said method by respondent, because of said game of chance, has a tendency and capacity to and does unfairly divert trade to respondent from its said competitors who do not use the same or an equivalent method, and as a result thereof substantial injury is being and has been done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of respondent as hereinabove found are all to the injury and prejudice 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.

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.

Order

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It is ordered, That the respondent, D. A. Schulte, Inc., 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 or any other merchandise so packed and assembled that sales of said products 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 or other merchandise which are to be used or which may be used to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of said products to the public.

3. Supplying to or placing in the hands of dealers assortments of candy or other merchandise together with punchboards, push or pull cards or any other lottery devices, which lottery devices are to be used or may be used in selling or distributing such products 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 products to the public.

5. Selling or otherwise disposing of any merchandise by the use of punchboards, push or pull cards or other lottery devices.

It is further ordered, That within 60 days from the date of the service of this order upon said respondent, it shall 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

MORTIMER ALFRED GERSTEN AND LEE GERSTEN,
DOING BUSINESS AS GERSTEN BROTHERSCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 2810. Complaint, May 18, 1936—Decision, Feb. 16, 1939*

Where two individuals engaged as partners in the manufacture of storage receptacles, chests, and closets for storing clothing and other materials against ravages of moths and deterioration caused by exposure to light and dust, and which were made of corrugated paper between thin sheets of fiber, about one-eighth of an inch thick, were supplied, in case of closets, with metal clothes hangers to support weight of 100 pounds of stored articles, and were provided, in case of both closets and chests, with built-in receptacle to hold chemicals or moth bullets or ant moth pellets placed therein prior to sale, and in selling said storage receptacles, closets, and chests to retail and wholesale dealers in such articles in the District of Columbia and in the various States, and in selling also, separately, for use in their storage receptacles, said so-called moth bullets or "Anti-Moth Pellets" and "Closet Moth Proofer," which contained, among other things, not more than about 2 ounces of a compound of cedar leaf and pine oils in about equal proportions, and, as thus engaged in selling as aforesaid their various articles, in substantial competition with those engaged in sale for similar purposes of various storage receptacles such as garment bags, closets, and chests—

- (a) Branded or marked their said storage receptacles "Cedarol Closets" and "Cedarol Chests," in large letters, and receptacles used therein "Cedarol Closet Moth Proofer" and "Mothador," and caused said storage receptacles, thus branded or marked, and said receptacles, to be offered and sold by wholesale and retail dealers to public, and thereby falsely represented, through use of said first-named word, to wholesale and retail dealers and public, that such "Cedarol" closets and chests were effective storage receptacles against ravages of moths because of presence of cedar oil in their construction, and that such "Cedarol Closet Moth Proofer" were provided with sufficient cedar oil so as to give storage receptacles or other storage places in which used same qualities for storage purposes as possessed by efficient cedar wood storage receptacles, as long made in accordance with accepted and recognized practice, and as associated by public with such qualities and efficiency for storage purposes of such practically air-tight cedar wood receptacles as thus made, and falsely represented, through use of word "Mothador," to wholesale and retail dealers and public, that such contrivances, attached to or contained in its said storage receptacles, made the same, or others when supplied with its so-called moth bullets or other chemicals or oil compounds, efficient protection to contents thereof against ravages of moths;

Facts being loose construction of said receptacles, when in use for storage purposes, tended to and did cause seams thereof to spread and permit ingress