

Syllabus

IN THE MATTER OF
SPECIALTIES, INC.

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

Docket 3248. Complaint, Oct. 20, 1937—Decision, Feb. 25, 1939

Where a corporation engaged in manufacture and sale of assortments of candy which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to purchasing public, and which were composed of small pieces of candy, together with 4-section punch card for sale and distribution of said candy to the penny purchasers under a plan and in accordance with said card's explanatory legend, pursuant to which purchaser received only 1, or received number of pieces ranging from 2 to 20 in accordance with success or failure in selecting by chance certain numbers, and last sale in each of said card's 3 sections received 5 pieces and last sale on card entitled purchaser to 20 pieces—

Sold to wholesalers and jobbers for display and resale by retail dealer buyers thereof to purchasing public in accordance with aforesaid sales plan, such assortments and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale and distribution of its said merchandise in accordance with such sales plan above described involving game of chance or sale of a chance to procure merchandise at a price much less than normal retail price thereof, contrary to an established public policy of the United States Government and in violation of the laws of several States, and in competition with many who sell and distribute like or similar candies and are unwilling to offer for sale and sell their said product by any method or sales plan which involves game of chance, gift enterprise, or lottery scheme, or any other method contrary to public policy, and refrain therefrom;

With effect of inducing purchasers of its said merchandise to buy same in preference to like or similar products offered and sold by its competitors who do not use such sales plan or method in sale and distribution of their said product, and with result that many purchasers of its said merchandise were attracted by element of chance involved in its said sales plan or method and were thereby induced to buy its said product in preference to like or similar merchandise of competitors who did not or do not use such or equivalent methods, and wholesalers and jobbers, by reason of such preference on part of members of purchasing public, were induced and persuaded to buy its said merchandise in preference to like or similar articles sold or distributed by its said competitors and it sold, as consequence thereof, substantial quantities of its said merchandise and trade was unfairly diverted to it from competitors aforesaid:

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

Before *Mr. William C. Reeves*, trial examiner.

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

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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 Specialties, Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said Act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Specialties, Inc., is a corporation organized and operating under the laws of the State of Maryland with its principal office and place of business located at 601 South Smallwood Street, Baltimore, Md. Respondent is now, and for some time 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. Respondent causes and has caused its said products when so sold to be transported from its principal place of business in Baltimore, Md., to purchasers thereof in the State of Maryland and in other States of the United States at their respective places of business; and there is now, and has been for 1 year last past a course of trade and commerce by said respondent in such candy 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 candy and in the sale and distribution thereof in commerce between and among the various States of the United States.

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

Said assortment manufactured and distributed by respondent is composed of a number of small candy bars together with a device commonly called a push card. The candy contained in said assortment is distributed to purchasers in the following manner:

The push card has a number of partially perforated discs arranged in 4 sections, and when a push is made and the disc separated from the card a number is disclosed. Sales are 1 cent each and the card bears statements informing customers and prospective customers that

certain specified numbers receive 2 of the said small bars of candy, that certain other specified numbers receive 3 of the small pieces of candy, that certain other specified numbers receive 5 pieces of candy, that 2 of the numbers receive 10 pieces of candy, that 1 of the numbers receives 20 pieces of candy, that the last sale in each of the first 3 sections receives 5 pieces of candy and that the last sale on the card receives 15 pieces of candy. All other numbers on said card receive 1 of the small pieces of candy. The numbers on the discs or pushes are effectively concealed from the purchaser and prospective purchaser until a selection has been made and the disc separated from the card. The number of small bars of candy which a customer receives for the price of 1 cent is thus determined wholly by lot or chance.

PAR. 3. The jobbers and wholesale dealers 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 products in accordance with the sales plan hereinabove set forth, as a means of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of 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 small bars of candy. The use by respondent of said method in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said method, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has the tendency unduly to hinder competition or create monopoly in this, to wit: That the use thereof has the tendency and capacity to exclude from the candy trade competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme. Many persons, firms, and corporations who make and sell candy in competition with the respondent, as above alleged, are unwilling to offer for sale or sell candy so packed and assembled as above 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.

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PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said method and manner of packing said candy and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful; to lessen competition in said candy trade and to tend to create a monopoly of said candy trade in respondent and in such other distributors of candy as use the same or an equivalent method; and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by respondent has the tendency and capacity to eliminate from said candy trade all actual competitors and to exclude therefrom all potential competitors who do not adopt and use the said method or an equivalent method.

PAR. 6. The aforementioned method, acts, and practices of respondent are all to the prejudice of the public and of respondent's competitors, as hereinabove alleged. Said method, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, 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 October 20, 1937, issued and thereafter served its complaint in this proceeding upon respondent, Specialties, Inc., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint, and the filing of respondent's answer thereto, testimony, and other evidence in support of the allegations of said complaint were introduced by D. C. Daniel and Henry C. Lank, attorneys for the Commission, and in opposition to the allegations of the complaint by Samuel A. Spector, vice president of respondent, before William C. Reeves, an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly

recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony, and other evidence, brief in support of the complaint (respondent not having filed brief 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, Specialties, Inc., is a corporation organized and doing business under the laws of the State of Maryland, with its principal office and place of business located at 601 South Smallwood Street, Baltimore, Md. Since April or May of 1934, respondent has been engaged in the manufacture of candies, and in the sale and distribution thereof to wholesale dealers and jobbers located in various States of the United States at their respective points of location. At all times hereinabove mentioned, respondent has caused its said products, when sold, to be shipped or transported from its said place of business in Baltimore, Md., to purchasers thereof in various States of the United States other than the State of Maryland, at their respective places of business.

In so carrying on said business, respondent has been in substantial competition with other corporations and with individuals, and partnerships engaged in the sale and distribution of like or similar products in commerce between and among various States of the United States and in the District of Columbia.

PAR. 2. Respondent, in the course and conduct of its business as described in paragraph 1 hereof, has sold and distributed to wholesale dealers and jobbers an assortment of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the purchasing public. This said assortment is known as the Dixie Assorted Cocomanut Fudge Assortment, and is sold and distributed to the purchasing public in the following manner:

Respondent furnishes with assortments of this candy, for use in disposing of same to the consuming public, devices known as push cards, each of which has a number of partially perforated discs arranged in 4 sections, and when a push is made and the disc separated from the card, a number is disclosed. Sales are 1 cent each, and the card bears statements or legends informing customers and prospective customers that for certain specified numbers the customer receives 2 of said small bars of candy; that for other specified numbers the customer receives

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3 of the small pieces of candy; that certain other specified numbers entitle the purchasers thereof to 5 pieces of candy; that 2 of the numbers entitle the purchasers thereof to 10 pieces of candy; and for 1 of the numbers the purchaser thereof is entitled to 20 pieces of candy; and that the last sale in each of the first 3 sections entitles the purchasers thereof to 5 pieces of candy; and that the last sale on the card entitles the purchaser thereof to 15 pieces of candy. All other numbers on said card entitle the purchasers thereof to 1 of the small pieces of candy. The numbers on the discs are effectively concealed from the purchaser or prospective purchaser until the selection has been made and the discs separated from the card. The number of small bars of candy which a customer receives for the price of 1 cent is thus determined wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its merchandise, together with said push card, resell the same to retail dealers, who in turn sell and distribute said merchandise by means of said push card to members of the purchasing public in accordance with the aforesaid sales plan. Respondent has thus supplied to and placed in the hands of others the means of conducting lotteries in the sale and distribution of its said merchandise, in accordance with the sales plan hereinabove described. Said sales plan has the capacity and tendency to induce, and has induced purchasers of respondent's merchandise to purchase the same in preference to like or similar merchandise offered for sale and sold by respondent's competitors who do not use such sales plan or method in the sale and distribution of their said merchandise.

PAR. 4. The sale and distribution of merchandise to the purchasing public in the manner hereinabove found involves a game of chance or the sale of a chance to procure merchandise at a price much less than the normal retail price thereof. The sale and distribution of merchandise in the manner hereinabove described is a practice of the sort which is contrary to an established public policy of the Government of the United States, and is in violation of the laws of several States of the United States. Among the respondent's competitors there are many persons, firms, and corporations who sell and distribute like or similar candies in competition with respondent as hereinabove found, and said competitors are unwilling to offer for sale or sell their said candies by any method or sales plan which involves a game of chance, gift enterprise, or lottery scheme, or any other method that is contrary to public policy, and such competitors refrain therefrom.

PAR. 5. Many purchasers of respondent's merchandise were attracted by the element of chance involved in the respondent's said sales plan or method, and were thereby induced to purchase respondent's merchan-

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dise in preference to the like or similar merchandise of respondent's competitors who did not or do not use the same or equivalent methods. Because of said preference on the part of members of the purchasing public, wholesale dealers, and jobbers have been induced and persuaded to purchase respondent's said merchandise in preference to like or similar articles of merchandise sold or distributed by respondent's said competitors. As a result thereof, respondent has sold substantial quantities of its said merchandise, and trade has been unfairly diverted to respondent from its said competitors.

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 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, the answer of respondent, testimony, and other evidence taken before William C. Reeves, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief filed herein by counsel for the Commission (respondent having filed no brief and oral argument not having been requested), and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Specialties, 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 other merchandise so packed and assembled that sales of such candy or other merchandise 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 others 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 other merchandise to the public.

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3. Supplying to or placing in the hands of others assortments of candy or other merchandise together with a lottery device, which lottery device is to be used or may be used in selling and distributing such candy or other merchandise to the public.

4. Supplying to or placing in the hands of others 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. Selling or otherwise disposing of candy or other merchandise by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

Syllabus

IN THE MATTER OF
CHARLES ATLAS, LTD.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3308. Complaint, Jan. 22, 1938—Decision, Feb. 25, 1939*

Where a corporation engaged in sale of a course of training in physical culture featuring dynamic tension by correspondence, as successor to a business theretofore carried on by an individual who was its treasurer and owner of one-half of its outstanding capital stock, and, as thus engaged, in advertising its said course or system through its booklet entitled "Everlasting Health and Strength" which it sent, along with circular letter and circular, to those applying therefor in response to its invitation so to do in advertisements in magazines and other periodicals of general circulation in the various States, and in which it set forth, among other things, purported facsimile of certificate of award to aforesaid individual as "America's Most Perfectly Developed Man," together with what was represented as an actual photograph showing his very remarkable muscular development, and with statements as to his height, weight, and body measurements, and also with representation, among others in his advertisements published as above described, to the effect that before he discovered the system of training in physical culture now offered and sold, he was "a physical wreck, a sickly half-pint runt, a 97 pound weakling, flat chested, spindly legs and with arms like pipe stems," and with representations in his various advertisements as aforesaid, along with such photographs, to the effect that the remarkable physical development made by him was due to his use of said course—

- (a) Represented, in said advertisements and advertising matter, that users of its course of training could thereby acquire a muscular development similar to that of said individual, including broad, powerful shoulders, biceps that bulge with smashing strength, chest which would stand out solid and muscular, and an evenly developed body that would make others look like dwarfs in comparison, and that it could prove in 7 days to anyone that he could have such a muscular development, facts being, while such course of training might be generally beneficial to users thereof, it would not accomplish results claimed therefor as above set out, muscular development of anyone is limited by the bony structure and other characteristics of his body, and it is impossible for persons of only average physical development, or less than average, to acquire muscular development approximating that depicted in its advertisements or advertising matter;
- (b) Represented that use of said course would bring about a healthy condition, and that constipation, pimples, skin blotches, and similar ailments would be banished, facts being that use thereof would not, in all cases, bring about a healthy condition or banish constipation, pimples, skin blotches, and similar ailments, and would not affect all users alike, and that, while such use might be beneficial to some, others would receive very little benefit or none at all, and such use on still others might have injurious, rather than beneficial, effect; and