

IN THE MATTER OF

E. J. BRACH & SONS, AND EMIL J. BRACH, EDWARD M. KERWIN, EDWIN O. BLOMQUIST, THEODORE STEMPFEL, AND EMIL J. GUTGSELL, INDIVIDUALLY, AND AS OFFICERS OF E. J. BRACH & SONS

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

Docket 3307. Complaint, Jan. 19, 1938—Decision, Mar. 15, 1939

Where a corporation and three individuals, officers thereof, engaged in manufacture and sale of candy, and as thus engaged in—

(1) Selling its "Betsy Ross" all-metal baskets, with asserted value of \$1, and containing 25 pounds of candy, 50 cellophane bags, and push card for sale and distribution of said items under a plan by which purchasers, for 10 cents, of said half-pound cellophane bags of candy, secured right to select one of number of girls' names displayed on said card and received or failed to receive said basket in accordance with success or failure in selecting name corresponding to that concealed under card's master seal; and in—

(2) Furnishing to customers, with plans of merchandising which involved operation of games of chance, gift enterprise, or lottery schemes, 400-hole, 8-section punchboards, for sale and distribution of candy under plan by which two of numbers concealed in said board entitled chance purchasers to 2-pound boxes of candy, for nickel paid, 4 other numbers entitled each of chance selectors to 1-pound box of chocolates, 24 other numbers entitled each of selectors to 1-pound box of chocolates of another type, and makers of last sale in each of aforesaid sections were similarly entitled to pound boxes of such candy, and purchasers thus received, in event of those making selections as aforesaid, prizes greatly exceeding cost of chance and received, in event of selection of 362 other numbers on board, nothing; and in—

(3) Furnishing various other types of punchboards, together with their candies, for distribution by use of such boards to customers in various States in substantially same manner as above described and varying therefrom in detail only—

Sold to wholesalers and jobbers candy manufactured by it and accompanied by punchboards and push cards for use in sale and distribution of said candy by retail dealer-purchasers thereof, who sold and distributed same to purchasing public in accordance with aforesaid sales plan, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale and distribution of such candy, involving game of chance or sale of a chance to procure quantities of candy at prices much less than prevailing price for like or similar candy in usual course of retail trade, contrary to an established public policy of the United States Government and in violation of the laws of the States and in competition with many who sell and distribute like or similar candy and are unwilling to offer or sell their said candy by any method or sales plan which involves game of chance, gift enterprise, lottery scheme, or other method or plan contrary to public policy and refrain from use thereof;

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With effect of inducing numerous customers to purchase their candies in preference to those sold by competitors who do not use like or similar sales or methods in sale and distribution of their products, and with result that numerous wholesale and retail candy dealers were attracted by element of chance involved in sales plan or method by which their said candies were resold to consuming public by retail dealers as before set out, and such dealers, by reason of said element of chance, were induced to purchase such candies from them in preference to like or similar candies sold by competitors who do not use like or equivalent methods and they or their corporation were thereby enabled to sell substantial quantities of candy and trade was unfairly diverted to corporation aforesaid from competitors thereof:

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

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

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

Ryan, Condon & Livingston, of Chicago, Ill., 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 E. J. Brach & Sons, a corporation, and Emil J. Brach, Edward M. Kerwin, Edwin O. Blomquist, Theodore Stempfel, and Emil J. Gutsell, individuals and officers of E. J. Brach & Sons, hereinafter referred to as respondents, have been, and are now, 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, E. J. Brach & Sons is a corporation organized and doing business under the laws of the State of Illinois, with its offices and principal place of business at 4656 West Kinzie Street in the city of Chicago in said State.

Respondent Emil J. Brach is the president and director of said corporation and resides in St. Petersburg, Fla. Respondent Edward M. Kerwin is vice president, assistant secretary, and assistant treasurer of said corporation and lives at 530 North Euclid Avenue, Oak Park, Ill. Respondents Edwin O. Blomquist, Theodore Stempfel, and Emil J. Gutsell are vice presidents of corporate respondent and, together with respondent Kerwin, have their business offices at the same address as said E. J. Brach & Sons. Respondent Brach, as an officer and director, and respondents Kerwin, Blomquist, Stempfel,

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and Gutzsell, as officers of said corporation, control and direct the policies, acts, and practices thereof. Respondents act together and in cooperation with each other in doing the acts and things herein-after alleged.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture of candies and in the sale and distribution thereof, to retail and wholesale dealers and jobbers. Respondents cause and have caused said candy when sold to be transported from their principal place of business in Chicago, Ill., to purchasers thereof in the State of Illinois and in other States of the United States at their respective places of business. There is now, and has been for some time last past, a course of trade and commerce by said respondents in such candy between and among the various States of the United States. In the course and conduct of their business, as hereinabove described, respondents are in competition with other corporations and individuals and with partnerships engaged in the sale and distribution of candy and assortments of candy in commerce between and among the various States of the United States.

PAR. 3. In the course and conduct of their said business as described in paragraph 2 hereof, respondents in soliciting the sale of, and in selling and distributing their candy, furnish and have furnished various devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes by which said candy is distributed to the ultimate consumers thereof wholly by lot or chance. Said devices or plans of merchandising consist of a variety of push cards and punchboards. The methods and practices adopted and used by respondents are substantially as follows:

Respondents distribute or cause to be distributed to customers and prospective customers, including wholesale dealers and jobbers, retail dealers and the purchasing public, through the United States mails in interstate commerce, certain literature including various order blanks, advertisements, catalogs, circulars, and other printed matter containing illustrations of their products and explaining respondents' plan of selling said candy and of allotting candy and other merchandise as premiums or prizes to the consuming public and to the operators of said push cards or punchboards. Said push cards or punchboards vary in detail and involve different assortments and various plans of distribution. One such plan is described in detail for illustration, but other plans used by respondents involve the same principle or method.

One such assortment consists of a number of bars or small pieces of assorted candy, 50 cellophane transparent bags, and an additional article of merchandise, together with a 50-hole push card. The said

push card is a paper card having 50 partially perforated disks, said disks being divided into two sections. A master seal is attached to the upper right-hand corner thereof. Concealed within each disk is a girl's name. At the right of said disk sections are printed 50 girls' names. Sales are 10 cents per 6-ounce bag of said candy, and with each purchase the customer is given a free push. The name of said purchaser is written opposite the listed name corresponding to the name secured by said customer from said disk. When all of the candy has been sold and all of the disks have been pushed, the master seal is removed and the person selecting the name corresponding to the name under said seal is given an additional article of merchandise which is worth more than 10 cents, without additional charge. The additional article of merchandise is thus distributed to the purchasing public wholly by lot or chance.

The push card bears legends informing purchasers and prospective purchasers of the plan or method by which said candy is being sold or distributed. The purchasing public is thus induced and persuaded into purchasing pushes from said card in the hope that they may select a prize-winning name and thus obtain an additional article of merchandise without additional charge.

PAR. 4. The wholesale dealers and jobbers to whom respondents sell said candy resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondents sell direct expose said products for sale and sell the same to the purchasing public in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of said candy in accordance with the sales plan hereinabove set forth; and said sales plan has the capacity and tendency to induce purchasers thereof to purchase respondents' said candy in preference to the candy offered for sale and sold by their competitors.

PAR. 5. The sale of candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure an additional item of merchandise. The use by respondents of said method in the sale of candy and the sale of such 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 respondents of said methods has a tendency unduly to hinder competition or create a 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

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of chance or lottery scheme. Many persons, firms, and corporations who sell and distribute candy in competition with the respondents, 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, or any other method of sale that is contrary to public policy, and such competitors refrain therefrom.

PAR. 6. Many dealers in, and ultimate purchasers of, candy are attracted by respondents' 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 respondents in preference to candy offered 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 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 tend to create a monopoly of said candy trade in respondents, and in such other distributors of said candy as use the same or equivalent methods, and to deprive the purchasing public of the benefit of free competition in said trade. The use of said methods by respondents has the capacity and tendency to eliminate from said candy trade all actual competitors and to exclude therefrom all potential competitors who do not adopt and use the same methods or equivalent methods.

PAR. 7. The aforesaid acts and practices of respondents are all to the injury and prejudice of the public and respondents' competitors, as hereinabove related. Said 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 January 19, 1938, issued and thereafter served its complaint in this proceeding upon the respondents, E. J. Brach & Sons, a corporation, Emil J. Brach, Edward M. Kerwin, Edwin O. Blomquist, Theodore Stempfelfel, and Emil J. Gutgsell, individually, and as officers of E. J. Brach & Sons, charging

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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 the complaint were introduced by Henry C. Lank, and D. C. Daniel, attorneys for the Commission, and in opposition to the allegations of the complaint by Ryan, Condon & Livingston, attorneys for the respondents, 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, and in opposition thereto (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, E. J. Brach & Sons, is a corporation organized under the laws of the State of Illinois, with its principal place of business at Chicago in said State; it is engaged in the business of the manufacture and sale of candy. The respondent, Emil J. Brach is the president of the respondent, E. J. Brach & Sons, and a member of its board of directors; the respondent, Edward M. Kerwin, is vice president, assistant secretary, and assistant treasurer of the respondent, E. J. Brach & Sons; and the respondents, Edwin O. Blomquist and Emil J. Gutgsell, also are vice presidents of the respondent, E. J. Brach & Sons; and the respondent, Theodore Stempfelf is vice president and general merchandising manager of the respondent E. J. Brach & Sons. The respondent, E. J. Brach & Sons, has caused candy manufactured by it to be transported when sold from its place of business in Chicago, in the State of Illinois, through and into or into various other States of the United States to the respective purchasers thereof, and in the course and conduct of its said business said respondent, E. J. Brach & Sons, has been in active competition with various persons and partnerships and other corporations also engaged in the manufacture and sale, or the sale, of candy, in commerce between and among several of the States of the United States.

PAR. 2. The greater portion of the output of the respondent, E. J. Brach & Sons, consists of candy sold in bulk, packed in 30-pound

units, but it manufactures a small amount of penny goods, bars intended for resale to the public at 5 cents each, and some box candy. In April 1937 it featured what it termed "Betsy Ross Baskets," each of which contained 25 pounds of candy; the container was described as "an all-metal combination bread box, picnic box or tackle box," and was represented as being of the value of \$1; 2,100 of these baskets were sold; with each of the baskets of candy there were packed 50 cellophane bags, each suitable for holding one-half pound of candy, and these bags were to be used in the resale of the candy in half-pound bags at 10 cents per bag. Also there was packed in each of the baskets a push card, and the use to be made of said card was explained in a circular letter which the respondent sent out on April 21, 1937, addressed to "Our Jobbers." Each of the cards had printed thereon a number of girls' names, and near the upper right-hand corner there was a disk in the form of a seal which concealed a name which was the same as one of the names printed on the card. Each purchaser of one of the bags of candy for 10 cents was to be given the right to select one of the names on the card without additional charge, and the names of each of the selectors were to be written on the card; when all the names had been selected the seal was then opened, and the name concealed thereby was disclosed, and the person who had selected the name on the card which was the same as that concealed by the seal, was awarded the metal basket, the determination in each instance being wholly a matter of chance, and purchasers who did not select a prize-winning name received no prize. The gross sales by the respondent, E. J. Brach & Sons, aggregated \$8,776,000 in 1937, and \$7,790,000 in 1936; its sales of candy with which it furnished punchboards or push cards aggregated \$48,000 in 1937, and \$78,000 in 1936. Said respondent has discontinued the practice of furnishing punchboards or push cards with candy sold by it.

PAR. 3. In carrying on its business as described in paragraphs 1 and 2 hereof, the respondent, E. J. Brach & Sons, also has supplied or furnished its customers with devices known as "punchboards" and plans of merchandising which involved the operation of games of chance, gift enterprises, or lottery schemes. One of the boards so furnished by respondent had 400 holes arranged in 8 sections; in each of the holes was inserted a rolled slip of paper on each of which was printed a number, the numbers running from 1 to 400, both inclusive; it was operated substantially as follows: Members of the public were required to pay 5 cents for the privilege of punching 1 of these slips from 1 of the boards, and 2 of the numbers so obtained entitled each of the selectors to a 2-pound box of chocolates; 4 other numbers so obtained entitled each of the selectors to a 1-pound box of chocolates,

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and 24 other numbers, so obtained, entitled each of the selectors to a 1-pound box of another type of chocolates, and each of the persons to whom the last sale in each section was made, was given a 1-pound box of chocolates. Each of the prizes so obtained by members of the public who had selected winning numbers, greatly exceeded the cost of a single number punched from the board, but the selectors of each of the other numbers, 362 out of 400, received nothing. By the use of these boards in the manner described, candy sold by respondent has been distributed to the purchasing public wholly by lot or chance. Said respondent has furnished various other types of punchboards together with candies to be distributed by the use of such boards to customers in various States of the United States, but the boards of each of said types were operated in substantially the same manner as the one herein described, and varied only in detail.

PAR. 4. Respondent, E. J. Brach & Sons, has sold candy manufactured by it accompanied by "push cards" or "punchboards" for use in the distribution of same as described herein, to wholesalers and jobbers who have resold such candy accompanied by such boards and cards, to retail dealers who in turn sold and distributed such candy by means of such push cards and punchboards to members of the purchasing public, in accordance with the sales plans hereinbefore described. Said respondent in this manner has supplied to others, and placed in their hands, the means of conducting lotteries in the sale and distribution of such candy. Said sales plans have the capacity and tendency to induce, and have induced numerous customers of respondent to purchase candies manufactured by it in preference to candies sold by competitors of said respondent who did not and do not use like or similar sales plans or methods in the sale and distribution of candies sold by them.

PAR. 5. The sale and distribution of candies to the purchasing public in the manner, and by the method described in paragraphs 2 and 3 hereof, involves a game of chance, or the sale of a chance, to procure quantities of candy at prices much less than the prevailing price for like or similar candy in the usual course of retail trade. The sale and distribution of candy by such methods 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 of the States of the United States. Among the competitors of respondent, E. J. Brach & Sons, are many persons, partnerships, and corporations who sell and distribute like or similar candies to those sold by said respondent, and in competition with it, which 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, lottery scheme,

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or any other method or plan that is contrary to public policy, and said competitors refrain from the use of any such plan or method and as a result are placed at a disadvantage in competition.

PAR. 6. Numerous wholesale and retail dealers in candy have been attracted by the element of chance involved in the sales plan or method by which candies sold by respondent, E. J. Brach & Sons, have been resold to the consuming public by retail dealers as hereinbefore set out, and said dealers by reason of such element of chance, have been induced to purchase such candies from said respondent in preference to like or similar candies sold by competitors of said respondent who do not use like or equivalent methods, and as a result of such preference said respondent has been able to sell substantial quantities of candy, and thereby trade has been diverted unfairly to said respondent from its competitors.

CONCLUSION

The aforesaid acts and practices of the respondents, as hereinbefore found, are all to the prejudice and injury of the public, and to competitors of the respondent, E. J. Brach & Sons, 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, answer of respondents, 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, briefs filed herein (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, E. J. Brach & Sons, 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 said 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 assortments of candy or other merchandise which are used, or which may be used, without alteration or rearrangement of the contents of such assortments to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of said assortments to the public;

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

4. Supplying to, or placing in the hands of, others punchboards, push or pull cards, or other lottery devices, either with assortments of said merchandise or separately, which lottery devices are to be used or may be used in selling or distributing said merchandise to the public;

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

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.

It is further ordered, That the complaint insofar as it relates to respondents, Emil J. Brach, Edward M. Kerwin, Edwin O. Blomquist, Theodore Stempfel and Emil J. Gutgsell, as individuals, be, and the same hereby is, dismissed without prejudice.

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IN THE MATTER OF
DE KAMA, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3480. Complaint, July 9, 1938—Decision, Mar. 15, 1939*

Where a corporation engaged in sale and distribution of cosmetics with claimed therapeutic properties—

- (a) Represented, in printed advertising matter shipped and distributed in interstate commerce and used in connection with offer and sale of its said products, that they were of remedial or therapeutic value in the prevention or treatment of skin conditions or disorders because of the hormones or gland extracts therein contained, and that use thereof would nourish and rejuvenate the skin, prevent sagging or wrinkling thereof, and overcome effect of age on the skin and preserve the soft contour and firmness of youthful skin, and that its "Creme Hormonique" was designed, among other things, "to penetrate the outer skin and give new life to the subcutaneous cells;" and

- (b) Represented, as aforesaid, that said preparations, as the case might be, would beneficially affect the oil glands and pores of the skin and were of special value in correcting an oily, muddy type of skin, or shrunken and anemic skin, because of the hormones or gland extracts contained therein; Facts being hormones or glandular extracts are not absorbed through the skin in therapeutically significant amounts, its said products do not enable the users to retain or restore youthful contour and firmness, or the silky smooth texture of the skin, and will not, in any manner, rejuvenate skin and facial contours, and cannot produce the results represented and claimed;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that all said representations were true, and with result, as direct consequence of such belief, that number of consuming public purchased substantial volume of its products and trade was diverted unfairly to it from its competitors who truthfully represent their respective preparations; to the injury of competition in commerce: Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Charles P. Vicini*, trial examiner.

Mr. Jesse D. Kash for the Commission.

Mr. Peyton H. Moore, of Los Angeles, Calif., for respondent.

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 De Kama, Inc., hereinafter referred to as respondent, has been and is now using unfair methods of competition in commerce as "commerce" is defined in said act, and it appearing to the Commission that a proceeding by it in