

Syllabus

IN THE MATTER OF
IDAHO CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3130. Complaint, May 15, 1937—Decision, Apr. 3, 1939*

Where a corporation engaged in selling and distributing various packages or assortments of candy and other articles of novelty merchandise which were so packed and assembled to involve or were designed to or might involve use of a lottery scheme when sold and distributed to ultimate consumers thereof, and included, in case of all, push card or punchboard and use of same method of chance for distribution of candy or other articles to consuming public by means of said card or board and were made up as illustrative, in case of two of such assortments, of

- (a) Number of bars of candy, together with push card for use in sale and distribution of such candy to purchasing public under a plan by which purchaser received for the 5 cents paid 5, 4, 3, 2, or 1 bar of candy in accordance with success or failure in securing from card certain legends concealed thereon, and last sale of assortment entitled purchaser to four bars of candy; and of
- (b) Number of packages of candy and another article of merchandise, together with a punchboard for use in sale and distribution of such candy and other article to purchasing public under a plan and in accordance with said board's explanatory legend, by which chance receipt from board of certain specified numbers entitled persons securing same to specified packages of candy, and certain other number, or last punch entitled person securing number or making punch to other article of merchandise, and purchasers not qualifying by obtaining one of specified numbers or making last purchase received nothing for their money other than privilege of punching number from board;

Sold to wholesalers and jobbers for display and resale to purchasing public by retail dealer purchasers thereof in accordance with such sales plans said assortment and thereby supplied to and placed in the hands of others means of conducting lottery in sale of its products in accordance with such plans involving game of chance or sale of a chance to procure additional bars of candy, packages of candy, or other article of merchandise; contrary to public policy as long recognized in the common law and criminal statutes and contrary to the public policy of the United States Government, and in competition with many who sell and distribute candy and other articles of merchandise and are unwilling to offer or sell the same so packed and assembled as above found or otherwise arranged or packed for sale to purchasing public so as to involve game of chance and refrain therefrom;

With capacity and tendency to induce purchasers of its said products thereby to buy same in preference to candy and other articles offered and sold by its competitors; and with result that many dealers in and ultimate purchasers of candy and other articles were attracted by its said method and manner of packing said candy and other merchandise and by element of chance involved therein as above set forth and were thereby induced to purchase substantial quantities of said products so packed and sold by it in preference to other articles offered and sold by its competitors who do not use same or equivalent method; and

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With further tendency and capacity through use of such method and because of said game of chance to divert trade and custom to it from said competitors who do not use same or equivalent methods, to exclude from said candy trade all competitors who are unwilling to and do not use such methods as unlawful, to lessen competition in said trade and create monopoly thereof in it and in such other distributors of candy and such other articles who use same or equivalent methods, and to deprive purchasing public of benefit of free competition in said trade, and to eliminate therefrom all actual and exclude therefrom all potential competitors, who do not adopt and use such or equivalent methods:

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

Before *Mr. Henry M. White, Mr. William C. Reeves, and Mr. Miles J. Furnas*, trial examiners.

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

Langroise, Sullivan & Griffin, of Boise, Idaho, for respondent.

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 the Idaho Candy Co., 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, 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 is a corporation organized and doing business under the laws of the State of Idaho, with its principal office and place of business located at 412 South Eighth Street, in the city of Boise, State of Idaho. Respondent is now, and for several years last past has been, engaged in the sale and distribution of candy and various articles of novelty merchandise to wholesale dealers and jobbers and retail dealers located at points in the State of Idaho and in various other States of the United States. Respondent causes said products when sold to be transported from its place of business in the city of Boise, State of Idaho, to purchasers thereof in Idaho and in other States of the United States at their respective points of location. There is now, and has been for several years last past, a course of trade and commerce by said respondent in such candy and other merchandise 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 individuals and partnerships engaged in the sale and distribution of candy and in the sale and distribution of various articles of novelty merchandise 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 wholesale dealers and jobbers and retail dealers various packages or assortments of candy and other articles of novelty merchandise so packed and assembled as to involve, or which are designed to or may involve, the use of a lottery scheme when sold and distributed to the ultimate consumers thereof. Respondent assembles, sells and distributes various assortments, some of which contain candy only while others contain packages of candy, together with other articles of merchandise. All such assortments include a push card or a punchboard, and each assortment involves the use of the same method of chance for the distribution of the candy or other articles of merchandise to the consuming public by means of said push card or punchboard; for illustration:

(a) One of said assortments is composed of a number of bars of candy, together with a device commonly called a "push card." The said bars of candy are sold and distributed to the consuming public by means of said push card in the following manner: Sales are 5 cents each, and each purchaser is entitled to one push from said card. When a push is made from said card, a legend is disclosed. The card bears statements informing purchasers and prospective purchasers that certain legends receive five bars of candy, that certain other legends receive four bars of candy, that certain other legends receive three bars of candy, that certain other legends receive two bars of candy, that certain other legends receive one bar of candy, and that the last sale from said assortment receives four bars of candy. The legends on said card are effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular push separated from the card. The fact as to whether a purchaser receives one or more than one bar of candy for the price of 5 cents is thus determined wholly by lot or chance.

(b) Another assortment is composed of a number of packages of candy and another article of merchandise, together with a device commonly called a "punchboard." The candy and the other article of merchandise are sold and distributed to the consuming public by means of said punchboard in the following manner: Sales are 5 cents each, and each purchaser is entitled to punch a concealed slip of paper bearing a printed number from said board. The numbers begin

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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 statements informing purchasers and prospective purchasers that certain numbers receive specified packages of candy, that a certain other number or the last punch from said board receives the other article of merchandise, and that purchasers not qualifying by obtaining one of the specified numbers or by making the last purchase from the board receive nothing for their money other than the privilege of punching a number from said board. The slips of paper bearing printed numbers are effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular punch or slip of paper separated from the board. The fact as to whether a purchaser receives one of the packages of candy or the other article of merchandise, or nothing other than the privilege of punching a number from said board, for the price of 5 cents is thus determined wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers 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 and other articles of merchandise 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 the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy and other articles of merchandise offered for sale and sold by its competitors.

PAR. 4. The sale of said 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 additional bars of candy, packages of candy, or another article of merchandise. The use by respondent of said methods in the sale of candy and other articles of merchandise, and the sale of candy and other articles of merchandise by and through the use thereof and by the aid of said methods, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy and is contrary to an established public policy of the Government of the United States. The use by respondent of said methods has the tendency unduly to hinder competition or to create monopoly in this, to wit: That the use thereof has the tendency and capacity to exclude from the said trade involved in this proceeding competitors who do not adopt and use the same methods or equivalent or similar methods involving the same or equiv-

alent or similar elements of chance or lottery schemes. Many persons, firms, and corporations who sell and distribute candy and other articles of merchandise in competition with the respondent, as above alleged, are unwilling to offer for sale or sell candy and merchandise so packed and assembled as above alleged, or otherwise arranged, and packed for sale to the purchasing public so as to involve a game of chance, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy and other articles of merchandise are attracted by respondent's said methods and manner of packing said candy and other merchandise and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy and other articles of merchandise so packed and sold by respondent 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 equivalent methods. The use of said methods 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 equivalent methods; to exclude from said trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are unlawful; to lessen competition in said trade and to tend to create a monopoly in said trade in respondent and such other distributors of candy and other articles of merchandise 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 respondent has the tendency and capacity to eliminate from said trade all actual competitors and exclude therefrom all potential competitors who do not adopt and use said methods or equivalent methods.

PAR. 6. The aforementioned methods, acts, and practices of respondent are all to the prejudice of the public and of respondent's competitors, as hereinabove alleged. Said methods, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 15, 1937 issued and thereafter served its complaint in this proceeding upon respondent, Idaho Candy Company, charging it with the use of unfair methods of competition

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in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, the Commission by order entered herein granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and substitute answer, 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 is a corporation organized and doing business under the laws of the State of Idaho, with its principal office and place of business located at 412 South Eighth Street, in the city of Boise, State of Idaho. Respondent is now, and for several years last past has been, engaged in the sale and distribution of candy and various articles of novelty merchandise to wholesale dealers and jobbers and retail dealers located at points in the State of Idaho and in various other States of the United States. Respondent causes said products when sold to be transported from its aforesaid place of business in the city of Boise, State of Idaho, to purchasers thereof in Idaho and in other States of the United States at their respective points of location. There is now, and has been for several years last past, a course of trade by said respondent in such candy and other merchandise in commerce 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 individuals and partnerships engaged in the sale and distribution of candy and in the sale and distribution of various articles of novelty merchandise 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 wholesale dealers and jobbers and retail dealers various packages or assortments of candy and other articles of novelty merchandise so packed and assembled as to involve, or which are designed to or may involve, the use of a lottery scheme when sold and distributed to the ultimate consumers thereof. Respondent assembles, sells and distributes various assortments, some of which contain candy only while others

contain packages of candy, together with other articles of merchandise. All such assortments include a push card or a punchboard, and each assortment involves the use of the same method of chance for the distribution of the candy or other articles of merchandise to the consuming public by means of said push card or punchboard; for illustration:

(a) One of said assortments is composed of a number of bars of candy, together with a device commonly called a "push card." The said bars of candy are sold and distributed to the consuming public by means of said push card in the following manner: Sales are 5 cents each, and each purchaser is entitled to one push from said card. When a push is made from said card, a legend is disclosed. The card bears statements informing purchasers and prospective purchasers that certain legends receive five bars of candy, that certain other legends receive four bars of candy, that certain other legends receive three bars of candy, that certain other legends receive two bars of candy, that certain other legends receive 1 bar of candy, and that the last sale from said assortment receives four bars of candy. The legends on said card are effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular push separated from the card. The fact as to whether a purchaser receives one or more than one bar of candy for the price of 5 cents is thus determined wholly by lot or chance.

(b) Another assortment is composed of a number of packages of candy and another article of merchandise, together with a device commonly called a "punchboard." The candy and the other article of merchandise are sold and distributed to the consuming public by means of said punchboard in the following manner: Sales are 5 cents each, and each purchaser is entitled to punch a concealed slip of paper bearing a printed number from said board. 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 statements informing purchasers and prospective purchasers that certain numbers receive specified packages of candy, that a certain other number or the last punch from said board receives the other article of merchandise, and that purchasers not qualifying by obtaining one of the specified numbers or by making the last purchase from the board receive nothing for their money other than the privilege of punching a number from said board. The slips of paper bearing printed numbers are effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular punch or slip of paper separated from the board. The fact as to whether a purchaser receives one of the

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packages of candy or the other article of merchandise, or nothing other than the privilege of punching a number from said board, for the price of 5 cents, is thus determined wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers 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 and other articles of merchandise 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 the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy and other articles of merchandise offered for sale and sold by its competitors.

PAR. 4. The sale of said 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 additional bars of candy, packages of candy, or another article of merchandise. The use by respondent of said methods in the sale of candy and other articles of merchandise, and the sale of candy and other articles of merchandise by and through the use thereof and by the aid of said methods, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy and is contrary to an established public policy of the Government of the United States. The use by respondent of said methods has the tendency unduly to hinder competition or to create monopoly in this, to wit: That the use thereof has the tendency and capacity to exclude from the said trade involved in this proceeding competitors who do not adopt and use the same methods or equivalent or similar methods involving the same or equivalent or similar elements of chance or lottery schemes. Many persons, firms, and corporations who sell and distribute candy and other articles of merchandise in competition with the respondent, as above found, are unwilling to offer for sale or sell candy and other merchandise so packed and assembled as above found, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy and other articles of merchandise are attracted by respondent's said methods and manner of packing said candy and other merchandise and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase substantial quantities of said candy and other articles of merchandise

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so packed and sold by respondent 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 equivalent methods. The use of said methods 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 equivalent methods; to exclude from said trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are unlawful; to lessen competition in said trade and to create a monopoly in said trade in respondent and such other distributors of candy and other articles of merchandise 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 respondent has the tendency and capacity to eliminate from said trade all actual competitors and exclude therefrom all potential competitors who do not adopt and use said methods or equivalent methods.

CONCLUSION

The aforementioned methods, 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 and the answer of respondent, in which answer respondent admits all the material allegations of the complaint to be true, 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, Idaho Candy 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 or other merchandise so packed and assembled that sales of such candy and other merchandise are to

be made or may be made by means of a lottery, gaming device, or gift enterprise.

2. Supplying to, or placing in the hands of dealers assortments of candy or other merchandise, which assortments are to be used or 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 candy or other merchandise contained in said assortments to the public.

3. Supplying to, or placing in the hands of dealers assortments of candy or other merchandise together with push cards, punchboards, or other lottery devices, which push cards, punchboards or other lottery devices are 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. Selling or otherwise disposing of any 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.

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IN THE MATTER OF

HIRAM E. BARBER DOING BUSINESS AS MOTOR EQUIPMENT SPECIALTY COMPANY

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

Docket 3617. Complaint, Sept. 30, 1938—Decision, Apr. 3, 1939

Where an individual engaged in manufacture, sale and distribution of two devices for use in connection with automobile work, namely, the "Mesco Fender Roller" and the "Universal Wheel Check," to purchasers in various other States, in substantial competition with others engaged in sale and distribution of other devices intended and sold for similar usage; in advertising in various periodicals and newspapers circulating throughout the various States for salesmen to engage in distribution of said devices, and in letters and circulars sent through the mails to prospective agents and salesmen purchasing for resale, and to those purchasing for use—

- (a) Made such statements, with respect to purported earnings or profits of salesmen of said devices, as "Up to \$250 weekly profits made with amazing new 'Mesco' fender tools," "Salesmen wanted—\$250 weekly profit made selling special tool set to garages," "Every garage needs one so you see \$250 per week isn't unreasonable. Really it is only a good week," and made, among others, such statements as "Hewett made \$84.50 in one day," etc., "Felton averaged better than \$150 weekly all summer long—Barber cleared \$1,100 in seven weeks—We will show you how to do as well," and "Dealers can just coin money";

Facts being successful demonstration is necessary in practically all cases to effect sales of said roller, and it is necessary to acquire considerable skill, which may be had only by actual practice and experience, in order to give such demonstration, those who do not acquire ability to operate roller so as to obtain successful and satisfactory results essential to success of a salesman cannot reasonably be expected to approach aforesaid earnings, many purchasers, without personal demonstration, have been unable to operate roller satisfactorily, notwithstanding written instructions, any earnings of \$250 a week were made by persons who had acquired sufficient skill to be able to demonstrate roller successfully, and even they had not earned at said rate consistently in ordinary course of business under normal conditions, stated earnings for specific periods of individuals named, who included owner and seller herein and all of whom were sufficiently skilled to give satisfactory demonstration, were not representative of their earnings over long periods, and none of salesmen obtained as result of said individual's advertising had earnings even approaching those of individuals mentioned;

- (b) Made such statements, with respect to efficacy of said roller and ease with which proficiency in use thereof might be acquired, and with respect to merchantability of said articles, as "Actually lifts dents out of fenders and makes them perfectly smooth without hammering, grinding or filing," "Does not mar paint or varnish," "Saves the long practice required with other tools," "Badly needed by every garage and shop," and "No competition";