

IN THE MATTER OF
MASON, AU & MAGENHEIMER CONFECTIONERY
MANUFACTURING COMPANY

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

Docket 3477. Complaint, July 8, 1938—Decision, May 31, 1939

Where a corporation engaged in manufacture and sale of candy assortments which were so packed and assembled as to involve use of a lottery scheme, gift enterprise, or game of chance, when sold and distributed to consumers thereof, and included two separate packages, which, sold together, constituted one complete assortment which could be sold and distributed to consuming public by means of a lottery scheme, gift enterprise, or a game of chance, and contained, in one of said packages, 150 pieces of penny candy of uniform size and shape, and in other of said packages, 24 larger pieces of candy to be given as prizes to purchasers of said penny pieces of uniform size and shape in first package containing pink instead of white centers;

Sold to dealers and jobbers for display and resale by retail dealer purchasers thereof in accordance with aforesaid sales plan such assortments, and thereby supplied to and placed in the hands of others means of conducting lotteries, gift enterprises, or games of chance in sale of its products in accordance with such sales plan, involving game of chance or sale of a chance to procure larger piece of candy; contrary to the established public policy of the United States Government and in competition with many who are unwilling to offer or sell candy so packed or assembled as above described or otherwise arranged or packed for sale to the purchasing public so as to involve a game of chance or sale of a chance to win by chance or any other methods contrary to public policy and refrain therefrom;

With capacity and tendency thus to induce wholesalers, jobbers, retailers, and public to purchase its said products in preference to candy offered and sold by its competitors and with results that many dealers in, and ultimate purchasers of, candy were attracted by such methods of packing and assembling said candy, and element of chance involved therein, and were thereby induced to purchase such candy so packed, assembled and sold by it in preference to that offered and sold by competitors who do not use such or equivalent method, and with tendency and capacity, because of said game of chance, unfairly to divert to it substantial trade from its competitors aforesaid who do not use such or equivalent method as unfair or unlawful, to lessen competition in said trade, and to deprive purchasing public of benefit of free competition:

Held, That such 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. Miles J. Furnas*, trial examiner.

Mr. D. C. Daniel for the Commission.

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 Mason, Au & Magenheimer Confectionery Manufacturing Co., a corporation, hereinafter referred to as respondent, has violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Mason, Au & Magenheimer Confectionery Manufacturing Co., is a corporation organized and doing business under the laws of the State of West Virginia with its principal office and place of business located at 22 Henry Street, in the city of Brooklyn, State of New York. Respondent is now and for some time last past has been engaged in the manufacture of candy and in the sale and distribution thereof to dealers and jobbers located at points in the various States of the United States and causes and has caused its said products when sold to be transported from its principal place of business in the State of New York to purchasers thereof in other States of the United States and in the District of Columbia at their respective places of business; and there is now and has been for several years last past a course of trade in commerce by said respondent in such candy between and among the States of the United States and in the District of Columbia. 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 and in the District of Columbia.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, respondent sells and has sold to dealers and jobbers certain assortments of candy so packed and assembled as to involve the use of a lottery scheme, gift enterprise, or game of chance when sold and distributed to the consumers thereof.

The respondent has packed and assembled certain of its candies in two separate packages which when sold together constitute one complete assortment which has been and may be sold and distributed to the consuming public by means of a lottery scheme, gift enterprise, or game of chance. One of the said packages contains 150 pieces of candy of uniform size and shape, 126 of which have white centers and 24 of which have pink centers. The other package referred to above contains 24 pieces of candy which said pieces of candy are

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larger than the pieces of candy of uniform size and shape contained in the first package above described. The said 24 pieces of candy in the second package described are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the first package referred to in the following manner: The said pieces of candy of uniform size and shape retail at a price of 1¢ each but the purchasers who procure one of the said pieces of candy having pink centers are entitled to receive and are to be given free of charge one of the said larger pieces of candy heretofore referred to and contained in the second package. The color of the center of the said piece of candy of uniform size and shape is effectively concealed from the purchasers or prospective purchasers until a selection has been made and a particular piece of candy is broken open. The aforesaid purchasers of said candies of uniform size and shape who procure the candy having a pink center thus procure one of the said larger pieces of candy wholly by lot or chance.

PAR. 3. The dealers and jobbers to whom respondent sells its assortments resell the same to retail dealers and said retail dealers expose said assortments for sale and sell said candy to the purchasing public in accordance with the sales plan above described. Respondent thus supplies to and places in the hands of others the means of conducting lotteries, gift enterprises, or games of chance in the sale of its products in accordance with the said sales plan and said sales plan has the capacity and tendency of inducing wholesale dealers, jobbers, retail dealers, and the public to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of candy to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure a larger piece of candy.

The use by respondent of said method and the sale of its candy through the use thereof and by the aid of said method is a practice of the sort which has long been contrary to the established public policy of the Government of the United States.

Many persons, firms, and corporations who make and sell candy in competition with the respondent are unwilling to offer for sale or sell candy so packed or assembled as above described or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance or the sale of a chance to win something by chance or by any other method that is contrary to public policy and such competitors refrain therefrom.

PAR. 5. Many dealers and ultimate purchasers of candy are attracted by respondent's said method of packing and assembling 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 assembled and sold by respondent in preference to candy offered for sale and sold by 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, unfairly to divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method because the same is unfair or unlawful; to lessen competition in said candy trade; and to deprive the purchasing public of the benefit of free competition.

PAR. 6. The aforesaid acts and practices of the respondent as herein alleged are all to the 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 8, 1938, issued, and thereafter served, its complaint in this proceeding upon respondent, Mason, Au & Magenheimer Confectionery Manufacturing Co., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. On May 9, 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, Mason, Au & Magenheimer Confectionery Manufacturing Co., is a corporation organized and doing business under the laws of the State of West Virginia with its principal office and place of business located at 22 Henry Street, in the city of Brooklyn, State of New York. Respondent is now and for some time last past has been engaged in the manufacture of candy and in the sale and distribution thereof to dealers and jobbers located at points in the various States of the United States and causes and has caused

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its said products when sold to be transported from its principal place of business in the State of New York to purchasers thereof in other States of the United States and in the District of Columbia at their respective places of business; and there is now and has been for several years last past a course of trade in commerce by said respondent in such candy between and among the States of the United States and in the District of Columbia. 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 and in the District of Columbia.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, respondent sells and has sold to dealers and jobbers certain assortments of candy so packed and assembled as to involve the use of a lottery scheme, gift enterprise, or game of chance when sold and distributed to the consumers thereof.

The respondent has packed and assembled certain of its candies in two separate packages which when sold together constitute one complete assortment which has been and may be sold and distributed to the consuming public by means of a lottery scheme, gift enterprise, or game of chance. One of the said packages contains 150 pieces of candy of uniform size and shape, 126 of which have white centers and 24 of which have pink centers. The other package referred to above contains 24 pieces of candy which said pieces of candy are larger than the pieces of candy of uniform size and shape contained in the first package above described. The said 24 pieces of candy in the second package described are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the first package referred to in the following manner: The said pieces of candy of uniform size and shape retail at a price of 1¢ each but the purchasers who procure one of the said pieces of candy having pink centers are entitled to receive and are to be given free of charge one of the said larger pieces of candy heretofore referred to and contained in the second package. The color of the center of the said pieces of candy of uniform size and shape is effectively concealed from the purchasers or prospective purchasers until a selection has been made and a particular piece of candy is broken open. The afore-said purchasers of said candies of uniform size and shape who procure the candy having a pink center thus procure one of the said larger pieces of candy wholly by lot or chance.

PAR. 3. The dealers and jobbers to whom respondent sells its assortments resell the same to retail dealers and said retail dealers expose

said assortments for sale and sell said candy to the purchasing public in accordance with the sales plan above described. Respondent thus supplies to and places in the hands of others the means of conducting lotteries, gift enterprises, or games of chance in the sale of its products in accordance with the said sales plan and said sales plan has the capacity and tendency of inducing wholesale dealers, jobbers, retail dealers, and the public to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of candy to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure a larger piece of candy.

The use by respondent of said method and the sale of its candy through the use thereof and by the aid of said method is a practice of the sort which has long been contrary to the established public policy of the Government of the United States.

Many persons, firms, and corporations who make and sell candy in competition with the respondent are unwilling to offer for sale or sell candy so packed or assembled as above described or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance or the sale of a chance to win something by chance or by any other method that is contrary to public policy and such competitors refrain therefrom.

PAR. 5. Many dealers and ultimate purchasers of candy are attracted by respondent's said method of packing and assembling 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 assembled and sold by respondent in preference to candy offered for sale and sold by 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, unfairly to divert to respondent substantial trade and custom from its said competitors who do not use the same or an equivalent method because the same is unfair or unlawful; to lessen competition in said candy trade; and to deprive the purchasing public of the benefit of free competition.

CONCLUSION

The aforesaid acts and practices of the respondent as hereinbefore 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 fact set forth in said complaint and states that it waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Mason, Au & Magenheimer Confectionery Manufacturing Co., its officers, representatives, agents, employees, directly, or through any corporate or other device, in connection with the offering for sale, sale, and distribution of candy or any other merchandise in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling and distributing candy so packed and assembled that sales of such candy to the general public are to be made or may be made by means of a lottery, gaming device, or gift enterprise.

2. Supplying to or placing in the hands of dealers packages or assortments of candy which are to be used, or may be used, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of candy, or any other merchandise, to the public.

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

4. Supplying to or placing in the hands of dealers a lottery device either with assortments of candy or other merchandise, or separately, which lottery device is to be used, or may be used, in selling or distributing such candy or other merchandise to the public.

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

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

Syllabus

IN THE MATTER OF
PUBLIX PRINTING CORPORATION

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

Docket 3742. Complaint, Mar. 21, 1939—Decision, May 31, 1939

Where a corporation engaged in manufacture, sale, and distribution of sales promotion cards, which were so designed and arranged as to involve use of a lottery scheme or gift enterprise when used by dealers in promoting and increasing sales of their merchandise to the consuming public and which included several groups involving in all cases lottery scheme or gift enterprise and varying in detail only, one of which included cards arranged for punching out and recording sales to a total amount of \$5.20 and had enclosed or concealed within a secret panel on card legend entitling holder of card, when opened, to amounts in trade ranging from 20 cents to \$5 and others of which provided for recording sales totaling \$10 worth of merchandise by numbers arranged around the border of the card and for the winning of amounts from 20 cents up to \$10 by holder of card and in accordance with particular legend concealed under secret panel—

Sold to retail merchant customers assortments of such sales promotion cards, together with various display posters and advertisements for merchant's use in distributing and making use of cards in question through distribution, as suggested, to customers of merchant making purchases and the punching out on the margin of the cards of the amount of such purchases, and the awarding of amounts to customer in accordance with legend revealed within secret panel of particular card, upon the completion thereon of the total amount of purchases, and provided with other suggested methods involving in all cases lottery, game of chance or gift enterprise, its various merchant customers, by whom said sales promotion cards were distributed to customers and prospective customers and awards shown on secret panels thereon honored; contrary to an established public policy of the United States Government and in violation of criminal law and in competition with various manufacturers and distributors of such promotion cards, premium cards, price concession cards, and coupon trading stamps, which, when used by dealers do not involve lottery scheme, game of chance or gift enterprise and in competition with many who sell and distribute various cards or devices for promoting or increasing sales of dealers and who are unwilling to offer or sell cards or devices so designed and arranged as above set forth, or otherwise so designed and arranged as to involve a game of chance, lottery scheme, or gift enterprise and refrain therefrom;

With result that consuming public was induced to deal with or purchase merchandise from dealers using its devices because of lottery scheme, game of chance, or gift enterprise connected therewith, in preference to purchasing merchandise from dealers using devices of its competitors, and dealers were thereby induced to buy its said cards in preference to devices of competitors and trade was unfairly diverted to it from its competitors aforesaid: