

Complaint

IN THE MATTER OF
KING CANDY COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 23, 1914

Docket 3437. Complaint, May 21, 1938—Decision, June 26, 1939

Where a corporation engaged in manufacture, sale, and distribution of candy to dealer purchasers in various States—

Furnished or sold, with certain assortments of candy, various push cards and punchboards for use in display, sale, and distribution thereof under a plan in accordance with which purchaser selecting by chance, for 10 cents paid, feminine name corresponding to that concealed under card's master seal, received a package of candy; and

Supplied thereby to and placed in the hands of others means of conducting lotteries in the sale of its products, in accordance with aforesaid or similar sales plan, by retail dealer purchasers of its candies, who exposed and sold same to purchasing public in accordance therewith, contrary to an established policy of the United States Government, and in competition with many who are unwilling to offer or sell their products so packed and assembled as above described for sale by any method involving game of chance or lottery, and refrain therefrom;

With effect of inducing purchasers of candy to buy its said product in preference to that offered and sold by competitors, and of excluding from candy trade all competitors who do not adopt and use such or similar method involving elements of chance or lottery, and with result that many dealers in and ultimate purchasers of candy were attracted by said method and manner of packing same and by element of chance involved in sale thereof as above set forth, and thereby induced to purchase such candy, thus packed and sold by it, in preference to that offered and sold by competitors who do not use similar methods, and with tendency and capacity, because of said game of chance, to divert to it trade and custom from its competitors who do not use similar methods, exclude from trade in question all competitors who are unwilling to and do not use such methods as against public policy, lessen competition in said trade, and create monopoly in it and in such other distributors of candy as use same or similar methods, and deprive purchasing public of benefit of free competition:

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

Before *Mr. Arthur F. Thomas*, trial examiner.

Mr. D. C. Daniel for the Commission.

Mr. Hugo Swan, of Dallas, Tex., 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 King Candy 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, King Candy Co., is a corporation organized and doing business under the laws of the State of Texas, with its offices and principal place of business located at 813 East Ninth Street, Fort Worth, Tex. 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. Respondent causes, and has caused, its products, when sold to be transported from its principal place of business in the city of Fort Worth, Tex., to purchasers thereof located in the State of Texas and in other States of the United States and in the District of Columbia, 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 respondent in such candy between and among the various States of the United States and in the District of Columbia. In the course and conduct of its business, respondent is in competition with other corporations and with individuals and partnerships likewise engaged in the sale and distribution of candy 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 certain assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One of said assortments consists of a package of candy and a device commonly called a push card. Said package of candy is displayed to the purchasing public and is awarded to a purchaser by means of said push card in the following manner: The push card contains a number of partially perforated disks, a printed feminine name adjacent to each disk, and a blank space opposite each feminine name for writing in the name of the customer. The push card has a master seal concealed within which is one of the feminine names appearing adjacent to the disks on said card. Sales are 10 cents each and upon perforation of a disk and selection of one of the printed feminine names, the customer writes his name in the blank opposite such feminine name. When the last feminine name has been selected and the last disk perforated, the master seal is removed and the feminine name concealed thereunder is disclosed. The purchaser who selected the feminine name corresponding to the feminine name disclosed under the master seal is awarded the package of candy. The remaining

purchasers receive nothing for their money. The name printed under the master seal is effectively concealed from purchasers and prospective purchasers until all purchases have been made, all feminine names selected and the last disk separated from the card. The said package of candy is thus distributed to the purchasers of pushes from said card wholly by lot or chance.

Respondent furnishes or sells various push cards and punchboards for use in the sale and distribution of candy by means of a game of chance, gift enterprise, or lottery scheme. The unit sale on some of such punchboards is 5 cents. Said punchboards involve the same lot or chance feature, but vary in size, running 300, 400, 600, 1,000, 1,200, and 1,500 punches per board.

PAR. 3. Retail dealers who purchase respondent's candy directly or indirectly, expose and sell the same 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 a lottery in the sale of its products in accordance with the sales plan hereinabove set forth. Said sales plan has a tendency and capacity to induce purchasers of candy to purchase respondent's candy 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 packages 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 is contrary to an established policy of the Government of the United States and in violation of the criminal laws. The use by respondent of said method has a tendency unduly to hinder competition or to create a monopoly in this, to wit: that the use thereof has a tendency and capacity to exclude from the candy trade competitors who do not adopt and use the same method or equivalent or similar methods involving the same or equivalent elements of chance or lottery. 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 to sell their products so packed and assembled as above alleged or by any other method involving a game of chance or lottery, and such competitors refrain therefrom.

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 equivalent methods. The use of said method by respondent has a capacity and tendency, because of said game of chance, to divert to respondent trade and custom from its 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 method because the same are against public policy and unlawful, to lessen competition in the candy trade, to create a monopoly of said candy trade in respondent and in such other distributors of candy as use the same or similar or equivalent methods, and to deprive the purchasing public of the benefit of free competition. The use of said method by respondent 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 method or equivalent methods.

PAR. 6. The aforesaid acts and practices of respondent as herein alleged are all to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition 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 May 21, 1938, issued and thereafter served its complaint in this proceeding upon the respondent, King Candy Co., a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. Thereafter, to wit on November 10, 1938, testimony and other evidence in support of the allegations of said complaint were introduced by Edward W. Thomerson, acting for D. C. Daniel, attorney for the Federal Trade Commission before A. F. Thomas, an examiner of this Commission duly appointed for that purpose, and in opposition to the allegations of said complaint by Hugo Swan, attorney for the respondent, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceedings regularly came on for final hearing before the Commission on the said complaint, testimony and other evidence, and brief of the attorney for the Commission, and the Commission having duly considered the same, 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, King Candy Co., is a corporation, organized and doing business under and by virtue of the laws of the State of Texas with its offices and principal place of business located in Fort Worth, Tex. Respondent is now, and for a long time past has been, engaged in the manufacture, sale, and distribution of candies to dealers. Respondent causes said candies, when sold to be transported from its principal place of business in Fort Worth, Tex., to purchasers thereof, some located in the State of Texas and others located in the various States of the United States and in the District of Columbia. There is now and has been for some time last past a course of trade and commerce by said respondent in such candy between and among various States of the United States and in the District of Columbia. In the course and conduct of its business, respondent is in competition with other corporations, partnerships, firms, and individuals likewise engaged in the sale and distribution of candy in commerce between and among various States of the United States and in the District of Columbia. Respondent does a business of approximately \$500,000 per annum, 20 percent of which is done in interstate commerce, and approximately 10 percent of this business involves the use of the push card or punchboard as herein described.

PAR. 2. In the course and conduct of its business, as above described, respondent sells and has sold to dealers certain assortments of candy for distribution to consumers by use of the following plans: One of said assortments consists of a package of candy and a device commonly called a push card. Said package of candy is displayed to the purchasing public and is awarded to a purchaser by means of said push card as follows: The push card contains a number of partially perforated disks, a printed feminine name adjacent to each disk, and a blank space opposite each feminine name in which is written the name of the purchaser. The push card has a master seal concealed within which is one of the feminine names appearing adjacent to the disks on said card. Sales are 10 cents each and upon perforation of a disk and selection of one of the printed feminine names, the purchaser writes his name in the blank space opposite such feminine name. When the last feminine name has been selected and the last disk perforated, the master seal is removed, and the feminine name concealed thereunder is disclosed. The purchaser who selects the feminine name corresponding to the feminine name disclosed under the master seal is awarded the package of candy. The

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name printed under the master seal is effectively concealed from purchasers and prospective purchasers until all purchases have been made, all feminine names selected and the last disk separated from the card.

PAR. 3. Respondent also furnishes or sells various push cards and punchboards for use in the sale and distribution of candy by means of a lottery scheme. The unit of sale on some of said punchboards is 5 cents. Said punchboards involve the same lottery feature, but vary in size running 300, 400, 600, 1,000, 1,200, and 1,500 punches per board.

PAR. 4. Retail dealers who purchase respondent's candies expose and sell the same to the purchasing public in accordance with the aforesaid sales plan. Respondent supplies to and places in the hands of others, means of conducting a lottery in the sale of its products in accordance with the sales plans hereinabove set forth. Said sales plan has a tendency and capacity to and does induce purchasers of candy to purchase respondent's candy in preference to candy offered for sale and sold by its competitors.

PAR. 5. The use by respondent of said methods in the sale of candy is a practice of a sort which is contrary to an established policy of the United States Government, and the use of said methods has a tendency and capacity to and does exclude from the candy trade, competitors of respondent who do not adopt and use the same method or similar methods involving elements of chance or lottery. Many persons, firms, and corporations who manufacture and sell candy in competition with the respondent are unwilling to offer for sale or to sell their products so packed and assembled as hereinabove described to be sold by any method involving a game of chance or lottery, and such competitors refrain therefrom.

PAR. 6. Many dealers in and ultimate purchasers of candy are attracted by respondent's 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 similar methods. The use of said methods by respondent has a capacity and tendency, because of said game of chance, to divert to respondent trade and custom from its competitors who do not use similar methods, to exclude from the candy trade all competitors who are unwilling to and who do not use similar methods because the same are against public policy, to lessen competition in the candy trade, to create a monopoly of said candy trade in respondent and in

such other distributors of candy as use the same or similar methods; and to deprive the purchasing public of the benefit of free competition.

CONCLUSION

The aforesaid acts and practices of the respondent, King Candy Co., as herein found, are 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.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission (respondent having filed no answer) testimony and other evidence taken before Arthur F. Thomas, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint, brief filed herein by counsel for the Commission (respondent having offered no proof, 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 King Candy Co., a corporation, its officers, agents, representatives, 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 or distributing candy or any 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 assortments of candy or other merchandise together with push or pull cards, punchboards, or other lottery devices, which said push or pull 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 general public.

3. Supplying to or placing in the hands of others push or pull cards, punchboards, or any other lottery devices, either with assortments of candy or other merchandise or separately, which said push or pull 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 general public.

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4. 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.

Syllabus

IN THE MATTER OF
BOBS CANDY AND PECAN COMPANY

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

Docket 3580. Complaint, Sept. 12, 1938—Decision, June 26, 1939

Where a corporation engaged in manufacture and sale of candy including certain assortments of candy and nut confections which were so packed and assembled as to involve a lottery scheme when sold and distributed to the consumer thereof and which included assortments composed of (1) number of individually wrapped bars of candy of uniform size and shape and sale and distribution thereof to purchasing public in accordance with concealed legend set forth on cardboard strips included with said individually wrapped pieces by which purchaser or customer securing with bar cardboard bearing letter "O" received such bar without charge and those securing bars with cardboards containing, as case might be numbers 1, 2, or 3 paid 1, 2, or 3 cents for bar thus secured; and, (2) number of 1 pound bars or rolls of nut confections of uniform size and shape, together with push card, for sale under a plan and in accordance with said cards' explanatory legend pursuant to which customer or purchaser received, for 5 cents paid, one of said pecan rolls in accordance with success or failure in selecting one of two numbers, or feminine name from list displayed corresponding to name displayed under card's master seal, and, failing any such selection received nothing other than privilege of pushing or separating disk from card—

Sold to dealers for display and resale by retailer dealer purchasers in accordance with aforesaid sales plans, such assortments and thereby supplied to and placed in the hands of others means of conducting lottery in the sale of its said products in accordance with aforesaid sales plan involving game of chance or sale of a chance to procure a bar or roll of candy or nut confection without charge, or at a price greatly below normal retail price thereof, contrary to an established public policy of the United States Government and in violation of the criminal laws and in competition with many who are unwilling to offer or sell their products so packed and assembled as above described or otherwise arranged and packed for sale to purchasing public so as to involve game of chance or any other method of sale contrary to public policy and refrain therefrom;

With tendency and capacity to induce purchasers of candy and nut confections to buy its said products in preference to those offered and sold by its competitors, and with result that many dealers in and other purchasers of such products were attracted by its said method of packing same and by element of chance involved in sale thereof as above described, were thereby induced to purchase substantial amounts of such candy and confections so packed and sold by it in preference to those offered and sold by competitors who do not use such or equivalent methods, and with capacity and tendency because of said game of chance to divert to it trade and customers from its competitors who do not use such or equivalent methods, to exclude from candy and nut confection trade all competitors who are unwilling to and do not use such or equivalent methods as unlawful, to lessen competi-