

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-

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tion in said trade, and to create monopoly thereof in it and in such other distributors of such products as used such or equivalent methods, and to deprive purchasing public of benefit of free competition in said trades 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 acts and practices were all to the injury and prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. William B. Lott*, 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 Bobs Candy & Pecan Co., a corporation, hereinafter referred to as respondent, has violated the provisions of 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, Bobs Candy & Pecan Co., is a corporation organized and doing business under the laws of the State of Georgia with its principal office and place of business located on Main Street, in Albany, Ga. Respondent is now, and for some time last past has been, engaged in the manufacture of candy and nut confections 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 aforesaid to purchasers thereof located in the various 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 by respondent in said candy and nut confections in commerce 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 and has been in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy and nut confections 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 and nut confections so packed and assembled as to involve a lottery scheme when so sold and distributed to the consumers thereof. One of said assortments is sold and distributed to the purchasing public in the following manner:

This assortment consists of a number of bars of candy of uniform size and shape together with a corresponding number of strips of cardboard. Each of said bars of candy together with one of said strips of cardboard is contained within an individual cellophane wrapper. The said strips of cardboard bear legends stating that either the letter "O" or number 1, 2, or 3 is printed on the reverse side of each of said strips and that persons selecting bars of said candy with strips of cardboard on which are printed the letter "O" will receive bars of said candy without charge; persons selecting bars of said candy with strips of cardboard on which are printed the number 1 pay 1 cent each for bars of said candy; persons selecting bars of said candy with strips of cardboard on which are printed the number 2 pay 2 cents each for bars of said candy; and persons selecting bars of said candy with strips of cardboard on which are printed the number 3 pay 3 cents each for bars of said candy. The fact as to whether a bar of said candy is to be given without charge or the price to be paid for same is effectively concealed from purchasers and prospective purchasers until a bar of said candy has been selected and the wrapper removed therefrom and the printing on the reverse side of the accompanying strip of cardboard revealed. The said bars of candy are thus distributed to the purchasing public wholly by lot or chance.

Another of said assortments is sold and distributed to the purchasing public as follows:

This assortment consists of a number of one pound bars or rolls of nut confections of uniform size and shape together with what is commonly known as a push card. Sales are 5 cents each. The card contains a number of partially perforated discs on the face of which is printed the word "push," and immediately beneath each of said discs is printed a feminine name. Within each of said discs is printed a number. The card also contains a master seal with a feminine name concealed therein. Said names are alphabetically arranged elsewhere on said card and opposite each of said names is a ruled space for recording the name of the purchaser opposite the feminine name selected. The card bears legends or statements informing purchasers or prospective purchasers that persons receiving the numbers 10 and 20 will each receive a pecan roll and that the persons selecting the name corresponding with the name under the master seal will also receive a pecan roll. Persons who do not qualify by selecting either the number 10 or the number 20 or the name corresponding to the name under the master seal receive nothing for their money other than the privilege of pushing or separating a disc from said card. The numbers within said discs are effectively

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concealed from purchasers and prospective purchasers until a selection has been made and a disc pushed or removed from said card. The name under the master seal is effectively concealed from purchasers and prospective purchasers until all of the said discs have been pushed or removed from said card. The said rolls are thus distributed to the purchasing public wholly by lot or chance.

PAR. 3. Retail dealers who purchase respondent's candy and nut confections 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 product in accordance with the sales plan hereinabove set forth. Said sales plan has a tendency and capacity to induce purchasers of candy and nut confections to purchase respondent's candy and nut confections in preference to candy and nut confections offered for sale and sold by its competitors.

PAR. 4. The sale of said candy and nut confections to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure a bar or roll of candy or nut confection without charge or at a price greatly below the normal retail price thereof. The use by respondent of said methods in the sale of candy and nut confections and the sale of candy and nut confections by and through the use thereof and by the aid of said methods is a practice of the sort which is contrary to an established public policy of the Government of the United States and which is in violation of the criminal laws. The use by respondent of said methods 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 and nut confections trade competitors who do not adopt and use the same method or equivalent methods involving the same or equivalent elements of chance or lottery. Many persons, firms, or corporations who make and sell candy and nut confections in competition with respondent as above alleged are unwilling to offer for sale or to sell their products 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. 5. Many dealers in and ultimate purchasers of candy and nut confections are attracted by respondent's said methods of packing said candy and nut confections 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 nut confections so packed and sold by respondent in preference to candy and nut confections

offered for sale and sold by competitors of respondent who do not use the same or equivalent 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 the same or equivalent methods to exclude from the candy and nut confections trades 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 and nut confections trades, to create a monopoly of said candy and nut confections trades in respondent and in such other distributors of candy and nut confections as use the same or equivalent methods and to deprive the purchasing public of the benefit of free competition in said candy and nut confections trades. The use of said methods by respondent has the capacity and tendency to eliminate from said candy and nut confections trades all actual competitors and to exclude therefrom all potential competitors who do not adopt and use the same methods or equivalent methods.

PAR. 6. The aforesaid acts and practices of respondent as herein alleged 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on September 12, 1938, issued, and on September 14, 1938, served, its complaint in this proceeding upon respondent, Bobs Candy & Pecan Co., a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, 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 hearings 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 the 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, Bobs Candy & Pecan Co., is a corporation, organized and doing business under the laws of the State of Georgia with its principal office and place of business located in Albany, Ga. Respondent is now, and for some time last past has been, engaged in the manufacture of candy and nut confections 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 aforesaid to purchasers thereof located in the various 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 by respondent in said candy and nut confections in commerce 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 and has been in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy and nut confections 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 and nut confections so packed and assembled as to involve a lottery scheme when so sold and distributed to the consumers thereof. One of said assortments is sold and distributed to the purchasing public in the following manner:

This assortment consists of a number of bars of candy of uniform size and shape together with a corresponding number of strips of cardboard. Each of said bars of candy together with one of said strips of cardboard is contained within an individual cellophane wrapper. The said strips of cardboard bear legends stating that either the letter "O" or number 1, 2, or 3 is printed on the reverse side of each of said strips and that persons selecting bars of said candy with strips of cardboard on which are printed the letter "O" will receive bars of said candy without charge; persons selecting bars of said candy with strips of cardboard on which are printed the number 1 pay 1 cent each for bars of said candy; persons selecting bars of said candy with strips of cardboard on which are printed the number 2 pay 2 cents each for bars of said candy; and persons selecting bars of said candy with strips of cardboard on which are printed the number 3 pay 3 cents each for bars of said candy. The fact as to whether a bar of said candy is to be given without charge or the price to be paid for same is effectively concealed from purchasers

and prospective purchasers until a bar of said candy has been selected and the wrapper removed therefrom and the printing on the reverse side of the accompanying strip of cardboard revealed. The said bars of candy are thus distributed to the purchasing public wholly by lot or chance.

Another of said assortments is sold and distributed to the purchasing public as follows:

This assortment consists of a number of 1 pound bars or rolls of nut confections of uniform size and shape together with what is commonly known as a push card. Sales are 5 cents each. The card contains a number of partially perforated disks on the face of which is printed the word "push," and immediately beneath each of said disks is printed a feminine name. Within each of said disks is printed a number. The card also contains a master seal with a feminine name concealed therein. Said names are alphabetically arranged elsewhere on said card and opposite each of said names is a ruled space for recording the name of the purchaser opposite the feminine name selected. The card bears legends or statements informing purchasers or prospective purchasers that persons receiving the numbers 10 and 20 will each receive a pecan roll and that the persons selecting the name corresponding with the name under the master seal will also receive a pecan roll. Persons who do not qualify by selecting either the number 10 or the number 20 or the name corresponding to the name under the master seal receive nothing for their money other than the privilege of pushing or separating a disk from said card. The numbers within said disks are effectively concealed from purchasers and prospective purchasers until a selection has been made and a disk pushed or removed from said card. The name under the master seal is effectively concealed from purchasers and prospective purchasers until all of the said disks have been pushed or removed from said card. The said rolls are thus distributed to the purchasing public wholly by lot or chance.

PAR. 3. Retail dealers who purchase respondent's candy and nut confections 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 product in accordance with the sales plan hereinabove described. Said sales plan has a tendency and capacity to induce purchasers of candy and nut confections to purchase respondent's candy and nut confections in preference to candy and nut confections offered for sale and sold by its competitors.

PAR. 4. The sale of said candy and nut confections to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure a bar or roll of candy or nut confection without charge or at a price greatly below the normal retail price thereof. The use by respondent of said methods in the sale of candy and nut confections and the sale of candy and nut confections by and through the use thereof and by the aid of said methods is a practice of the sort which is contrary to an established public policy of the government of the United States and which is in violation of the criminal laws. The use by respondent of said methods 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 and nut confections trades competitors who do not adopt and use the same method or equivalent methods involving the same or equivalent elements of chance or lottery. Many persons, firms, or corporations who make and sell candy and nut confections in competition with respondent as above described are unwilling to offer for sale or to sell their product so packed and assembled as above described 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. 5. Many dealers in and ultimate purchasers of candy and nut confections are attracted by respondent's said methods of packing said candy and nut confections and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase substantial amounts of said candy and nut confections so packed and sold by respondent in preference to candy and nut confections offered for sale and sold by competitors of respondent who do not use the same or equivalent 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 the same or equivalent methods, to exclude from the candy and nut confections trades 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 and nut confections trades, to create a monopoly of said candy and nut confections trades in respondent and in such other distributors of candy and nut confections as use the same or equivalent methods and to deprive the purchasing public of the benefit of free competition in said candy and nut confections trades. The use of said methods by respondent has the capacity and tendency to elimi-

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nate from said candy and nut confections trades all actual competitors and to exclude therefrom all potential competitors who do not adopt and use the same methods or equivalent methods.

CONCLUSION

The aforesaid acts and practices of respondent as herein 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, Bobs Candy & Pecan 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 and nut confections 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, nut confections or any other merchandise so packed and assembled that sales of such candy, nut confections or such 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 others, packages or assortments of candy, nut confections or other merchandise together with a push or pull card, punchboard, or other lottery device, which push or pull card, punchboard or other lottery device is to be used or may be used in selling and distributing such candy, nut confections or other merchandise to the public.

3. Supplying to or placing in the hands of others any lottery device either with assortments of candy, nut confections or other merchandise, or separately, which lottery device is to be used, or may be used in selling or distributing such candy, nut confections or other merchandise to the general public.

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4. Selling or otherwise distributing 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.

FEE & STEMWEDEL, INC.

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