

Syllabus

IN THE MATTER OF

SAMUEL I. SIFERS, INDIVIDUALLY AND TRADING AS
SIFERS CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3311. Complaint, Jan. 25, 1938—Decision, Aug. 24, 1939*

Where an individual engaged in manufacture and sale of candy to wholesalers in various other States—

Furnished with certain types of candies made by him various push cards and plans of merchandising which involved operation of games of chance, gift enterprises, or lottery schemes for distribution of said candies to members of consuming public wholly by lot or chance, and were used by said wholesalers' or retailers' customers for resale of said products to purchasing public, in accordance therewith, and which included (1) box of candy consisting of 40 pieces, together with 1 of said cards for use in sale and distribution of said candy, in accordance with said card's explanatory legend, pursuant to which customer paid 1 cent, 2 cents, 3 cents, 4 cents, or 5 cents, depending upon number concealed by disk selected and received, as described by card, high quality, full value, 5-cent candy bar, (2) assortments, together with 150 disk cards for use in sale and distribution thereof in accordance with said cards' explanatory legends, pursuant to which those securing for their penny paid, certain 1 of 20 numbers received 5-cent candy bars, and those securing other numbers received penny pieces, and person making last purchase received 4 bars, and (3) 30 disk cards, in 2 sections, for use in sale and distribution of candy under a plan and in accordance with said card's explanatory legend, pursuant to which selectors of each of 6 of the disks received for the 5 cents paid two 5-cent candy bars, selectors of last disk in each of 2 sections into which card was divided received 1 large-size candy bar, and others received 1 bar of ordinary size; and

Supplied thereby to and placed in the hands of others means by which games of chance, gift enterprises, and lotteries were conducted by retailer purchasers of said candy for resale to consuming public through use of said cards as above described, involving game of chance or sale of a chance in resale and distribution of his said candy, contrary to the established public policy of the United States Government, and in violation of the laws of several of the States, and in competition with those who are unwilling to employ in sale and distribution of candies any method or sales plan which involves games of chance, gift enterprises, or lottery schemes, and refrain therefrom;

With the result that such competitors were placed at a disadvantage in competing, many purchasers of candies manufactured and sold by him were attracted by element of chance involved in sale and distribution of said candies by use of said push cards furnished by him, and were thereby induced to purchase his candies in preference to similar products offered and sold by competitors who do not furnish with their candy similar push cards or other devices, and with result by reason of such preference that wholesale dealers and jobbers purchased substantial amounts of candies made

Complaint

29 F. T. C.

and sold by said individual and trade was diverted unfairly to him from competitors aforesaid:

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

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

Mr. D. C. Daniel and *Mr. William L. Pencke* for the Commission.

Apt & Enfield, of Iola, Kans., 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 Samuel I. Sifers, individually, and trading as Sifers Candy Co., 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 Samuel I. Sifers is an individual doing business under the trade name of Sifers Candy Co., with his principal office and place of business located at Iola, Kans. He is now, and for some time last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to wholesale dealers and jobbers. Respondent causes and has caused his products when sold to be transported from his principal place of business in Iola, Kans., to purchasers thereof in the State of Kansas and in other States of the United States at their respective places of business. There is now, and has been for some time last past, a course of trade and commerce by said respondent in such candy between and among the various States of the United States. In the course and conduct of his said business respondent is in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of candy and similar products, in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale dealers and jobbers 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 is sold and distributed to the consuming public in the following manner:

This assortment consists of a number of small bars of candy of uniform size and shape and a number of large bars of candy, together

with a device commonly called a "push card." The card contains a number of partially perforated disks, which are arranged in two sections. When a disk is pushed or separated from the card a number is disclosed. The numbers begin with one and continue to the number of pushes there are on the card, but the numbers are not arranged in numerical sequence. Sales are 5 cents each. The card bears statements or legends informing prospective purchasers as to which numbers entitle the purchasers thereof to receive two of the small bars of candy. The purchaser of the last push in each section is entitled to and receives one of the large bars of candy. All numbers other than those specified entitle the purchasers thereof to receive one of the small bars of candy. Two of the small bars of candy are worth more than 5 cents, but the purchaser who obtains one of the specified numbers receives the two bars for the price of 5 cents. The numbers are effectively concealed from purchasers and prospective purchasers until a push or selection has been made and the particular push separated from the card. A number of the small bars of candy are thus distributed to the purchasers of pushes from the card wholly by lot or chance.

The respondent manufactures, sells, and distributes various assortments of candy involving a lot or chance feature, but such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's said 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 lotteries in the sale of his products in accordance with the sales plan hereinabove set forth. Said sales plan has a capacity and tendency to induce purchasers thereof to purchase respondent's candy in preference to candy and similar products offered for sale and sold by his 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 an additional bar 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 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 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 an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery. Many persons, firms, and corporations who make and sell candy or similar products in competition with the respondent, as above alleged, are unwilling to offer for sale or to sell their said 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 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 an equivalent method. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from his competitors who do not use the same or an equivalent method, to exclude from said trade all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful, to lessen competition in said trade, to tend to create a monopoly of said trade in respondent and in such other distributors as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said trade. The use of said method by the respondent has the tendency and capacity to eliminate from the candy trade all actual competitors and to exclude therefrom all potential competitors who do not adopt and use said method or an equivalent method.

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

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on January 25, 1938, issued its complaint and caused same to be served on the respondent, Samuel I. Sifers, individually and trading as Sifers Candy Co., charging him

with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint (respondent having filed no answer thereto), testimony and other evidence in support of the allegations of the complaint were introduced by William L. Pencke, an attorney for the Commission, before William C. Reeves, an examiner for the Commission theretofore duly designated by it, which testimony was reduced to writing and filed in the office of the Commission, together with numerous pieces of documentary evidence received as exhibits. No testimony or other evidence was introduced by or on behalf of said respondent. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the testimony and other evidence and the brief in support of the complaint. No brief was filed by or on behalf of respondent and oral argument was waived by him, 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. For more than 3 years the respondent, Samuel I. Sifers, has carried on business at Iola, Kans., under the name and style of Sifers Candy Co. He has been engaged in the business of the manufacture and sale of candy; his entire output has been sold to wholesale dealers located in the States of Kansas, Nebraska, Iowa, Missouri, Arkansas, Texas, and Oklahoma. The volume of business done by respondent has been about \$125,000 per year. Respondent has caused the candy manufactured by him when sold to be transported from his place of business in Iola in the State of Kansas, through and into or into other States of the United States, and in the course and conduct of his said business respondent has been, and is now, in active competition with various partnerships and corporations and other persons also engaged in the manufacture and sale, or the sale, of candy in commerce among several of the States of the United States.

PAR. 2. Respondent, in the course of his business as described in paragraph 1 hereof, in soliciting the sale of and in selling certain types of candies manufactured by him, has furnished with such candies various devices, sometimes described as push cards and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes by which such candies were to be distributed to members of the consuming public wholly by lot or chance. One of the devices so furnished by respondent was intended for use

by retail dealers in the sale of a box of candy consisting of 40 pieces. Printed on each of the cards was a statement to the effect that the card contained no blanks; that each customer paid 1 cent, 2 cents, 3 cents, 4 cents, or 5 cents, depending upon the number concealed by the disk selected by him, and that each customer received a high quality, full value, 5-cent candy bar. Each of the cards had stamped thereon 40 disks, each of which concealed a number and customers were to be solicited to select 1 or more of the disks and to pay a number of cents corresponding with the number concealed by each of the disks selected. Another card furnished by respondent with other assortments of candies sold by him had stamped thereon 150 disks, each of which concealed a number. There was printed on each of these cards a statement to the effect that it contained no blanks; that selectors of the disk paid 1 cent for each of the disks selected; that selectors of disks which concealed 20 of the numbers each received a 5-cent candy bar and selectors of the other numbers each received a 1-cent piece of candy except that the person to whom the last sale was made received 4 candy bars. Another card so furnished by respondent had stamped thereon 30 disks divided into 2 sections, each of which disks concealed a number. Selectors of the disks were required to pay 5 cents for each disk selected and selectors of each of 6 of the disks receive two 5-cent candy bars and selectors of the last disk in each of the sections each received 1 large size bar of candy and each of the others received 1 candy bar of ordinary size. Respondent has sold a substantial quantity of candy with which he furnished such devices and the Commission finds that the candy so sold was distributed to the purchasing public wholly by lot or chance and that by use of 1 of the devices so sold by respondent the amount which each customer was required to pay also was determined wholly by lot or chance.

PAR. 3. The Commission finds that candy sold by respondent to wholesale dealers and jobbers, with which he furnished push cards as set out in paragraph 2 hereof, was resold by such wholesale dealers and jobbers to retail dealers, who resold such candy to the consuming public by the use of such push cards, in the manner and by the sales plan described in said paragraph 2. That respondent, by furnishing such push cards with the candy sold by him thereby supplied to and placed in the hands of others the means by which games of chance, gift enterprises, and lotteries have been conducted. The Commission further finds that the use of such push cards in the resale and distribution of the candy manufactured and sold by respondent, involved a game of chance or the sale of a chance and that the use of such methods in the sale and distribution of candies or other merchandise is a practice of the sort which is contrary to

the established public policy of the Government of the United States and is in violation of the laws of several of the States of the United States.

PAR. 4. There are among the competitors of respondent, persons, partnerships, and corporations engaged in the manufacture and sale, or the sale, of candies in commerce between and among the various States of the United States, which competitors are unwilling to employ in the sale and distribution of candies any method or sales plan which involves games of chance, gift enterprises, or lottery schemes, and refrain from such practice, and as a result are placed at a disadvantage in competition. Many purchasers of candies manufactured and sold by respondent were attracted by the element of chance involved in the sale and distribution of such candies by the use of push cards furnished by respondent and were thereby induced to purchase the candies sold by respondent in preference to similar candies offered for sale and sold by competitors of respondent who did not furnish with candy sold by them similar push cards or other devices, and because of this preference wholesale dealers and jobbers have purchased a substantial amount of candies manufactured and sold by respondent with the result that trade has been diverted unfairly to respondent from said competitors.

CONCLUSION

The acts and practices of respondent, as herein before found, are all to the injury and prejudice of the public and of competitors of respondent and constitute unfair methods of competition in commerce within the intent and meaning of the provisions 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 thereto), testimony and other evidence taken before William C. Reeves, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint (respondent having offered no testimony or other evidence in opposition to the allegations of said complaint), brief of counsel for the Commission filed herein (respondent having 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, Samuel I. Sifers, individually and trading as Sifers Candy Co., his representatives, agents, and

Order

29 F. T. C.

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 any other merchandise so packed and assembled that sales of said 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 dealers assortments of candy 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 said candy or other merchandise to the general public.

3. Supplying to or placing in the hands of dealers push or pull cards, punchboards or 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 said candy or other merchandise to the general public.

4. Selling or otherwise disposing of said candy or any other merchandise by use of push or pull cards or other lottery devices.

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

Complaint

IN THE MATTER OF
SUMLAK COMPANY

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

Docket 3828. Complaint, June 21, 1939—Decision, Aug. 24, 1939

Where a corporation engaged in sale and distribution of medicinal preparation known as "Sumlakia" for use, as recommended by it, by those suffering from epilepsy; in advertisements which it disseminated and caused to be disseminated through the mails, through newspapers and periodicals of general circulation and through circulars and other printed or written matter distributed in commerce among the various States, and through other means, and which were intended and calculated to induce, directly or indirectly, purchase of said preparation—

- (a) Represented that said "Sumlakia" was a cure or remedy for epilepsy, and a competent treatment therefor, and harmless and safe for use, facts being it was not such a cure, remedy, or treatment, nor harmless nor safe for use by those suffering from epilepsy, by reason of the various bromides contained therein, and long continued or excessive use of such bromides might cause injury to health, such as mental dullness and deterioration, psychoses, skin eruptions, digestive disturbances, or loss of sexual power; and
- (b) Failed, in its said advertisements disseminated as above set forth, to reveal to purchasers and prospective purchasers that use of said preparation by uninformed persons under the conditions prescribed in said advertisements or under such conditions as are customary or usual, might in some cases cause them to suffer serious injury to health;

With effect of engendering in the minds of substantial portion of purchasing public erroneous and mistaken belief that said statements and representations were true and that said preparation might be used under conditions prescribed in said advertisements, or under customary or usual conditions, without danger to user, and to induce portion of said public, because of such belief, to purchase its said drug-containing medicinal preparation;

Held, That such acts and practices were all to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce.

Mr. R. W. Branch for the Commission.

Nash & Donnelly, of Washington, D. C., 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 Sumlak 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: