

Syllabus

IN THE MATTER OF

C. I. LEVIN AND EDWARD JOHNSON, TRADING AS
MIDWEST MERCHANDISE COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 4058. Complaint, Mar. 12, 1940—Decision, June 10, 1940

Where two individuals engaged in sale and distribution of knives, watches, radios, cameras, and various other articles of merchandise to dealer purchasers in various States and in the District of Columbia, in competition with others engaged in the sale and distribution of like and similar merchandise in commerce as aforesaid—

Sold and distributed to dealers certain assortments of said merchandise which were so packed and assembled as to involve use of game of chance, gift enterprise, or lottery scheme when such merchandise was sold and distributed to the consumer thereof, and which included (1) replica of "Ferdinand the Bull" together with punchboard for use in sale and distribution of said replica, and number of packages of cigarettes, supplied by dealer, under plan by which person punching certain numbers received in return for 2 cents paid said replica or cigarettes, value of which was in excess of amount paid for chance, and others receive nothing, and (2) other assortments, together with various punchboards and push card devices for use in sale and distribution of merchandise in question by means of game of chance, gift enterprise, or lottery scheme involving sales plan and method similar to that described and varying therefrom in detail only; and

Supplied thereby to and placed in the hands of others means of conducting chasers by whom they were exposed and sold to purchasing public in accordance with such sales plans or methods by retail dealers who purchased or secured said assortments, together with said punchboards or push cards, either directly or indirectly, and exposed said devices and merchandise to purchasing public and sold and distributed same in accordance with such sales plans or methods as above described, involving game of chance or sale of a chance to procure article of merchandise at price much less than 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 adopt and use said or any method involving game of chance or sale of chance to win something by chance or any other method contrary to public policy and refrain therefrom;

With tendency and capacity to induce a substantial number of purchasing public to buy their said merchandise in preference to similar merchandise offered by competitors, and with result that many dealers and ultimate purchasers of merchandise similar to that distributed by them were attracted by their said sales plans or methods, and by element of chance involved in sale thereof as above described, and were thereby induced to purchase said merchandise from them in preference to similar products

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offered and sold by competitors who do not use same or similar methods, and with capacity and tendency, because of said game of chance, gift enterprise, or lottery scheme, to divert unfairly to them trade in commerce from the said competitors who do not use same or equivalent methods, and to deprive purchasing public of free competition in such merchandise:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Lewis C. Russell*, trial examiner.

Mr. D. C. Daniel for the Commission.

Mr. H. R. Brandt, of Kansas City, Mo., for respondents.

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 C. I. Levin and Edward Johnson, individually, and trading under the name of Midwest Merchandise Co., hereinafter referred to as respondents, have 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. Respondents C. I. Levin and Edward Johnson are individuals trading under the name of Midwest Merchandise Co., with their principal office and place of business located at 1006 Broadway, Kansas City, Mo. Respondents are now and for more than 1 year last past have been engaged in the sale and distribution of knives, watches, radios, cameras, clocks, lamps, and various other articles of merchandise to dealers located in various States of the United States and in the District of Columbia. Respondents cause, and have caused, their said merchandise, when sold, to be shipped or transported from their aforesaid place of business in the State of Missouri to purchasers thereof in various States of the United States and in the District of Columbia at their respective points of location. There is now, and for more than 1 year last past has been, a course of trade by said respondents in such merchandise in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of their business respondents are and have been in competition with other partnerships and individuals and with corporations engaged in the sale and distribution of like or similar merchandise 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 their business as described in paragraph 1 hereof, respondents sell and have sold to dealers certain assortments of said merchandise so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when said merchandise is sold and distributed to the consumers thereof.

One of said assortments consists of a replica of "Ferdinand the Bull" together with a device commonly known as a punchboard. To this assortment the retail dealer who purchases same adds a number of packages of cigarettes. Said punchboard has printed on the top thereof various instructions or legends showing the method or sales plan by which said merchandise is to be sold or distributed to the purchasing or consuming public. Sales are 2 cents each and said punchboard has a number of sealed tubes in which have been inserted slips of paper with numbers appearing thereon. Each purchaser is entitled to punch one of said slips from said board. The said numbers are effectively concealed from purchasers and prospective purchasers until a selection has been made and the slip of paper punched or removed from said board. The person who punches a certain specified number is entitled to and receives the replica of "Ferdinand the Bull." Purchasers who punch other specified numbers are entitled to and receive a specified number of packages of cigarettes. Persons obtaining numbers not so specified receive nothing for their money. Said replica of "Ferdinand the Bull" and said packages of cigarettes are each worth more than the amount to be paid therefor. Said replica and said packages of cigarettes are thus sold and distributed to the consuming or purchasing public wholly by lot or chance. Respondents sell and distribute various assortments of said merchandise and furnish or sell various punchboard and push-card devices for use in the sale and distribution of such merchandise by means of a game of chance, gift enterprise, or lottery scheme, but the sales plans or methods involved in the sale and distribution of all of said assortments of merchandise are similar to the sales plan or method hereinabove set out, varying only in detail.

PAR. 3. Retail dealers who purchase or procure respondents' said assortments of merchandise, together with said punchboards or push cards, either directly or indirectly, expose said devices and merchandise to the purchasing public and sell and distribute such merchandise in accordance with the above-described sales plan or

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methods. Respondents thus supply to and place in the hands of others the means of conducting lotteries, gift enterprises, or games of chance in the sale of said merchandise in accordance with the sales plans or methods hereinabove set forth. Such sales plans or methods have the tendency and capacity to induce the consuming or purchasing public to purchase respondents' said merchandise in preference to similar merchandise offered for sale and sold by their competitors.

PAR. 4. The sale of said merchandise to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure an article of merchandise at a price much less than the normal retail price thereof. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of such merchandise 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 in violation of criminal laws. The use by respondents of said sales plans or methods has the tendency and capacity to unfairly hinder competition. Many persons, firms, and corporations who sell and distribute merchandise in competition with the respondents as above described are unwilling to adopt and use said methods or any methods involving a game of chance or the sale of a chance to win something by chance or any other method that is contrary to public policy and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of merchandise similar to that distributed by respondents are attracted by respondents' said sales plans or methods and by the element of chance involved in the sale thereof in the manner above described and are thereby induced to purchase said merchandise from respondents in preference to similar merchandise offered for sale and sold by said competitors of respondents who do not use the same or similar methods. The use of said methods by respondents has the capacity and tendency, because of said game of chance, gift enterprise, or lottery scheme, to unfairly divert to respondents trade and custom from their said competitors who do not use the same or equivalent methods and has the tendency and capacity to deprive the purchasing public of free competition in said merchandise.

PAR. 6. The aforesaid acts and practices of the respondents as herein alleged are all to the injury and prejudice of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 March 12, 1940, issued, and thereafter served its complaint in this proceeding upon respondents C. I. Levin and Edward Johnson, individually and trading as Midwest Merchandise Company, charging them with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answer the Commission by order entered herein granted respondents' motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and substitute answer, and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents C. I. Levin and Edward Johnson are individuals trading under the name of Midwest Merchandise Company, with their principal office and place of business located at 1006 Broadway, Kansas City, Mo. Respondents are now and for more than 1 year last past have been engaged in the sale and distribution of knives, watches, radios, cameras, clocks, lamps, and various other articles of merchandise to dealers located in various States of the United States and in the District of Columbia. Respondents cause, and have caused, their said merchandise, when sold, to be shipped or transported from their aforesaid place of business in the State of Missouri to purchasers thereof in the various States of the United States and in the District of Columbia at their respective points of location. There is now, and for more than 1 year last past has been, a course of trade by said respondents in such merchandise in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of their business respondents are and have been in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of like or similar merchandise in commerce between and among the various States of the United States and in the District of Columbia.

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PAR. 2. In the course and conduct of their business as described in paragraph 1 hereof, respondents sell and have sold to dealers certain assortments of said merchandise so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when said merchandise is sold and distributed to the consumers thereof.

One of said assortments consists of a replica of "Ferdinand the Bull" together with a device commonly known as a punchboard. To this assortment the retail dealer who purchases same adds a number of packages of cigarettes. Said punchboard has printed on the top thereof various instructions or legends showing the method or sales plan by which said merchandise is to be sold or distributed to the purchasing or consuming public. Sales are 2 cents each and said punchboard has a number of sealed tubes in which have been inserted slips of paper with numbers appearing thereon. Each purchaser is entitled to punch one of said slips from said board. The said numbers are effectively concealed from purchasers and prospective purchasers until a selection has been made and the slip of paper punched or removed from said board. The person who punches a certain specified number is entitled to and receives the replica of "Ferdinand the Bull." Purchasers who punch other specified numbers are entitled to and receive a specified number of packages of cigarettes. Persons obtaining numbers not so specified receive nothing for their money. Said replica of "Ferdinand the Bull" and said packages of cigarettes are each worth more than the amount to be paid therefor. Said replica and said packages of cigarettes are thus sold and distributed to the consuming or purchasing public wholly by lot or chance. Respondents sell and distribute various assortments of said merchandise and furnish or sell various punchboard and push card devices for use in the sale and distribution of such merchandise by means of a game of chance, gift enterprise, or lottery scheme, but the sales plans or methods involved in the sale and distribution of all of said assortments of merchandise are similar to the sales plan or method hereinabove described, varying only in detail.

PAR. 3. Retail dealers who purchase or procure respondents' said assortments of merchandise, together with said punchboards or push cards, either directly or indirectly, expose said devices and merchandise to the purchasing public and sell and distribute such merchandise in accordance with the above described sales plans or methods. Respondents thus supply to and place in the hands of others the means of conducting lotteries, gift enterprises, or games of chance in the sale of said merchandise in accordance with the sales plans or methods hereinabove described. Such sales plans or methods have the ten-

dency and capacity to induce the consuming or purchasing public to purchase respondents' said merchandise in preference to similar merchandise offered for sale and sold by their competitors.

PAR. 4. The sale of said merchandise to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure an article of merchandise at a price much less than the normal retail price thereof. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of such merchandise 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 in violation of criminal laws. The use by respondents of said sales plans or methods has the tendency and capacity to unfairly hinder competition. Many persons, firms, and corporations who sell and distribute merchandise in competition with the respondents as above described are unwilling to adopt and use said methods or any methods involving a game of chance or the sale of a chance to win something by chance or any other method that is contrary to public policy and such competitors refrain therefrom.

PAR. 5. Many dealers in, and ultimate purchasers of, merchandise similar to that distributed by respondents are attracted by respondents' said sales plans or methods and by the element of chance involved in the sale thereof in the manner above described and are thereby induced to purchase said merchandise from respondents in preference to similar merchandise offered for sale and sold by said competitors of respondents who do not use the same or similar methods. The use of said methods by respondents has the capacity and tendency, because of said game of chance, gift enterprise, or lottery scheme, to unfairly divert to respondents trade and custom from their said competitors who do not use the same or equivalent methods and has the tendency and capacity to deprive the purchasing public of free competition in said merchandise.

CONCLUSION

The aforesaid acts and practices of the respondents as herein found are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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

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respondents, in which answer respondents admit all the material allegations of fact set forth in said complaint and state that they waive 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 respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, C. I. Levin and Edward Johnson, individually and trading under the name of Midwest Merchandise Co., or trading under any other name, their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of knives, watches, radios, cameras, clocks, lamps, 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 said merchandise or any other merchandise so packed and assembled that sales of said merchandise or other merchandise are to be made or may be made by means of a lottery, gaming device, or gift enterprise.

2. Supplying to or placing in the hands of others assortments of any 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 said merchandise to the public.

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

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 respondents shall, within 60 days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

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IN THE MATTER OF

E. T. JAMES, JR., TRADING UNDER THE NAME OF
UNITED CANDY COMPANY

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

Docket 4060. Complaint, Mar. 12, 1940—Decision, June 10, 1940

Where an individual engaged in manufacture of candy and in sale and distribution of assortments thereof, which were so packed and assembled as to involve use of a lottery scheme, when sold and distributed to consumers thereof, and included (1) number of candy bars, value of each of which was in excess of a cent, and push card for use in sale and distribution of said assortment to purchasing public, under a plan in accordance with which chance selection of certain numbers determined whether customer paid 1 cent, 2 cents, 3 cents, 4 cents, or 5 cents for candy bar, and (2) various other assortments involving lot or chance feature and sales plans or methods for distribution thereof similar to that above described and varying therefrom in detail only—

Sold such assortments, along with said push cards, to dealers or retailer purchasers by whom they were exposed and sold to purchasing public in accordance with aforesaid sales plan, under which amount to be paid by each customer for a bar of candy was determined wholly by lot or chance, and involving game of chance or sale of a chance to procure candy bars at prices much less than normal retail price thereof, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of his products in accordance with sales plans or methods above set forth, contrary to an established public 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, or otherwise arranged and packed for sale to purchasing public so as to involve game of chance or any other method contrary to public policy and refrain therefrom;

With result that many dealers in and ultimate consumers of candy were attracted by his said method and manner of packing same and by element of chance involved in sale thereof as above set forth, and were thereby induced to purchase such candy so packed and sold by him, in preference to that offered and sold by his competitors who do not use same or equivalent methods, and with tendency and capacity, because of said game of chance, to divert unfairly to himself, trade from his competitors who do not use such or equivalent methods, exclude from candy trade or competitors who are unwilling to and do not use such methods, as unlawful, lessen competition in said trade and create a monopoly thereof in said individual and in such other distributors of candy as use same or equivalent methods, and deprive purchasing public of benefit of free competition, and to eliminate from said trade all actual, and to exclude therefrom, all potential, competitors who do not adopt and use same or equivalent methods: