

IN THE MATTER OF
MONTAGUE L. MERRICK AND EDNA H. MERRICK, TRADING AS MERRICK NATIONAL COMPANY AND CHOCOLATE CONFECTIONS COMPANY

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

Docket 4097. Complaint, Apr. 23, 1940—Decision, Nov. 29, 1940

Where two individuals engaged in sale and distribution of candy, including certain assortments which were so packed and assembled as to involve use of a game of chance, gift enterprise, or lottery scheme when sold or distributed to consumers thereof, and which included (1) number of small penny pieces of candy of uniform size and shape, together with number of candy bars to be given as prizes and without additional cost to those securing by chance aforesaid pieces, concealed colored centers of which differed from those of the majority, and also together with a giant candy loaf to be given without additional charge to purchaser of last one of said pieces, (2) number of small penny pieces of candy, number of candy bars, retail value of which exceeded 1 cent, and a larger bar, together with a push card for use in sale and distribution of said candy under a plan, and in accordance with card's explanatory legend, by which those purchasers securing from card's various discs certain numbers received, in addition to one of small penny pieces, one of said candy bars, and purchaser of last small piece was entitled to and received larger bar without additional cost, and (3) various assortments involving lot or chance features in sale and distribution thereof to consuming public similar to methods of sale and distribution above described, and varying therefrom in detail only—

Sold to dealers such assortments and boards, for sale and distribution to consuming public in accordance with aforesaid sales plan or method, involving game of chance or sale of a chance to procure bars of candy at prices much less than normal retail prices thereof, contrary to an established public policy of the United States Government, and in violation of criminal law, and in competition with many who are unwilling to offer and sell candy so packed and assembled, as above described, or otherwise arranged and packed, for sale to purchasing public so as to involve a game of chance or any other method of sale that is contrary to public policy, and refrain therefrom;

With result that many dealers in and ultimate purchasers of candy were attracted by their 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, thus packed and sold by them, in preference to that offered and sold by their said competitors who do not use same or equivalent method, and with tendency and capacity, through use of said methods and because of said game of chance, to divert unfairly to themselves substantial trade from their said competitors, exclude from candy trade all competitors who are unwilling to and do not use same or equivalent methods as unlawful, lessen competition in trade in question and create monopoly thereof in themselves and such other distributors of

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said product as use same or equivalent methods, and deprive purchasing public of benefit of free competition in trade in question, and to eliminate from such trade all actual, and exclude therefrom all potential, competitors who do not use such or equivalent methods, and with result, through use of methods aforesaid, that substantial trade had been and was being unfairly diverted to them from their competitors aforesaid, who refrain from use thereof:

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. Miles J. Furnas*, trial examiner.

Mr. D. C. Daniel, for the Commission.

Mr. Jerome Jackman and *Mr. Donald O. Wright*, of Minneapolis, Minn., 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 Montague L. Merrick and Edna H. Merrick, individually, and as copartners trading under the names of Merrick National Co. and Chocolate Confections 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 Montague L. Merrick and Edna H. Merrick are individuals trading as copartners under the names of Merrick National Company and Chocolate Confections Co., with their principal office and place of business located at 617 Washington Avenue North, Minneapolis, Minn. Respondents are now, and for more than 1 year last past have been, engaged in the sale and distribution of candy to dealers. Respondents cause and have caused said candy, when sold, to be shipped or transported from their aforesaid principal place of business in the State of Minnesota to purchasers thereof in the various other 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 candy 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 partnerships and with corporations engaged in the sale and distribution of like or similar products in commerce between and among

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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 candy so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when said candy is 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 small pieces of candy of uniform size and shape, a number of bars of candy and a giant loaf of candy. The said bars of candy and said loaf of candy are to be given as prizes to purchasers of certain of said pieces of candy as follows: The majority of said pieces of candy of uniform size and shape in said assortment have centers of a certain color but the minority of said pieces of candy of uniform size and shape have centers of a different color. The said pieces of candy retail at 1 cent each. Purchasers procuring said minority pieces of candy are entitled to and receive, without additional charge, said bars of candy as prizes. The purchaser of the last one of said pieces of candy is entitled to and receives, without additional charge, the said giant loaf of candy. The colors of the centers of said pieces of candy are effectively concealed from purchasers and prospective purchasers until a purchase is made and the said pieces of candy are broken open. The said bars of candy are thus distributed to the purchasing public wholly by lot or chance.

Another of respondents' said assortments of candy consists of a number of small pieces of candy, a number of bars of candy and a larger bar of candy, together with what is commonly known as a push card. This assortment of candy is sold and distributed to the purchasing public in substantially the following manner: Said push card contains a number of partially perforated discs. Printed within each of said discs is a number. Sales are 1 cent each, and each purchaser is entitled to and receives one of said pieces of candy. Each purchaser selects and removes one of said discs from said card. The card bears statements or legends informing purchasers and prospective purchasers that persons selecting certain designated numbers each receive one of the said bars of candy, and the purchaser of the last piece of said small pieces of candy is entitled to and receives the said larger bar of candy without additional cost. The said numbers are effectively concealed from purchasers and prospective purchasers until a selection has been made and the selected disc separated or removed from said card. Each of said bars of candy has a retail value greater than 1 cent. The said bars of candy are thus distrib-

uted to the purchasing public by means of said push cards wholly by lot or chance.

The respondents sell and distribute various assortments of candy involving lot or chance features when said assortments are sold and distributed to the consuming public but such assortments, and the methods of sale and distribution thereof, are similar to the ones hereinabove described, varying only in detail.

PAR. 3. 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 bars of candy at prices much less than the normal retail prices thereof. The use by respondents of said methods in the sale of their candy and the sale of such candy 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 law. The use by respondents of said methods has a tendency and capacity 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 or equivalent methods involving the same, equivalent or similar element of chance or lottery scheme. Many persons, firms, and corporations who sell candy in competition with the respondents as above alleged are unwilling to offer for sale and sell candy 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. 4. Many dealers in, and ultimate purchasers of, candy are attracted by respondents' 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 respondents in preference to candy offered for sale and sold by said competitors of respondents who do not use the same or equivalent methods. The use of said methods by respondents has a tendency and capacity, because of said game of chance, to unfairly divert to respondents trade from their said competitors who do not use the same or equivalent methods; to exclude from said candy trade 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 said candy trade; to create a monopoly of said candy trade in respondents and such other distributors of candy as use the same or equivalent methods and to deprive the purchasing public of the benefit of free com-

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petition in said candy trade. The use of said methods by respondents has a tendency and capacity to eliminate from said candy trade all actual competitors and to exclude therefrom all potential competitors who do not use said methods or equivalent methods.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on April 23, 1940, issued and thereafter served its complaint in this proceeding upon respondents Montague L. Merrick and Edna H. Merrick, individually and as copartners trading under the names of Merrick National Co. and Chocolate Confections Co., charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in violation of the provisions of said act. On May 15, 1940, the respondents filed their answer in this proceeding. Thereafter a stipulation was entered into by and between counsel for the Commission and counsel for the respondents whereby it was stipulated and agreed that a statement of facts stipulated on the record were the facts in this case. Brief was filed by counsel for the Commission (respondents having waived filing of brief and oral argument before the Commission). Thereafter this proceeding regularly came on for final hearing before the Commission on said complaint, answer, and stipulation, 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 its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents Montague L. Merrick and Edna H. Merrick are individuals trading as copartners under the names of Merrick National Co. and Chocolate Confections Co., with their principal office and place of business located at 617 Washington Avenue North, Minneapolis, Minn. Respondents are now, and for more than 1 year last past have been, engaged in the sale and distribution of candy to dealers. Respondents cause and have caused said candy, when sold, to be shipped or transported from their aforesaid prin-

cial place of business in the State of Minnesota to purchasers thereof in the various other 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 candy 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 partnerships and with corporations engaged in the sale and distribution of like or similar products 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 candy so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when said candy is 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 small pieces of candy of uniform size and shape, a number of bars of candy and a giant loaf of candy. The said bars of candy and said loaf of candy are to be given as prizes to purchasers of certain of said pieces of candy as follows: The majority of said pieces of candy of uniform size and shape in said assortment have centers of a certain color but the minority of said pieces of candy of uniform size and shape have centers of a different color. The said pieces of candy retail at 1 cent each. Purchasers procuring said minority pieces of candy are entitled to and receive, without additional charge, said bars of candy as prizes. The purchaser of the last one of said pieces of candy is entitled to and receives, without additional charge, the said giant loaf of candy. The colors of the centers of said pieces of candy are effectively concealed from purchasers and prospective purchasers until a purchase is made and the said pieces of candy are broken open. The said bars of candy are thus distributed to the purchasing public wholly by lot or chance.

Another of respondents' said assortments of candy consists of a number of small pieces of candy, a number of bars of candy and a larger bar of candy, together with what is commonly known as a push card. This assortment of candy is sold and distributed to the purchasing public in substantially the following manner: Said push card contains a number of partially perforated discs. Printed within each of said discs is a number. Sales are 1 cent each, and each purchaser is entitled to and receives one of said pieces of candy. Each purchaser selects and removes one of said discs from said

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card. The card bears statements or legends informing purchasers and prospective purchasers that persons selecting certain designated numbers each receive one of the said bars of candy, and the purchaser of the last piece of said small pieces of candy is entitled to and receives the said larger bar of candy without additional cost. The said numbers are effectively concealed from purchasers and prospective purchasers until a selection has been made and the selected disc separated or removed from said card. Each of said bars of candy has a retail value greater than 1 cent. The said bars of candy are thus distributed to the purchasing public by means of said push cards wholly by lot or chance.

The respondents sell and distribute, and have sold and distributed, various assortments of candy involving lot or chance features when said assortments are sold and distributed to the consuming public, but such assortments, and the methods of sale and distribution thereof, are similar to the ones hereinabove described, varying only in detail.

PAR. 3. The sale of said candy to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure bars of candy at prices much less than the normal retail prices thereof. The use by respondents of said methods in the sale of their candy and the sale of such candy by and through the use thereof and by the aid of said methods is a practice of a sort which is contrary to an established public policy of the Government of the United States and in violation of criminal law. The use by respondents of said methods has a tendency and capacity 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 or equivalent methods involving the same, equivalent or similar element of chance or lottery scheme. Many persons, firms, and corporations who sell candy in competition with the respondents as above described are unwilling to offer for sale and sell candy 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. 4. Many dealers in, and ultimate purchasers of, candy are attracted by respondents' said method and manner of packing said candy and by the element of chance involved in the sale thereof, in the manner above found, and are thereby induced to purchase said candy so packed and sold by respondents in preference to candy offered for sale and sold by said competitors of respondents who do not use the same or equivalent methods. The use of said methods by

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respondents has a tendency and capacity, because of said game of chance, to unfairly divert to respondents substantial trade from their said competitors who do not use the same or equivalent methods; to exclude from said candy trade 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 said candy trade; to create a monopoly of said candy trade in respondents and such other distributors of candy as use the same or equivalent methods and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said methods by respondents has a tendency and capacity to eliminate from said candy trade all actual competitors and to exclude therefrom all potential competitors who do not use said methods or equivalent methods.

As a result of the use of said methods in the sale of their candy by respondents substantial trade has been and is being unfairly diverted to respondents from their said competitors who refrain from the use of said methods.

CONCLUSION

The aforesaid acts and practices of 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, the answer of respondents, and the stipulation as to the facts entered into by and between counsel for the Commission and counsel for the respondents, 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 Montague L. Merrick, and Edna H. Merrick, individually and as copartners trading under the names of Merrick National Co. and Chocolate Confections Co., or trading under any other name or names, their representatives, agents 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:

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1. Selling and distributing any merchandise so packed and assembled that sales of such merchandise to the public are to be made, or may be made, by means of a game of chance, gift enterprise, or lottery scheme.

2. Supplying to, or placing in the hands of others, assortments of any merchandise together with push or pull cards, punchboards, or other devices, or separately, which said push or pull cards, punchboards, or other devices, are to be used, or may be used, in selling or distributing said merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

3. Supplying to, or placing in the hands of others, packages or assortments of candy containing pieces of candy of uniform size and shape having centers of different colors, together with larger pieces of candy, or other merchandise, or separately, which said larger pieces of candy or other merchandise are to be given, or may be given, as prizes to purchasers procuring pieces of candy having centers of a particular color.

4. Supplying to, or placing in the hands of others, assortments of candy composed of individually wrapped pieces of candy of uniform size and shape and of different colors together with other articles of merchandise, or separately, which said other articles of merchandise are to be given or may be given as prizes to the purchasers procuring pieces of said candy of a particular color.

5. 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 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.

Syllabus

IN THE MATTER OF
KUHN REMEDY COMPANY

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

Docket 4264. Complaint, Oct. 17, 1940¹—Decision, Nov. 29, 1940

Where a corporation engaged in sale and distribution of its "Kuhn's Rheumatic Fever Remedy" or, as more recently described, "Kuhn's Remedy," medicinal preparation, to purchasers in various other States and in the District of Columbia; in advertisements thereof which it disseminated and caused to be disseminated through the mails, radio continuities, advertisements in newspapers and periodicals, and through circulars, leaflets, and other advertising literature, and through various other means in commerce and otherwise, and in which were included testimonial or purported testimonial statements, and which were intended and likely to induce purchase of its said product—

(a) Represented, directly or by implication, that its said preparation constituted a cure or remedy for rheumatism, rheumatic fever, gout, neuralgia, and lumbago, and for muscular and joint aches and pains generally, and possessed substantial therapeutic value in the treatment of such ailments and conditions and was entirely safe and harmless and might be used without danger of ill effect upon health of the user;

Facts being it was not a cure or remedy for aforesaid ailments and conditions, possessed no therapeutic value in the treatment of rheumatism, rheumatic fever, gout, neuralgia, or lumbago in excess of affording, in some cases, temporary symptomatic relief from the aches and pains associated with such disorders, and was not, by virtue of its potassium iodide content in quantities sufficient to cause, in some instances, injury to health if taken under conditions prescribed in advertisements in question or under such conditions as are usual or customary, in all cases safe or harmless and might be harmful to those having healed lesions of arrested tuberculosis or goiter; and

(b) Failed to reveal, in said advertisements, facts material in the light of the representations contained therein, and that use of preparation in question, under conditions prescribed in said advertisements or under such conditions as are customary or usual, might result in injury to health, in that said advertisements did not contain any cautionary statement to effect that said preparation should be used only as directed on label thereof; and

(c) Represented, falsely and misleadingly, through use of word "Remedy" in its corporate name and in designation and description of its said preparation, that same constituted a cure or remedy for ailments and conditions above set forth;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that such false statements and representations were true, and into purchase of substantial quantities of its said preparation:

¹ Amended and supplemental.