

Syllabus

IN THE MATTER OF

HARRY YATES, TRADING AS CUMBERLAND CANDY
COMPANY AND DIXIE CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4296. Complaint, Aug. 30, 1940—Decision, Dec. 28, 1940*

Where an individual engaged in manufacture of candy and in sale and distribution of certain assortments thereof which were so packed and assembled as to involve games of chance, gift enterprise, or lottery schemes when sold and distributed to consumers thereof, and included, as illustrative, assortment composed of a number of candy bars of uniform size and shape, together with a push card for use in sale and distribution of said bars under a plan in accordance with which purchasers paid for said bars 1, 2, 3, 4, and 5 cents, in accordance with chance receipt of figures 1, 2, 3, 4, or 5, as case might be, and assortments with other push cards for use and sale and distribution of his candy by means of games of chance, gift enterprise, or lottery schemes similar to that above described and varying therefrom in detail only;

Sold such assortments, together with said push cards, to wholesalers, jobbers, and retailers, by whom, as direct or indirect purchasers thereof, they were exposed and sold to purchasing public, in accordance with aforesaid sales plan, involving game of chance or sale of a chance to procure bars of candy 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 plan above described, contrary to an established public policy of the United States Government, and in violation of criminal laws, and in competition with many who are unwilling to adopt and use said methods involving games of chance or a sale of a chance to win something by chance, or any other method contrary to public policy and refrain therefrom;

With the result that many persons were attracted by said plan employed by him in distribution of his candy and in element of chance involved therein, and were thereby induced to buy and sell his candy in preference to that of competitors who do not use same or equivalent methods, and with effect of unfairly diverting trade to him from said competitors who do not use same or equivalent methods, to the substantial injury of competition in commerce:

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

Before *Mr. W. W. Sheppard*, trial examiner.

Mr. L. P. Allen, Jr., for the Commission.

Mr. R. G. Cobb, of Fayetteville, N. C., for respondent.

Complaint

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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 Harry Yates, individually and trading as Cumberland Candy Co. and Dixie Candy Co., 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 interest of the public, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Harry Yates, is an individual trading as Cumberland Candy Co. and Dixie Candy Co. with his principal office and place of business located at 231 William Street, Fayetteville, N. C. Respondent is now and for more than 2 years last past has been engaged in the manufacture and in the sale and distribution of candy to wholesale dealers, jobbers, and retailers. Respondent causes, and has caused, said products when sold to be transported from his place of business in the city of Fayetteville, N. C., to purchasers thereof at their respective points of location in various States of the United States other than North Carolina. There is now, and for more than 2 years last past has been, a course of trade by respondent in said candy in commerce between and among various States of the United States. In the course and conduct of said business respondent is and has been in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of candy in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business, as described in paragraph 1 hereof, respondent sells and has sold to agents, wholesale dealers, jobbers, and retail dealers certain assortments of candy so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to the consumers thereof. One of said assortments is hereinafter described for the purpose of showing the method used by respondent, and is as follows:

This assortment is composed of a number of bars of candy of uniform size and shape, together with a device commonly called a push card. The said push card has 36 partially perforated disks, on the face of which is printed the word "Push." Concealed within the said disks are numbers ranging from 1 to 5, inclusive. When the disks are pushed or separated from the card a number is disclosed. Purchasers punching numbers 1, 2, 3, 4 and 5 pay 1¢, 2¢, 3¢, 4¢ and 5¢, respectively. The numbers are effectively concealed from purchasers and prospective purchasers until the disks are pushed or separated

from the card. The prices of said bars of candy are thus determined wholly by lot or chance.

The respondent furnishes, and has furnished, various push cards for use in the sale and distribution of his candy by means of a game of chance, gift enterprise, or lottery scheme. Such cards are similar to the one herein described and vary only in detail.

PAR. 3. Retail dealers who, directly or indirectly, purchase respondent's said candy expose and sell the same to the purchasing public in accordance with the sales plan aforesaid. 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. The use by respondent of said sales plan or method in the sale of his candy, and the sale of said candy by and through the use thereof and by the aid of said sales plan or method, 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 the criminal laws.

PAR. 4. The sale of candy to the purchasing public by the method or plan hereinabove set forth involves a game of chance or the sale of a chance to procure bars of candy at prices much less than the normal retail price thereof. Many persons, firms, and corporations who sell and distribute candy in competition with respondent, as above alleged, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance or any other method contrary to public policy and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of his candy and in the element of chance involved therein, and are thereby induced to buy and sell respondent's candy in preference to candy of said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent because of said game of chance has a tendency and capacity to, and does, unfairly divert trade in commerce between and among various States of the United States to respondent from his said competitors who do not use the same or equivalent methods, and as a result thereof substantial injury is being and has been done by respondent to competition in commerce between and among various States of the United States.

PAR. 5. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's 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 August 30, 1940, issued, and on September 5, 1940, served its complaint in this proceeding upon respondent, Harry Yates, trading as Cumberland Candy Co. and Dixie Candy Co., charging him with the use of unfair methods of competition 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 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 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. Respondent, Harry Yates, is an individual trading as Cumberland Candy Co. and Dixie Candy Co. with his principal office and place of business located at 231 William Street, Fayetteville, N. C. Respondent is now and for more than 2 years last past has been engaged in the manufacture and in the sale and distribution of candy to wholesale dealers, jobbers, and retailers. Respondent causes, and has caused, said products when sold to be transported from his place of business in the city of Fayetteville, N. C., to purchasers thereof at their respective points of location in various States of the United States other than North Carolina. There is now, and for more than 2 years last past has been, a course of trade by respondent in said candy in commerce between and among various States of the United States. In the course and conduct of said business respondent is and has been in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of candy in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business, as described in paragraph 1 hereof, respondent sells and has sold to agents, wholesale dealers, jobbers, and retail dealers certain assortments of candy so packed and assembled as to involve the use of games of chance, gift enterprises or lottery schemes when sold and distributed to the consumers thereof. One of said assortments is hereinafter described for the purpose of showing the method used by respondent, and is as follows:

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The respondent furnishes, and has furnished, various push cards for use in the sale and distribution of his candy by means of a game of chance, gift enterprise, or lottery scheme. Such cards are similar to the one herein described and vary only in detail.

PAR. 3. Retail dealers who, directly or indirectly, purchase respondent's said candy expose and sell the same to the purchasing public in accordance with the sales plan aforesaid. 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. The use by respondent of said sales plan or method in the sale of his candy, and the sale of said candy by and through the use thereof and by the aid of said sales plan or method, 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 the criminal laws.

PAR. 4. The sale of candy to the purchasing public by the method or plan hereinabove set forth involves a game of chance or the sale of a chance to procure bars of candy at prices much less than the normal retail price thereof. Many persons, firms, and corporations who sell and distribute candy in competition with respondent, as above found, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance or any other method contrary to public policy and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of his candy and in the element of chance involved

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therein, and are thereby induced to buy and sell respondent's candy in preference to candy of said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent because of said game of chance has a tendency and capacity to, and does, unfairly divert trade in commerce between and among various States of the United States to respondent from his said competitors who do not use the same or equivalent methods, and as a result thereof substantial injury is being and has been done by respondent to competition in commerce between and among various States of the United States.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, are all to the prejudice and injury of the public and of respondent's 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 respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that he 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, Harry Yates, individually and trading under the names Cumberland Candy Co. and Dixie Candy Co., or trading under any other name or names, his 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:

1. Selling or 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

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other lottery devices, 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 to the public by means of a game of chance, gift enterprise, or lottery scheme.

3. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That 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.

IN THE MATTER OF

EDWIN L. LEISENRING, TRADING AS U. S. DRUG & SALES
COMPANY, U. S. DRUG LABORATORIES, AND U. S. DRUG
COMPANY, AND GORDON LEISENRINGCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4364. Complaint, Oct. 29, 1940—Decision, Dec. 28, 1940*

Where two individuals engaged in interstate sale and distribution of their "Alcoban" for alcoholism; in advertisements of their said product which they disseminated and caused to be disseminated through the mails and by various other means in commerce and otherwise, and through newspapers and periodicals, and by circulars, pamphlets, and other advertising literature, and which advertisements were intended and likely to induce purchase of their said product—

- (a) Represented, directly and by implication, that said preparation was a competent and effective treatment for alcoholism which removed desire for alcoholic stimulants, and that it was safe and harmless, facts being it did not constitute such a treatment for said purpose, nor remove aforesaid desire, and was not safe and harmless, by virtue of content therein of drugs ephedrine hydrochloride, emetine hydrochloride, and pilocarpine hydrochloride in quantities sufficient to cause serious injury to health if used under conditions prescribed in said advertisements, or under such conditions as are customary or usual, and including, among effects thus variously produced, nervous excitability, which might be characterized by tremors, insomnia and anxiety complex, toxic disturbances and conditions, and particularly in case of those whose general resistance is at low level, and possibility of oedema of the lungs; and

- (b) Failed to reveal, in advertisements disseminated by it as aforesaid, facts material in the light of the representations contained therein, and that use of said preparation under conditions prescribed in said advertisements or under such conditions as are customary or usual might cause serious injury to the nerves, tissues, and lungs, and might produce toxic conditions in the body;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that their preparation possessed properties which it did not in fact possess, and that it was safe and harmless, when such was not the fact, and with result, as consequence of such erroneous and mistaken belief, engendered as above set forth, that said public was induced to purchase and purchased substantial quantities of their said preparation:

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

Mr. DeWitt T. Puckett for the Commission.