

Syllabus

IN THE MATTER OF

JOE B. HILL AND C. O. McAFEE, TRADING AS McAFEE
CANDY COMPANY, AND LIBERTY CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 4114. Complaint, Apr. 26, 1940—Decision, Jan. 21, 1941*

Where two partners engaged in manufacture of candy, and in sale and distribution of certain assortments thereof which were so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to consumers, and included, as illustrative of methods used (1) large number of chocolate-covered pieces of uniform size and shape, together with 24 small candy bars and one large bar, for sale and distribution to purchasers under a plan by which purchaser procuring, by chance, one of said pieces having center differing in color from that of the majority of said candy pieces of uniform size and shape, was entitled to and received without additional cost one of said small bars, and person procuring last one of said pieces of uniform size and shape in assortment was entitled to and received without additional cost said large bar, and (2) number of bars of candy of uniform size and shape, together with a push card for use in sale and distribution to purchasers of said bars, under a plan by which purchaser paid 1 cent, 2 cents, 3 cents, 4 cents, and 5 cents, as case might be, for bar, in accordance with particular number secured by chance from card, and purchaser making last push in each of two sections into which card was divided received without additional cost two of said bars, and in furnishing, as thus engaged, various push cards for use in sale and distribution of their candy by means of game of chance, gift enterprise, or lottery scheme under plans similar to that hereinabove described and varying therefrom in detail only—

Sold such assortments, together with said push cards, as case might be, to wholesalers, to jobbers, and to retailers by whom, as direct or indirect purchasers thereof, they were exposed and sold to purchasing public in accordance with sales plans aforesaid, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of their products in accordance with such sales plans, involving game of chance or sale of a chance to procure bars of candy at prices much less than normal retail value thereof, or additional bars of candy without additional cost, 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 such or any method involving game of chance or 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 sales plans or methods employed by them in sale and distribution of their said candy, and element of chance involved therein, and were thereby induced to buy and sell their said candy in preference to that of said competitors who do not use same

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or equivalent methods, and with tendency and capacity, through use of said methods and because of said game of chance, to unfairly divert trade to them from their said competitors who do not use same or equivalent methods:

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. W. W. Sheppard*; trial examiner.

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission having reason to believe that Joe B. Hill and C. O. McAfee, individuals and copartners trading as McAfee Candy Co. and Liberty Candy Co., hereinafter referred to as respondents, have violated the provisions of the 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. Respondents Joe B. Hill and C. O. McAfee are individuals and copartners trading as McAfee Candy Co. and Liberty Candy Co., with their principal office and place of business located at 651 Poplar Street, Macon, Ga. Respondents are now, and for more than 1 year last past have been, engaged in the manufacture and in the sale and distribution of candy to wholesale dealers, jobbers, and retail dealers, located at points in various States of the United States and in the District of Columbia. Respondents cause and have caused said products when sold to be transported from their place of business in the city of Macon, Ga., to purchasers thereof, at their respective points of location, in the various States of the United States other than Georgia and in the District of Columbia. There is now, and has been for more than 1 year last past, a course of trade by respondents in such products in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business respondents are and have 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 their business, as described in paragraph 1 hereof, respondents sell and have sold to 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. Certain of said assortments are hereinafter described for the purpose of showing the methods used by respondents but this list is not all inclusive of the various assortments nor does it include all of the details of the several plans which respondents have been or are using in the sale and distribution of candy by lot or chance;

(a) One assortment consists of 150 pieces of chocolate covered candy of uniform size and shape, together with 24 small bars of candy and one large bar of candy, which bars of candy are to be given as prizes to purchasers of said chocolate covered candy of uniform size and shape in the following manner:

The majority of said chocolate covered pieces of candy of uniform size and shape in said assortment has centers of the same color but 24 pieces of said chocolate covered candy have centers of a different color. The said pieces of chocolate covered candy of uniform size and shape in said assortment retail at the price of 1 cent each but the purchasers who procure a piece of the said candy having a center of a different color from the majority of said pieces are entitled to and receive without additional cost one of the said small bars of candy. The color of the centers of the said chocolate covered candy is effectively concealed from the prospective purchaser until a selection or purchase has been made and the piece of candy broken open. The person purchasing the last piece of chocolate covered candy of uniform size and shape in said assortment is entitled to and receives without additional cost the said large bar of candy. The said bars of candy in said assortment are thus distributed to the purchasing and consuming public wholly by lot or chance.

Respondents sell and distribute and have sold and distributed various assortments of candy as above described involving a lot or chance feature but such assortments are similar to the one hereinabove described and vary only in detail.

(b) Another assortment is composed of 42 bars of candy of uniform size and shape together with a device commonly called a "push card." The said push card has 40 partially perforated disks on the face of which is printed the word "push." Concealed within 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 cents, respectively. The card is also divided into two sections and the purchaser making the last push in each section receives without additional cost two of

the said bars of candy. 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 respondents furnish and have furnished various push cards for use in the sale and distribution of their candy by means of a game of chance, gift enterprise, or lottery scheme. Such cards are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondents' said candy, directly or indirectly, expose and sell the same to the purchasing public in accordance with the sales plan aforesaid. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their products in accordance with the sales plans hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their candy and the sale of said candy by and through the use thereof and by the aid of said sales plans or 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 the criminal laws.

PAR. 4. The sale of candy to the purchasing public by the methods or plans hereinabove set forth involves a game of chance or the sale of a chance to procure bars of candy at prices much less than normal retail prices thereof, or additional bars of candy without additional cost. Many persons, firms, and corporations who sell and distribute candy in competition with the respondents, as above alleged, are unwilling to adopt and use such methods 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 plans or methods employed by respondents in the sale and distribution of their candy and in the element of chance involved therein and are thereby induced to buy and sell respondents' candy in preference to candy of said competitors of respondents who do not use the same or equivalent methods. The use of said methods by respondents because of said game of chance has a tendency and capacity to, and does, unfairly divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondents from their 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 respondents to competition in commerce between and among various States of the United States and in the District of Columbia.

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 26, 1940, issued and thereafter served its complaint in this proceeding upon respondents Joe B. Hill and C. O. McAfee, individuals and copartners, trading as McAfee Candy Company and Liberty Candy 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. On January 8, 1941, the respondents filed their answer, in which answer they admitted all the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearing as to said facts. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint and the answer thereto, 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 Joe B. Hill and C. O. McAfee are individuals and copartners trading as McAfee Candy Co. and Liberty Candy Co., with their principal office and place of business located at 651 Poplar Street, Macon, Ga. Respondents are now, and for more than 1 year last past have been, engaged in the manufacture and in the sale and distribution of candy to wholesale dealers, jobbers, and retail dealers, located at points in various States of the United States and in the District of Columbia. Respondents cause and have caused said products when sold to be transported from their place of business in the city of Macon, Ga., to purchasers thereof, at their respective points of location, in the various States of the United States other than Georgia and in the District of Columbia. There is now, and has been for more than one year last past, a course of trade by respondents in such products in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business respondents are and have 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.

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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 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. Certain of said assortments are hereinafter described for the purpose of showing the methods used by respondents but this list is not all inclusive of the various assortments nor does it include all of the details of the several plans which respondents have been using in the sale and distribution of candy by lot or chance;

(a) One assortment consists of 150 pieces of chocolate covered candy of uniform size and shape, together with 24 small bars of candy and one large bar of candy, which bars of candy are to be given as prizes to purchasers of said chocolate covered candy of uniform size and shape in the following manner:

The majority of said chocolate covered pieces of candy of uniform size and shape in said assortment has centers of the same color but 24 pieces of said chocolate covered candy have centers of a different color. The said pieces of chocolate covered candy of uniform size and shape in said assortment retail at the price of 1 cent each but the purchasers who procure a piece of the said candy having a center of a different color from the majority of said pieces are entitled to and receive without additional cost one of the said small bars of candy. The color of the centers of the said chocolate covered candy is effectively concealed from the prospective purchaser until a selection or purchase has been made and the piece of candy broken open. The person purchasing the last piece of chocolate covered candy of uniform size and shape in said assortment is entitled to and receives without additional cost the said large bar of candy. The said bars of candy in said assortment are thus distributed to the purchasing and consuming public wholly by lot or chance.

Respondents sell and distribute and have sold and distributed various assortments of candy as above described involving a lot or chance feature but such assortments are similar to the one hereinabove described and vary only in detail.

(b) Another assortment is composed of 42 bars of candy of uniform size and shape together with a device commonly called a "push card." The said push card has 40 partially perforated disks on the face of which is printed the word "push." Concealed within 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 cents, respectively. The card is also divided into two sections and the pur-

chaser making the last push in each section received without additional cost two of the said bars of candy. 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 respondents furnish and have furnished various push cards for use in the sale and distribution of their candy by means of a game of chance, gift enterprise, or lottery scheme. Such cards are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondents' said candy, directly or indirectly, expose and sell the same to the purchasing public in accordance with the sales plans aforesaid. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their products in accordance with the sales plans hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their candy and the sale of said candy by and through the use thereof and by the aid of said sales plans or 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 the criminal laws.

PAR. 4. The sale of candy to the purchasing public by the methods or plans 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 prices thereof, or additional bars of candy without additional cost. Many persons, firms, and corporations who sell and distribute candy in competition with the respondents, as above found, are unwilling to adopt and use such methods 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 plans or methods employed by respondents in the sale and distribution of their candy and in the element of chance involved therein and are thereby induced to buy and sell respondents' candy in preference to candy of said competitors of respondents who do not use the same or equivalent methods. The use of said methods by respondents because of said game of chance has a tendency and capacity to, and does, unfairly divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondents from their said competitors who do not use the same or equivalent 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 and the answer of 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 Joe B. Hill and C. O. McAfee, individually and as copartners, trading as McAfee Candy Co. and Liberty Candy 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:

1. Supplying to or placing in the hands of others, candy or any other merchandise, so packed or assembled that sales of such candy or other 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, candy or any other merchandise, together with punchboards, push or pull cards, or other lottery devices which said punchboards, push or pull cards or other lottery devices are to be used, or may be used, in selling or distributing such candy or other merchandise to the public;
3. Supplying to or placing in the hands of others, punchboards, push or pull cards or other lottery devices either with assortments of candy or other merchandise or separately, which said punchboards, push or pull cards or other lottery devices are to be used, or may be used, in selling or distributing such candy or other merchandise to the public;
4. 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

S. M. FRANK & CO., INC., AND WM. DEMUTH & CO., INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 4393. Complaint, Nov. 30, 1940—Decision, Jan. 21, 1941*

Where a corporation and a second concern, subsidiary thereof, with common officers and same place of business, engaged in interstate sale and distribution of pipes and other articles of merchandise in competition with others engaged in sale and distribution of like and similar articles of merchandise in commerce, as aforesaid, and acting in conjunction and cooperation with each other in carrying out acts and practices below set forth; in soliciting sale of and in selling and distributing their merchandise to wholesalers, jobbers, and retailers—

Furnished various devices and plans of merchandising which involved operation of games of chance, gift enterprises, or lottery schemes in sale or distribution of their said products to ultimate consumer, and shipped or transported punchboards designed to be and used with their said merchandise, to aforesaid purchasers, by whom said boards and products were assembled into various assortments and by them sold to their trade, and including among other such assortments, as illustrative, (1) number of pipes and board, for sale and distribution of said articles to consuming public, under a plan and in accordance with board's explanatory legend, by which purchaser securing by chance, for 5 cents paid, certain numbers, or making last punch in each of the sections into which board was divided, received one of said pipes, value of each of which was in excess of amount referred to, and purchaser who did not qualify as aforesaid received nothing for his money other than privilege of punching number from board, and (2) various other assortments and punchboards involving lot or chance feature similar to that hereinabove described and varying therefrom in detail only; and

Supplied thereby to and placed in hands of others means of conducting lotteries in sale of their merchandise, in accordance with sales plan as above set forth, by retail dealers who, as direct or indirect purchasers of their said merchandise, exposed and sold same to purchasing public in accordance with aforesaid sales plan, 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 method or any method involving game of chance or 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 were attracted by said sales plan or method employed by them in sale and distribution of their merchandise and element of chance involved therein, and were thereby induced to buy and sell their said merchandise in preference to that offered and sold by said competitors who do not use same or equivalent methods, and that use of said method, because of said game of chance, had tendency and capacity to