

Syllabus

IN THE MATTER OF

JACOBS CANDY COMPANY, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 3586. Complaint, Sept. 14, 1938—Decision, Feb. 7, 1941*

Where a corporation engaged in manufacture of candy and nut confections and in interstate sale and distribution of certain assortments thereof which were so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when sold or distributed to consumers thereof, and which included (a) number of small bars of candy, number of medium sized bars and number of large bars, together with four-section punchboard for use in sale and distribution of said candy in accordance with plan and board's explanatory legend by which fact as to whether purchaser received, for 5 cents paid, small or medium sized bars was dependent upon securing of particular numbers by purchasers, and in accordance with which last number in each section entitled purchaser to one of the large bars, and under which purchaser who did not qualify by one of numbers calling for one of said bars, or last number in one of said four sections, received nothing for his money, (b) number of small boxes of candy and package containing 5-pound box and pillow, together with punchboard for use in sale and distribution of said products under a plan in accordance with which, and board's explanatory legend, amount paid for chance was dependent upon number obtained, and the securing of said small boxes were likewise dependent upon the obtaining of certain numbers by purchasers, and under which purchaser securing number corresponding with that concealed under card's master seal became entitled to the 5-pound box of candy and pillow, and those who did not qualify by obtaining number calling for one of small boxes or that corresponding to that under master seal received nothing for their money, and (c) various other assortments which were similar to those hereinbefore described and varied therefrom in detail only—

Sold such assortments to dealers in many States and retailers by whom, as direct to indirect purchasers thereof, they were exposed and sold to purchasing public in accordance with aforesaid sales plans or methods, constituting game of chance or sale of a chance to procure an article of merchandise at price much less than normal retail price thereof, and thereby supplied to and placed in the hands of others means of conducting lotteries in accordance with such sales plans, contrary to an established public policy of the United States Government and in violation of criminal laws, and in competition with those who sell and distribute like or similar merchandise in commerce but are unwilling to use said or any other sales plans or methods involving game of chance or sale of a chance to win something thereby, or any other sales plan or method contrary to public policy, and refrain therefrom;

With the result that many persons, because of said element of chance involved in said sales plans or methods employed by it as above described, were

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induced to buy and sell its said merchandise in preference to that offered and sold by its competitors, whereby through use of said sales plans or methods, that trade was unfairly diverted to it from its competitors aforesaid; to their substantial injury 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 constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Randolph Preston* and *Mr. Arthur F. Thomas*, trial examiners.

Mr. Edw. W. Thomerson and *Mr. D. C. Daniel* 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 Jacobs Candy Co., Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Jacobs Candy Co., Inc., is a corporation organized and doing business under the laws of the State of Louisiana, with its principal office and place of business located at 827 Carondelet Street, New Orleans, La. Respondent is now and for some time last past has been engaged in the manufacture of candy and nut confections and in the sale and distribution thereof to dealers located in the various States of the United States and in the District of Columbia. It causes, and has caused, said products when sold to be shipped or transported from its place of business aforesaid to the 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 some time last past has been, a course of trade by said respondent 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 its business, respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy and nut confections 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 its business as described in paragraph 1 hereof, respondent sells, and has sold, to dealers certain assortments of candy and nut confections so packed and assembled as to

involve the use of a game of chance, gift enterprise, or lottery scheme, when sold and distributed to the consumers thereof. One of respondent's assortments is sold and distributed to the purchasing public in the following manner:

This assortment consists of a number of small bars of candy, a number of medium size bars of candy and a number of large bars of candy, together with a device commonly called a punchboard. The said board is divided into four sections. Sales are 5 cents each. The board bears statements or legends informing purchasers and prospective purchasers that certain numbers entitle the purchasers thereof to said small bars of candy; that certain other numbers entitle the purchasers thereof to said medium size bars of candy; and that the last number in each section entitles the purchaser thereof to one of said large bars of candy. A purchaser who does not qualify by obtaining one of the numbers calling for one of said bars of candy or the last number in one of said sections, receives nothing for his money other than the privilege of punching a number from said board. The numbers are effectively concealed from purchasers and prospective purchasers until a punch has been made and the particular punch separated or removed from said board. The small bars of candy and the medium size bars of candy are thus distributed to the purchasing public wholly by lot or chance.

Another of respondent's assortments is sold and distributed to the purchasing public as follows:

This assortment consists of a number of small boxes of candy and a package containing a 5-pound box of candy and a pillow, together with a device commonly called a punchboard. Purchasers punching numbers 1 to 10 pay in cents the amount of the numbers punched from said board and for all numbers above 10 the purchasers thereof pay 10 cents. The board also contains a master seal under which is concealed a number corresponding to one of the numbers on said board. The said board bears statements or legends informing purchasers and prospective purchasers that certain numbers entitle the purchasers thereof to a small box of candy, that the number corresponding to the number under the master seal entitles the purchaser thereof to said package containing a 5-pound box of candy and a pillow. The said numbers on said board are effectively concealed from purchasers and prospective purchasers until a punch has been made and the particular punch separated or removed from said board. The number under the master seal is effectively concealed from purchasers and prospective purchasers until all of said numbers have been separated or removed from said board. Purchasers who do not qualify by obtaining

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a number calling for one of the small boxes of candy or the number corresponding to the number under the master seal, receive nothing for their money other than the privilege of punching a number from said board. The said small boxes of candy and the package containing a 5-pound box of candy and a pillow are worth more than the amounts to be paid for punches from said boards but are received by the purchasers thereof for the amounts called for by the numbers punched from the board. The said small box of candy and the package containing a 5-pound box of candy and a pillow are thus distributed to the purchasing public wholly by lot or chance.

Respondent sells and distributes various assortments of its candy and nut confections and furnishes various punchboards and push cards for use in the sale and distribution of such candy and nut confections by means of a game of chance, gift enterprise, or lottery scheme. The sales plan or method employed in connection with each of said punchboards and push cards is substantially the same as the sales plan or method hereinabove described and varies only in detail.

PAR. 3. Retail dealers who purchase respondent's said candy and nut confections, directly or indirectly expose and sell the same to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to, and places in the hands of, others a means of conducting lotteries in the sale of its products in accordance with the sales plan hereinabove set forth. Said sales plan has the tendency and capacity to, and does, induce purchasers of candy and nut confections to purchase respondent's said products in preference to candy and nut confections offered for sale and sold by its competitors.

PAR. 4. The sale of said products to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure a box or a bar of candy or nut confections at a price greatly below the normal retail price thereof. The use by respondent of said method in the sale of candy and nut confections, and the sale of said candy and nut confections by and through the use thereof and by the aid of said method, 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 the criminal laws. The use by respondent of said method has a tendency unduly to hinder competition or create a monopoly in this, to wit: That the use thereof has a tendency and capacity to exclude from the candy and nut confections trades competitors who do not adopt and use the same method or an equivalent element of chance or lottery scheme. Many persons, firms, and corporations who make and sell candy and nut confections in competition with the respondent as above alleged, are unwilling to offer for sale or

sell said candy and nut confections 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 the public policy, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy and nut confections are attracted by respondent's method and manner of packing said candy and nut confections, and by the element of chance involved in the sale thereof, in the manner above described, and are thereby induced to purchase said candy and nut confections so packed and sold by respondent in preference to candy and nut confections offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method. The use of said method by respondent has the tendency and capacity, because of said game of chance, to unfairly divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method, to exclude from the candy and nut confections trades all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful, to lessen competition in said candy and nut confections trades, to create a monopoly of said candy and nut confections trades in respondent and such other distributors of candy and nut confections as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy and nut confections trades. The use of said method by respondent has a tendency and capacity to eliminate from said trades all actual competitors and to exclude therefrom all potential competitors who do not adopt and use said methods or an equivalent method.

PAR. 6. The aforesaid acts and practices of respondent as herein alleged are all to the injury and prejudice 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 September 14, 1938, issued and thereafter served its complaint in this proceeding upon respondent Jacobs Candy Co., Inc., a corporation, charging it 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

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act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Edward W. Thomerson and D. C. Daniel, attorneys for the Commission (respondent having offered no testimony or other evidence in opposition to the allegations of said complaint), before Randolph Preston and Arthur F. Thomas, examiners of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint and the answer thereto, testimony and other evidence, brief of counsel for the Commission (respondent not having filed brief and oral argument not having been requested) 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 conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Jacobs Candy Co., Inc., is a corporation organized and doing business under the laws of the State of Louisiana with its principal office and place of business located at 827 Carondelet Street, New Orleans, La. Respondent is now, and for about 4 years last past, has been engaged in the manufacture of candy and nut confections and in the sale and distribution thereof to dealers located in various States of the United States and the District of Columbia. Respondent causes, and has caused, its said products, when sold, to be shipped or transported from its place of business aforesaid to purchasers thereof in various States of the United States and the District of Columbia at their various respective points of location. There is now, and has been, for about 4 years last past a course of trade by respondent in such merchandise in commerce between and among various States of the United States and in the District of Columbia. In the course and conduct of its business respondent is, and has been, in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy and nut confections 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 its business as aforesaid respondent sells and distributes, and has sold and distributed, to many dealers in various States of the United States, certain assortments of candy and nut confections so packed and assembled as to involve the

use of a game of chance, gift enterprise, or lottery scheme, when sold or distributed to the consumers thereof. One assortment of candy so sold by the respondent consisted of a number of small bars of candy, a number of medium sized bars of candy and a number of large bars of candy, together with a device called a punchboard. Said board is divided into four sections. Sales are for 5 cents each. The said board bears statements or legends at the top thereof informing purchasers or prospective purchasers that certain numbers entitle the purchasers to said small bars of candy; that certain other numbers entitle the purchasers to medium-sized bars of candy, and that the last number in each section entitles the purchasers to one of said large bars of candy. A purchaser who does not qualify by obtaining one of the numbers calling for one of said bars of candy or the last number in one of said sections of said board, receives nothing for his money. The numbers are entirely and effectively concealed from purchasers and prospective purchasers until and after they have been separated or removed from said board. The said small bars of candy and the medium-sized bars of candy are thus sold and distributed to the purchasing public wholly by lot or chance.

Another of respondent's assortments of candy has been sold and distributed to a substantial part of the purchasing public as follows:

This consists of a number of small boxes of candy and a package containing a 5-pound box of candy and a pillow, together with a device commonly called a punchboard. Purchasers punching numbers 1 to 10 thereon pay in cents the amount of the respective numbers punched upon said board and for all numbers above 10 the purchasers thereof pay 10 cents each. The board also contains a master seal under which is concealed a number corresponding to one of the numbers on said board. The said boards bear statements or legends informing purchasers and prospective purchasers that certain numbers entitle the purchasers thereof to a small box of candy, that the number corresponding to the number under the master seal entitles the purchasers thereof to said package containing a 5-pound box of candy and a pillow. The said numbers on said board are effectively concealed from purchasers and prospective purchasers until punched from said board. The number under the master seal is effectively concealed from purchasers and prospective purchasers until all of said numbers have been separated or removed from said board. Purchasers who do not qualify by obtaining a number calling for one of the small boxes of candy or the number corresponding to the number under the master seal, receive nothing for their money. The said boxes of candy and the package containing a 5-pound box

of candy and a pillow are thus distributed to the purchasing public wholly by lot or chance.

Respondent sells and distributes, and has sold and distributed, various other assortments but the sales plans in connection therewith are similar to the ones hereinabove described, varying only in detail.

PAR. 3. The Commission finds that retail dealers who purchase respondent's said assortments, directly or indirectly, expose and sell the same to the purchasing public in accordance with the sales plans or methods hereinabove described. Respondent thus supplies to and places in the hands of others, a means of conducting lotteries in the sale of its products in accordance with the sales plans or methods hereinabove described. The use by respondent of said sales plans or methods in the sale of its products and the sale of said products 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 criminal laws.

PAR. 4. The Commission finds that the sale of said merchandise in the manner described hereinbefore constitutes a game of chance or sale of a chance to procure an article of merchandise at a price much less than the normal retail price thereof. Respondent has competitors who sell and distribute like or similar merchandise in commerce between and among various States of the United States but who are unwilling to use said sales plans or methods in the sale of their said merchandise or any other sales plan or method involving a game of chance or the sale of a chance to win something thereby, or any other sales plan or method which is contrary to public policy and such competitors refrain therefrom. Because of said element of chance involved in said sales plans or methods employed by respondent, as herein described, many persons have been induced to buy and sell respondent's merchandise in preference to the merchandise offered for sale and sold by its said competitors.

PAR. 5. The Commission finds that as a result of the use of said sales plans or methods, as above described, trade is being, and has been, unfairly diverted to respondent from its said competitors and substantial injury is being, and has been, done to said competitors by respondent in commerce between and among various States of the United States.

CONCLUSION

The aforesaid acts and practices of the respondent as herein found are all to the prejudice and injury of the public and of respondent's

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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, testimony and other evidence taken before Randolph Preston and Arthur F. Thomas, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint (respondent having offered no proof in opposition thereto), brief of counsel for the Commission (counsel for respondent having filed no brief and oral argument not having been requested), and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondent, Jacobs Candy Co., Inc., a corporation, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of candy and nut confections, or any other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling and distributing any merchandise so packed and assembled that sales of said 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. 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 respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

ALLEN B. WRISLEY COMPANY ET AL.

MODIFIED CEASE AND DESIST ORDER

Docket 3021. Order, Feb. 10, 1941

Modified order, pursuant to provisions of section 5 (1) of Federal Trade Commission Act, and in accordance with decree below set forth, in proceeding in question, in which original order issued on April 6, 1939, 28 F. T. C. 1368, 1375, and in which Circuit Court of Appeals for Seventh Circuit on June 12, 1940, in *Allen B. Wrisley Co. et al v. Federal Trade Commission*, 113 F. (2d) 437, 31 F. T. C. 1815, rendered its decision setting aside Commission's order, with permission to Commission to present order consistent with such decision, and on July 18, 1940, issued its decree modifying said Commission order and directed Commission to modify its said order to cease and desist in accordance therewith—

Requiring respondents, their officers, etc., in connection with offer, etc., in interstate commerce or District of Columbia, of soap, to forthwith cease and desist from representing, in any manner, that any soap which does not contain olive oil to exclusion of all other oils is an olive oil soap, and from using brand names or labels "Olivilo," "Royal Olive Oil Pure," and other brand names or labels as below set forth, or others of similar import or meaning, or word "Olive" or letters "oliv," equivalent term to describe, etc., soap, oil content of which is not wholly olive oil, and subject to explanatory qualification, in case of soap composed in part thereof, as below set forth, and excepting from prohibition of order trade names or labels "Palm and Olive Oil Soap," "Palm and Olive Soap," and "Oliv-Palm Complexion Soap."

MODIFIED ORDER TO CEASE AND DESIST

This proceeding coming on for further hearing before the Federal Trade Commission and it appearing that on April 6, 1939, the Commission made its findings as to the facts herein and concluded therefrom that the respondents had violated the provisions of section 5 of the Federal Trade Commission Act and issued and subsequently served its order to cease and desist; and it further appearing that on June 12, 1940, the United States Circuit Court of Appeals for the Seventh Circuit rendered its decision setting aside the Commission's order to cease and desist with permission to the Commission to present an order consistent with such decision, and that on July 18, 1940, the aforesaid Circuit Court of Appeals issued its decree modifying the aforesaid order of the Commission and directed the Commission to modify its aforesaid order to cease and desist in accordance with said decree.