

Syllabus

IN THE MATTER OF
CHERRY SPECIALTY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914*Docket 3215. Complaint, Aug. 26, 1937—Decision, Apr. 3, 1941*

Where a corporation engaged in the manufacture of candy and in the competitive interstate sale and distribution thereof, including certain assortments composed of a number of boxes of chocolate covered cherries, together with an electric lamp to be offered by the retailer as a prize to the ultimate purchaser of one of the boxes, and also a circular for retailer's use in disposing of candy in accordance with sales plan involving use of a lottery scheme or game of chance as indicated thereon, and as often carried out by the retailer through use of punch cards or other device by which the price to be paid for box of candy by the ultimate purchaser was determined by lot or chance—

(a) Sold such assortments to wholesalers, jobbers, and retailers by whom they were exposed for sale to the purchasing public in accordance with aforesaid sales plan, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its products in accordance with such plan, contrary to an established public policy of the United States Government and in competition with many who do not sell their merchandise by means of a lottery scheme or chance device;

With result that many persons were attracted by said chance sales plan or method and were induced to buy its product in preference to that of aforesaid competitors who do not use same or equivalent methods in the sale thereof, whereby trade in commerce was unfairly diverted to it from such competitors; and

(b) Represented that its said product had been examined and approved and certified by an independent and unbiased agency, unconnected with it, through placing on each package of its said products a replica of a red banner bearing the words "Seal of Approval" above an eight-pointed star with a circular seal in its center containing the words "Certified Chocolate Cherries" and its corporate name in smaller letters on the rim, and furthered said misrepresentation by supplying retail dealers with price cards upon which was conspicuously displayed the eight-pointed star and the "Seal of Approval" banner and the statement, among others, "Only selected, luscious, whole maraschino type cherries, enrobed in rich chocolate, and made under sanitary, wholesome conditions can merit this seal of approval";

Facts being that while it did thereafter and subsequent to complaint submit its said candy to an independent agency for examination and received latter's seal of approval, said candy theretofore had not been thus examined and approved or certified;

With capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous belief that said cherries were approved and certified by an independent and unbiased agency engaged in such activities and not connected with it, whereby substantial quantities of its candy were pur-

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chased in preference to that of its competitors who do not falsely represent that their product has received such certificate of approval:

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.

Before *Mr. William C. Reeves*, *Mr. Arthur F. Thomas* and *Mr. Lewis C. Russell*, trial examiners.

Mr. D. C. Daniel and *Mr. DeWitt T. Puckett* for the Commission.

Mr. Harry P. Kishner of Pennish & Rashbaum, of Chicago, Ill., for respondent.

COMPLAINT

Pursuant to the provisions of an act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that the Cherry Specialty Co., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said 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. The respondent, Cherry Specialty Co., is a corporation organized and doing business under the laws of the State of Illinois, with its principal office and place of business located at 4722 Augusta Boulevard, Chicago, Ill. Respondent is now, and for some time last past has been, engaged in the manufacture, sale, and distribution of candy to wholesale dealers and jobbers and to retail dealers located at points in the various States of the United States. Respondent causes and has caused its said products when sold to be transported from its principal place of business in the city of Chicago, State of Illinois, to purchasers thereof in Illinois and in other States of the United States at their respective points of location. There is now, and has been for some time last past, a course of trade and commerce by said respondent in such candy between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other corporations and with partnerships and individuals engaged in the manufacture, sale, and distribution of candy in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, the respondent sells and has sold to wholesale dealers and jobbers and retail dealers assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the ultimate consumers thereof. Said assortments are

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composed of 24 one-pound boxes of chocolate covered cherries, together with an electric lamp and a display circular, which lamp is to be given as a prize to the purchaser of one of the boxes of candy contained in said assortments and which display circular is for use of the retail dealer in disposing of said boxes of candy by a sales plan or method involving a game of chance, a lottery scheme, or a gift enterprise. The said circular has imprinted thereon the following language:

FREE
LAMP
WITH CHOCOLATE CHERRIES



One of the purchasers of one of these
24 boxes of Cherries will receive
THIS LAMP

Register your name and address when you buy a box.

Respondent packs and assembles said assortments as above described so that they may be resold at retail by a lottery scheme, and respondent knows that in many cases they will be and are sold by means of a lottery scheme.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments resell said assortments to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale and sell said candy to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with the sales plan hereinabove set forth. Said sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. 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 an electric lamp. The use by respondent of said method in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said method, is a practice of the sort which common law and criminal statutes have long deemed contrary to public policy, and

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is contrary to an established public policy of the Government of the United States. The use by respondent of said method has the tendency unduly to hinder competition or create monopoly in this, to wit: That the use thereof has the tendency and capacity to exclude from the candy trade competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme. Many persons, firms, and corporations who make and sell candy in competition with respondent, as above alleged, are unwilling to offer for sale or sell candy so packed and assembled as above alleged, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's 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 respondent in preference to candy 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 divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method; to exclude from said candy trade 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 trade and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method; and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by respondent has the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors who do not adopt and use said method or an equivalent method.

PAR. 6. In the course and conduct of its business, as described in paragraph 1 hereof, the respondent, in soliciting the sale of and in selling and distributing certain of its candy and candy products, has advertised and represented that its chocolate covered cherries are "certified" and have received a "seal of approval," thereby representing that the said chocolate covered cherries have been certified by an independent or unbiased or unprejudiced organization or agency entirely unconnected with the respondent, and that such chocolate covered cherries have received the seal of approval of such inde-

pendent, unbiased or unprejudiced organization or agency, when in truth and in fact such representation is false and deceptive. Said chocolate-covered cherries have not been inspected or examined or certified by any such organization or agency and have not received the seal of approval by any such organization or agency.

PAR. 7. There are or have been independent organizations or agencies in no way connected with the manufacturer which examine or inspect various products being manufactured and sold and many such agencies or organizations which certify to such products and authorize or license manufacturers in distributing their products to place on the containers or on such products a certification or a seal of approval.

Many persons and dealers prefer to buy merchandise so certified or approved, believing thereby that they are procuring a product that has been examined or inspected by an independent agency or organization which is unbiased and unprejudiced and in no way connected with the manufacturer, and that in so buying they are assured of a better product. The use by respondent of such false, misleading, and deceptive advertising has the capacity and tendency to and does mislead and deceive many persons and dealers into purchasing respondent's products in preference to the products of respondent's competitors, and trade is thereby diverted to respondent from its competitors. There are many competitors of respondent who do not falsely represent that their products are so certified or have received the approval of such agencies or organizations.

PAR. 8. The aforesaid methods, acts, and practices of respondent are all to the prejudice of the public and of respondent's competitors, as hereinabove alleged. Said methods, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of section 5 of an act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on August 26, 1937, issued and subsequently served its complaint in this proceeding upon respondent, Cherry Specialty Co., a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in

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support of the allegations of said complaint were introduced by attorneys for the Commission, and in opposition to the allegations of the complaint by attorneys for the respondent, before 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, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of counsel aforesaid; 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. The respondent, Cherry Specialty Co., is an Illinois corporation with its principal office and place of business located at 4722 Augusta Boulevard, Chicago, Ill. Respondent is now, and has been for more than four years last past, engaged in manufacturing candy including a cherry-centered chocolate candy and in the sale and distribution thereof to wholesalers, jobbers, and retailers.

In the course and conduct of the aforesaid business, respondent ships said candy from its place of business in Chicago, Ill., to the purchasers thereof located in various States of the United States, other than Illinois. Respondent, during all the time mentioned herein, has maintained a course of trade in the sale of its candy in commerce among and between the various States of the United States.

In the course and conduct of its business as aforesaid, respondent has been during all the time mentioned herein in substantial competition with other corporations and with partnerships and individuals also engaged in the sale and distribution of candy in commerce among and between the various States of the United States.

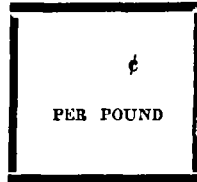
PAR. 2. In the course and conduct of its business as aforesaid, and prior to the date of the hearings herein, the respondent sold said cherry-center candy in assortments packed and assembled in such a manner as to involve the use of a lottery scheme or a game of chance when sold and distributed by retail dealers to the ultimate purchasers thereof. Said assortments were composed of a number of 1-pound boxes of chocolate-covered cherries. With each assortment the respondent furnished an electric lamp to be offered by the retail dealers as a prize to the purchaser of one of the boxes of candy

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contained in the assortment, and also furnished a circular for the retail dealer's use in disposing of the candy by means of the aforesaid sales plan. Printed on each circular was the following language:

FREE
LAMP
WITH CHOCOLATE CHERRIES



One of the purchasers of one of these
24 boxes of Cherries will receive

THIS LAMP

Register your name and address when you buy a box.

The boxes of candy were often disposed of by the retail dealers through the use of punch cards or some other device by which the price to be paid for a box of the candy by the ultimate purchaser was determined by lot or chance. When all the boxes of candy were sold, one of the persons whose name had been registered was entitled to receive the electric lamp as a result of chance.

PAR. 3. Retail dealers who purchased respondent's said candy exposed the same for sale to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplied to and placed in the hands of others the means of conducting lotteries in the sale of its products in accordance with the aforesaid sales plan. The use by respondent of said sales plan or method in the sale of its 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.

PAR. 4. There are among respondent's competitors, mentioned in paragraph 1 here of, many corporations, firms, and individuals who do not sell their merchandise by means of a lottery scheme or chance device. Many persons are attracted by a chance sales plan or the method employed by respondent in the sale and distribution of its cherry center candy and such persons were thereby induced to buy respondent's candy in preference to candy of respondent's aforesaid competitors who do not use the same or equivalent methods in the sale

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of their candy. The use of said method by respondent, because of said game of chance, had a tendency and capacity to, and did unfairly divert trade in commerce between and among the various States of the United States to respondent from its said competitors who do not use the same or equivalent methods.

PAR. 5. In the course and conduct of its business as described herein, the respondent placed in the hands of retail dealers a price card upon which there was conspicuously displayed an eight pointed star with the simulation of a seal in the center thereof. On the seal were the words "Certified Chocolate Cherries." In another portion of the seal written around the edge thereof was the term "Cherry Specialty Company." Above the star was a banner carrying the term "Seal of Approval." On this same price card, among other statements, appear the following one: "Only selected, luscious, whole maraschino type cherries, enrobed in rich chocolate, and made under sanitary, wholesome conditions can merit this seal of approval."

In addition to the price card above referred to which is displayed by retailers, each package of respondent's products carries a replica of the seal which consists of the red banner containing the term "Seal of Approval" and the eight-pointed star with a circular seal in its center containing the words "Certified Chocolate Cherries." Respondent's corporate name Cherry Specialty Co. appears in smaller letters on the rim of the circular seal superimposed upon the eight-pointed star.

Respondent's cherry-center candy had not been examined and approved or certified by any independent or unbiased agency unconnected with the respondent, though subsequent to the issuance of the complaint herein the respondent did submit this particular type of candy to an independent agency for examination and did receive a seal of approval for its products.

The Commission finds that the respondent's method of using the above-described seal of approval on each box of the cherry-center candy constituted a representation that such product had been examined and approved or certified by an independent and unbiased agency which was unconnected with the respondent. This representation was furthered by the use of the above quoted language appearing on the price cards displayed by retail merchants in connection with the sale of this candy to the ultimate purchaser. These price cards were supplied to retail dealers by the respondent.

PAR. 6. There are independent organizations or agencies, in no way connected with manufacturers, which test and approve various manufactured products and authorize manufacturers or distributors of said

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products to represent that the products have been tested and approved by such organization. There is a substantial number of purchasers who prefer to buy products that have been tested and approved by such organizations because of the belief on the part of such purchasers that products that have been tested and approved by such agencies are of a superior quality.

PAR. 7. The use by respondent of the expressions "seal of approval" and "certified" in the manner set forth herein has had and now has the capacity and tendency to mislead and deceive, a substantial portion of the purchasing public into the erroneous belief that said cherries were approved and certified by an independent and unprejudiced agency engaged in such activities and which is not connected with respondent. As a result of such erroneous belief, substantial quantities of respondent's candy have been purchased in preference to candy which did not bear a "seal of approval." Thereby, trade has been diverted unfairly to respondent from its aforesaid competitors who do not falsely represent that their candy has received a certificate of approval.

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 competitors and constitute unfair methods of competition 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 respondent, testimony and other evidence taken before examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral argument by DeWitt T. Puckett, counsel for the Commission, and by Harry P. Kishner, counsel for the respondent, 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 the respondent, Cherry Specialty Co., 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, or any other merchandise, in

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commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

2. Supplying to or placing in the hands of others display posters or other advertising literature either with assortments of merchandise or separately, which said display posters or other advertising literature inform the purchasing public that sales of said assortment of merchandise are to be or may be made by means of a game of chance, gift enterprise, or lottery scheme.

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

4. Using the terms "Seal of Approval" or "Certified" or any other terms of similar import or meaning to describe or refer to its products, or otherwise representing that such products have been inspected and approved by any organization unless such products have, in fact, been tested, approved and certified by an adequately equipped independent establishment engaged in the business of conducting impartial tests of the character represented.

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.

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IN THE MATTER OF
WALLACE G. CLARK AND NORMAN A. DODGE, TRADING
AS HYRAL DISTRIBUTING COMPANY

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

Docket 3726. Complaint, Feb. 28, 1939—Decision, Apr. 3, 1941

Where (1) two individuals, and (2) a corporation of which they were officers and directors and which, with the exception of a certain period, they fully owned and controlled; engaged in competitive interstate sale and distribution of a dental preparation known as Hyral; by advertisements disseminated through circulars, letters and other printed matter and by radio continuities broadcast from stations of interstate reception—

Represented that said Hyral was a notable new discovery in the field of dental hygiene which was both an antiseptic and a germicide and a cure or remedy for all mouth disorders, including bleeding gums, pyorrhea, and trench mouth, and constituted a competent and effective treatment for said conditions; that it would remove film, tobacco, food stains, and accumulated tartar from the teeth; would whiten teeth and prevent formation of tartar; correct foul breath, make condition of mouth entirely healthy, prevent loss of teeth; and make and keep gums firm;

Facts being that said product or powder, consisting of sodium perborate and sodium borate with pink coloring and flavoring, was not a new discovery but had long been used by members of the dental profession and in dentifrices; it would not cure trench mouth, though tending temporarily to inhibit growth of bacteria or germ causing it; nor, while it might, through its effervescent quality, remove loose particles of food lodged on the teeth, did it have any value in cleaning or whitening them or removing film; such effect as it might have on unpleasant breath odors would be limited to masking such odors temporarily; it had no special quality or value in whitening the teeth in excess of results obtained when used as an aid to the tooth brush, in which case its action would be the same as any ordinary dentifrice; and, except as above noted, it would not accomplish the results claimed;

With effect of confusing, misleading and deceiving a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were true and thereby, into purchase of said product, whereby substantial trade in commerce was unfairly diverted to them from competitors who truthfully advertise their products:

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

Before *Mr. John J. Keenan*, trial examiner.

Mr. Randolph W. Branch and *Mr. DeWitt T. Puckett* for the Commission.

Mr. Norman A. Dodge, of Fort Worth, Tex., for respondents.