

Complaint

IN THE MATTER OF

ETHEL'S CANDY & SALES COMPANY, INC.

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

Docket 4056. Complaint, Mar. 12, 1940—Decision, June 11, 1941

Where a corporation engaged in the manufacture and competitive interstate sale and distribution of candy to retail dealers—

Furnished to purchasers various devices and plans which involved the operation of games of chance, gift enterprises, or lottery schemes for sale and distribution of its merchandise to the ultimate consumer wholly by lot or chance, including, as typical, assortment consisting of a number of bars of candy and a push card displaying 40 feminine names, with adjoining disks, for use in sale of candy under a plan which provided that purchasers pay for a "push" from 1 to 5 cents, depending upon the number disclosed by disk pushed, and thereby placed in the hands of others various plans and devices whereby its said candy was distributed to the ultimate consumer wholly by lot or chance;

With result that many persons were attracted by aforesaid sales methods and the element of chance involved therein, and were thereby induced to purchase its candy in preference to that of its competitors who did not use similar methods, and trade was unfairly diverted from such competitors to it:

Held, That such acts and practices were all to the prejudice and injury of the public and its competitors, and constituted unfair methods of competition in commerce and unfair acts and practices therein.

Before *Mr. Miles J. Furnas*, *Mr. Randolph Preston*, and *Mr. John J. Keenan*, trial examiners.

Mr. D. C. Daniel for the Commission.

Mr. Isaac M. Wengrow, of Atlanta, Ga., for respondent.

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 Ethel's Candy & Sales 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, Ethel's Candy & Sales Co., Inc., is a corporation, organized and doing business under the laws of the State of Georgia, with its principal office and place of business located at 164 Whitehall Street, SW., Atlanta, Ga. Respondent is

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now, and for more than 1 year last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to dealers. Respondent causes and has caused its said products, when sold, to be shipped or transported from its aforesaid principal place of business in the State of Georgia, to purchasers thereof in the various other States of the United States and in the District of Columbia, at their respective points of location. There is now, and for more than 1 year last past has been, a course of trade by said respondent in such candy in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its business respondent is and has been in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of like or similar products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to dealers certain assortments of said candy so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when said candy is sold and distributed to the consumers thereof. One of said assortments consists of a number of bars of candy, together with a device commonly called a push card. Said push card contains a number of partially perforated disks with the word "push" appearing on the face of each of said disks. Printed within each of said disks is either 1¢—2¢—3¢—4¢ or 5¢. Each purchaser selects and removes one of said disks from said card and receives a bar of said candy for the amount disclosed when said disk is removed from the card. Each of said bars of candy has a retail value greater than 1 cent. The said amounts are effectively concealed from purchasers and prospective purchasers until the disks have been selected and removed from said card. The amounts to be paid for said bars of candy are thus determined wholly by lot or chance.

The respondent manufactures, sells and distributes various assortments of candy involving a lot or chance feature but such assortments and the method of sale and distribution thereof are similar to the one hereinabove described, varying only in detail.

PAR. 3. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure bars of candy at prices much less than the normal retail prices thereof. The use by respondent of said methods in the sale of candy and the sale of candy by and through the use thereof and by the aid of said methods is a practice of the sort which is contrary to an established public policy of the Government of the United States

and in violation of criminal laws. The use by respondent of said methods has the tendency unduly to hinder competition or to create a 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 or equivalent methods 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 the respondent, as above alleged, are unwilling to offer for sale and sell candy so packed and assembled as above described, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, or any other method of sale that is contrary to public policy, and such competitors refrain therefrom.

PAR. 4. Many dealers in, and ultimate purchasers of, candy are attracted by respondent's said methods 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 equivalent methods. The use of said methods by respondent has a tendency and capacity, because of said game of chance, to unfairly divert to respondent trade from its said competitors who do not use the same or equivalent methods, to exclude from said candy trade all competitors who are unwilling to, and who do not, use the same or equivalent or similar methods because the same are unlawful, to lessen competition in said candy trade, to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or equivalent methods and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said methods by respondent has a 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 methods or equivalent methods.

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 the 12th day of March, A. D., 1940, issued and thereafter served its complaint in this proceeding upon the

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respondent, Ethel's Candy & Sales Co., Inc., a corporation, charging it with unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint, testimony and other evidence in support of the allegations of the complaint were introduced by attorneys for the Commission before duly appointed trial examiners of the Commission designated by it to serve in this proceeding. Said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceedings regularly came on for final hearing before the Commission on the said complaint, the testimony and other evidence, report of the trial examiners thereon, and brief of attorney for the Commission, 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, Ethel's Candy & Sales Co., Inc., is a corporation organized in October 1939 under the laws of the State of Georgia and having its principal place of business in the city of Atlanta, State of Georgia.

PAR. 2. Respondent for some time prior to the issuance of the complaint herein was engaged in the manufacture and sale of candy, which it distributed to retail dealers and caused its candy when sold to be shipped from its principal place of business to purchasers thereof located in various States of the United States.

PAR. 3. Respondent in the conduct of its business, as set forth in paragraph 2 hereof, has been in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy in commerce between and among various States of the United States.

PAR. 4. Respondent in the sale and distribution of its candy has furnished to the purchasers thereof various devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes, by means of which said candy was sold and distributed to the ultimate consumer wholly by lot or chance. Typical of the methods used by the respondent is the following:

One of respondent's assortments consisted of a number of candy bars and a push card. Upon the face of this card appear 40 disks each bearing the word "push," and above the disk appears a feminine name. Printed on the under side of each disk appear numbers rang-

ing from 1¢ to 5¢. These numbers are not disclosed until the disk is pushed. The price paid for each push is determined by the number disclosed after the disk is pushed.

Respondent has used other similar devices in disposing of its candy, which differ from the above in detail only.

PAR. 5. Respondent by its sales methods hereinabove described has placed in the hands of others various plans, methods, and devices which involve games of chance, gift enterprises, or lottery schemes, to be used in the distribution of its candy, and by the use of said plan, methods, and devices said candy was distributed to the ultimate consumer wholly by lot or chance.

PAR. 6. Many persons have been and are attracted by the sales methods employed by respondent in the sale and distribution of its candy and by the element of chance involved therein, and have been thereby induced to purchase respondent's candy in preference to that offered for sale by respondent's competitors who do not use the same or a similar method.

PAR. 7. During all the times herein mentioned, respondent has been in competition with corporations, individuals, and partnerships engaged in the sale and distribution of candy similar to that sold by respondent in commerce between and among various States of the United States, who are unwilling to use and do not use in the sale and distribution of their candy any method involving a game of chance, gift enterprise, or lottery scheme, and as a result trade has been unfairly diverted from such competitors to the respondent.

CONCLUSION

The aforesaid acts and practices of the respondent 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 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, testimony and other evidence taken before duly appointed trial examiners of the Commission designated by it to serve in this proceeding, the report of the trial examiners thereon, and brief filed by the attorney for the Commission, and the Commission having made its findings as to the facts and its conclusion that the respondent, Ethel's Candy & Sales

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Co., Inc., a corporation, has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Ethel's Candy & Sales Co., Inc., a corporation, its officers, directors, agents, and employees, jointly and severally, directly or indirectly, or through any corporate or other device, in connection with the offering for sale, sale and distribution of candy or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Selling or distributing any merchandise so packed or 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 a lottery scheme.

2. Supplying to or placing in the hands of others push or pull cards, punchboards or other lottery devices either with assortments of merchandise 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.

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.

Syllabus

IN THE MATTER OF

J. R. OLNEY, SR., AND J. R. OLNEY, JR., DOING BUSINESS
AS J. R. PHARMACAL COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4127. Complaint, May 7, 1940—Decision, June 11, 1941*

Where two individuals engaged in interstate sale and distribution of their "J. R." medicinal preparation; by advertisements disseminated through the mails, newspapers, and periodicals, and circulars, leaflets, and other advertising literature—

(a) Represented that their preparation constituted a cure or remedy for all cases of athlete's foot and afforded immediate relief from said condition, itching toes, ringworm, and raw, inflamed feet, that it was endorsed by leading health institutions, and was the only known treatment of its kind;

Facts being no method of treating the condition known as athlete's foot is applicable or suitable in all cases, extended treatment is usually required, and in certain cases it is practically impossible to kill or destroy all of the fungi; while the drugs in said preparation were among those used by dermatologists in treatment of athlete's foot or ringworm generally, they were rarely used by such persons in the proportions found therein, and might in some cases aggravate rather than improve the condition; said preparation would not afford cure or remedy or immediate relief in all cases, though possibly affording temporary relief in some cases from frequent itching symptom associated therewith; and said product had not been endorsed as claimed, and was not the only known treatment of its kind; and

(b) Represented through the statement "Athlete's foot fungi killed in less than 3 minutes in laboratory test," that said product would in all cases kill or destroy such fungi, so that thereby speedy cure would be effected;

Facts being that while said statement might be literally true, as used it was deceptive and misleading: conditions under which laboratory tests were made and those existing when the fungi were on the foot were so dissimilar that results obtained in the former instances are not necessarily indicative of what might be expected in latter; and said preparation was wholly incapable of killing all fungi under ordinary conditions of use;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the therapeutic value of their said preparation, and to cause it to purchase their product as a result of such erroneous belief:

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

Before Mr. John J. Keenan, trial examiner.

Mr. R. P. Bellinger for the Commission.

Mr. Guy W. Davis, of Chester, Pa., for respondents.