

Complaint

33 F. T. C.

IN THE MATTER OF

LOUIS KELLER AND WILLIAM CARSKY, INDIVIDUALLY
AND TRADING AS CASEY CONCESSION COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3413. Complaint, May 10, 1938—Decision, Oct. 28, 1941*

Where two individuals engaged in the competitive interstate sale and distribution, to operators and concessionaires of moving pictures, moving picture and burlesque theaters, tent shows, medicine shows and circuses, of assortments of candy and other merchandise, such as toy cameras, hosiery, perfume, etc. so packed and assembled as to involve the use of a lottery scheme or game of chance, when sold and distributed to the consuming public, typical assortment being composed of 110 small uniform cartons each containing an equal number of pieces of candy and an additional article of merchandise, some of which had a retail value in excess of the 5 cent charged for the carton—

Sold such assortments to their customers, by whom they were resold to the consuming public in accordance with the aforesaid sales plan, and thereby placed in the hands of others the means of conducting lotteries or games of chance in the sale of their products;

With the result that many dealers in and ultimate consumers of candy were attracted by their said method of packing said products and by the element of chance involved in the sale thereof, and were thereby induced to purchase such candy in preference to that of their competitors who do not use such methods, and with tendency and capacity to divert to themselves trade and custom from their said competitors and exclude them from the candy trade, lessen competition in such trade and create a monopoly thereof in themselves and in such other distributors as do use such a method, and to deprive the purchasing public of the benefit of free competition:

Held, That such acts and practices were all to the prejudice and injury of the public and their competitors, and contrary to established public policy of the United States Government, and constituted unfair methods of competition in commerce.

Before *Mr. Charles F. Diggs*, *Mr. John W. Addison*, and *Mr. W. W. Sheppard*, trial examiners.

Mr. D. C. Daniel for the Commission.

Mr. Morris A. Haft, of Chicago, Ill., for respondents.

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 Louis Keller and William Carsky, individually and trading as Casey Concession 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 public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents, Louis Keller and William Carsky, are individuals doing business as a copartnership under the trade name and style of Casey Concession Co., with their principal office and place of business located at 1132 South Wabash Avenue, Chicago, Ill. They are now, and for some time last past have been, engaged in the sale and distribution of candy and other merchandise to operators of and concessionaires with moving picture and burlesque theaters and tent shows, medicine shows, and repertoire companies located at points in the various States of the United States. Respondents also sell their merchandise direct to the consuming public in theaters located in several of the States of the United States. They cause their said products, when sold, to be transported from their place of business in the city of Chicago, State of Illinois, to purchasers thereof in the various States of the United States other than the State of Illinois and in the District of Columbia at their respective places of business. There is now, and has been for some time last past, a course of trade by said respondents in such candy and other 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 said business, respondents are in competition with other partnerships and with corporations and individuals likewise engaged in the sale and distribution of candy or other merchandise 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 operators of and concessionaires with moving picture and burlesque theaters and medicine shows, tent shows, and repertoire companies, assortments of candy and other merchandise so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One of said assortments is composed of a number of packages containing pieces of candy and other articles of merchandise. The said packages of candy each have approximately the same number of pieces of candy therein, but the other articles of merchandise contained in said packages are of varying value. The said packages are identical in appearance and the purchaser of one of said packages cannot ascertain what the other article of merchandise contained therein is, or the value thereof, until after a purchase has been made and the package broken open. The sale of said packages of candy and

Complaint

33 F. T. C.

other articles of merchandise in the manner above described thus constitutes the operation of a lottery scheme, game of chance, or gift enterprise. Respondents sell and distribute various assortments of said candy and other articles of merchandise by means of a game of chance, gift enterprise, or lottery scheme. Such plan or method varies in detail, but the above described plan or method is illustrative of the principle involved.

PAR. 3. The customers of respondents resell said assortments to the consuming public in accordance with the aforesaid sales plan. 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 plan hereinabove set forth. Respondents have what is commonly referred to as the candy concession in various theaters in several States of the United States, and offer for sale and sell their said products in accordance with the above described sales plan direct to the consuming public in such theaters. The respondents' merchandise is shipped or transported from their place of business to such theaters at their various points of location for resale to the consuming public.

PAR. 4. The sale of candy and other merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure packages of candy and other articles of merchandise of varying value. The use by respondents 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 is contrary to an established public policy of the Government of the United States and which is in violation of criminal laws. The use by respondents of said method 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 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 sell and distribute candy in competition with respondents 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 respondents' 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 respondents in preference to candy

1588

Complaint

offered for sale and sold by said competitors of respondents who do not use the same or an equivalent method. The use of said method by respondents has the tendency and capacity, because of said game of chance, to divert to respondents trade and custom from their 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, to create a monopoly of said candy trade in respondents, and in 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 respondents 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 the said method or an equivalent method.

PAR. 6. In the course and conduct of their business as hereinabove related, respondents cause and have caused various false, deceptive, and misleading statements or representations concerning their said candy to appear in advertising matter distributed or caused to be distributed by respondents, of which the following statements or representations are examples but are not all-inclusive:

Hawaiian Health Confection—Rich in Vitamin "D."

The candy in this package contains the rare Sunshine Vitamin D.

ALOHA, the Hawaiian Confection. A wonderful chocolate sweetmeat containing the Sunshine Vitamin D, which has the same effect as the Hawaiian sun in building strong, straight bones and bodies. You don't have to go to Hawaii to get this wonderful confection.

675 U. S. P. units of Vitamin D in every pound, which is equal to four teaspoonfuls of Cod Liver Oil.

Respondents' advertising matter also contains the following statement:

To introduce this tasty and beneficial confection, we are giving away free with every package a valuable gift. Here are just a few of the hundreds of presents given away. The candy is worth many times the price paid for it, so try a package now * * * Buy the Candy * * * Get a valuable gift * * *

The effect of the foregoing false, deceptive, and misleading statements and representations of the respondents in selling and offering for sale such items of merchandise as hereinabove referred to, is to mislead and deceive a substantial part of the purchasing public in the various States of the United States and in the District of Columbia by inducing them to mistakenly believe (1) that respondents' candy contains vitamin D in sufficient amount to be beneficial to the purchaser's health and that the amount of vitamin D contained in every pound of respondents' candy is equal to that contained in four teaspoons of cod liver oil, and (2) that respondents give away certain

of their articles of merchandise without cost to the purchasers of said packages of candy.

PAR. 7. In truth and in fact respondents' candy does not contain a sufficient amount of vitamin D to be beneficial to the purchaser's health, and every pound of said candy does not contain vitamin D in a quantity which is equivalent to that contained in four teaspoons of cod liver oil, as represented by respondent; and none of respondents' so-called premiums or gifts or prizes is given away "free," but the prices thereof are included in the prices of said packages of candy.

PAR. 8. The use by respondents of the false, deceptive, and misleading statements and misrepresentations set forth herein has had and now has the capacity and tendency to mislead and deceive, and has misled and deceived, a substantial portion of the purchasing public into the erroneous belief that such statements and representations are true, and into the purchase of substantial quantities of said respondents' products as a result of such erroneous belief. There are among the competitors of respondents, as mentioned hereinabove, manufacturers and distributors of like and similar products who do not make such false, deceptive, and misleading statements and representations concerning their products. By the statements and representations aforesaid, trade is unfairly diverted to respondents from such competitors, and as a result thereof substantial injury is being done and has been done by respondents to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 9. The aforesaid acts and practices of respondents are all to the prejudice of the public and of respondents' competitors, and constitute unfair methods of competition 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 May 10, A. D., 1938, issued and thereafter served its complaint in this proceeding upon the respondents Louis Keller and William Carsky, individually and as co-partners trading as Casey Concession Co., charging them with unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of the complaint and the filing of respondents' answer thereto, testimony and other evidence in support of the allegations of the complaint and in opposition thereto were introduced by the attorneys for the Commission and the at-

1588

Findings

torney for the respondents before duly appointed trial examiners of the Commission designated by it to serve in this proceeding. The testimony and other evidence introduced 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 complaint, the answer thereto, the testimony, and other evidence, report of the trial examiners and exceptions thereto, briefs in support of and in opposition to the complaint, and oral arguments; 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, Louis Keller and William Carsky, have been copartners since December 1, A. D., 1936, and during all of said time have traded as Casey Concession Co. Their principal place of business during all of said time has been located at 1132 South Wabash Avenue, Chicago, Ill.

PAR. 2. Respondents, during all the time herein mentioned, have been and now are engaged in the business of selling and distributing candy and other merchandise, consisting in part of cardboard toy cameras, women's hosiery, boxes of face powder, bottles of perfume, small note books and pencils, dolls, and cigarette cases, to operators and concessionaires of moving pictures, moving picture and burlesque theaters, tent shows, medicine shows, and circuses located in various States of the United States and in the District of Columbia. Respondents cause their products, when sold, to be transported from their principal place of business in the city of Chicago, State of Illinois, to purchasers thereof located in various States of the United States and in the District of Columbia. There is now, and during all the period herein mentioned has been, a course of trade by said respondents in such candy and other merchandise between and among the various States of the United States and in the District of Columbia. Respondents, in the course and conduct of their business have been and are in competition with other partnerships and with individuals and corporations likewise engaged in the sale and distribution of candy and other merchandise similar to that sold and distributed by respondents, in commerce between and among the various States of the United States and in the District of Columbia.

Respondents, in the course and conduct of their business as herein-after described, sell and have sold assortments of candy and other merchandise so packed and assembled as to involve the use of a

Conclusion

33 F. T. C.

lottery scheme or game of chance, when sold and distributed to the consuming public. One of said assortments is composed of 110 small cartons of uniform size, shape and appearance in each of which is placed an equal number of pieces of candy and an additional article of merchandise. Sales are 5 cents per carton. The various additional articles of merchandise vary in retail value, some thereof having a retail value in excess of 5 cents. The said additional articles of merchandise are effectively concealed in said cartons from purchasers and prospective purchasers until a purchase has been made, the carton broken open and the additional article of merchandise removed therefrom. The said additional articles of merchandise are thus distributed to the consuming public wholly by lot or chance. Others of said assortments are similar to the one hereinabove described, varying only in detail. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale or distribution of their merchandise in accordance with the sales plan hereinabove described.

PAR. 3. Respondents' customers resell said assortments to the consuming public in accordance with the aforesaid sales plan. The respondents thus place in the hands of others the means of conducting lotteries, or games of chance in the sale of their product.

PAR. 4. Many dealers in and ultimate consumers of candy are attracted by respondents' 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 respondents in preference to candy offered for sale and sold by competitors of respondents who do not use the same or an equivalent method. The use of said method by respondents has the tendency and capacity, because of said element of chance, to divert to respondents trade and custom from their 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, to lessen competition in said candy trade, and to create a monopoly of said candy trade in respondents and in 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.

CONCLUSION

The aforesaid acts and practices of the respondents are all to the prejudice and injury of the public and of respondents' competitors, and are contrary to the established public policy of the Government of the United States of America, and constitute unfair methods of

1588

Order

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 the respondents, the 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 and exceptions thereto, briefs in support of and in opposition to the complaint, and oral arguments; and the Commission having made its findings as to the facts and its conclusion that the respondents, Louis Keller and William Carsky, individually and as copartners trading as Casey Concession Co., have violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondents, Louis Keller and William Carsky, individually and trading as Casey Concession Co., or trading under any other name or designation, their representatives, agents, and employees, jointly or severally, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of candy, cardboard toy cameras, women's hosiery, face powder, perfume, note books, pencils, dolls, cigarette cases, or any 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 lottery scheme.

2. Supplying to or placing in the hands of others any merchandise together with a sales plan or device, or separately, which said sales plan or device is to be used or may be used in the sale or distribution of 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 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.

IN THE MATTER OF
OHIO ART COMPANY

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

Docket 4183. Complaint, July 12, 1940—Decision, Oct. 28, 1941

Where a corporation engaged in interstate sale and distribution of toy musical tops, and, in said connection, in importing musical reeds made in Germany, stamped with the word "Germany" as indicating their foreign origin, which, in enclosing said reeds in its tops, was hidden from view—

Stamped or imprinted upon its said tops, containing such imported reeds, legend "Made in U. S. A.," and placed upon the carton or container enclosing the top notation "Made by The Ohio Art Co., Bryan, Ohio," with no disclosure of any kind upon its said product informing members of the purchasing public that the musical reeds contained therein were of German origin;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that its said products were wholly of domestic origin and manufacture, decidedly preferred over products made in Germany and many other foreign countries, with result that a substantial portion of the public was induced to and did purchase its said tops, and with effect of placing in the hands of unscrupulous and un-informed dealers means whereby they were enabled to mislead and deceive members of the purchasing public:

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

Before *Mr. Lewis C. Russell*, trial examiner.

Mr. R. A. McQuat and *Mr. Maurice C. Pearce* for the Commission.

Gebhard & Hogue, of Bryan, Ohio, 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 Ohio Art Co., 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, Ohio Art Co., is a corporation organized and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business at Bryan, Ohio.

PAR. 2. Respondent is now, and for more than 1 year last past has been, engaged in the sale and distribution of toy musical tops. Respondent causes its said products, when sold, to be transported from