

Complaint

IN THE MATTER OF

SIERRA CANDY 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 4758. Complaint, May 7, 1942—Decision, June 23, 1942

Where a corporation, engaged in the manufacture and competitive interstate sale and distribution of candy, including certain assortments which were so packed and assembled as to involve the use of games of chance, gift enterprises and lottery schemes when sold and distributed to the consumers, typical assortments including, as illustrative, one of 24 one-pound boxes of uniform size and shape, together with a push card for use in sale and distribution thereof under a plan by which amount paid by customers for said boxes was determined by number secured by chance from card, and another of 19 boxes with punchboard, for use under a plan by which customer, for 5 cents, by chance selection of certain designated numbers received one of said boxes, as did also the customer making the last punch in each of the first two sections into which the board was divided, or the last punch on the board, others receiving nothing for their money—
Sold such assortments to wholesalers, to jobbers, and to retailers, by whom they were sold to the purchasing public in accordance with aforesaid plan, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its products under plan in question, involving game of chance to procure candy at much less than normal retail price, in competition with many who do not use any such method;

With the result that many persons were attracted by its said sales method and element of chance involved therein, and were thereby induced to buy and sell its candy in preference to that of competitors aforesaid, whereby trade was unfairly diverted to it from them; to the injury of competition 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, were contrary to the public policy of the United States Government, and constituted unfair methods of competition in commerce and unfair acts and practices therein.

Mr. J. W. Brookfield, Jr. for the Commission.

Mr. David Rubenstein, of San Francisco, Calif., 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 Sierra 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 interest of the

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public, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Sierra Candy Co., Inc., is a corporation, organized and doing business under the laws of the State of California with its office and principal place of business located at 2203 Third Street, San Francisco, Calif. Respondent, is now, and for more than 6 months last past, has been engaged in the manufacture and in the sale and distribution of candy to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States and in the District of Columbia. Respondent causes and has caused said candy, when sold, to be transported from its principal place of business in the city of San Francisco, Calif., to purchasers thereof at their respective points of location in various States of the United States other than California and in the District of Columbia. There is now and has been for more than 6 months last past a course of trade by 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 said business respondent is and has been in competition with other corporations and with partnerships and individuals engaged in the sale and distribution of candy in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, respondent sells and has sold to wholesale dealers, jobbers, and retailer dealers certain assortments of candy so packed and assembled as to involve the use of games of chance, gift, enterprises and lottery schemes when sold and distributed to the consumers thereof. Two of said assortments are hereinafter described for the purpose of showing the methods used by the respondent and are as follows:

One assortment includes 24 one-pound boxes of candy of uniform size and shape together with a device commonly called a push card. The said push card has 24 partially perforated disks on the faces of which is printed the word "Push." Concealed within the said disks are numbers ranging from 1 to 39 inclusive. When the disks are pushed or separated from the card, a number is disclosed. Purchasers pushing No. 1 pay 1 cent; those pushing Nos. 2, 8, or 39 pay 2 cents, 8 cents, or 39 cents, respectively, each purchaser paying the amount revealed by the punch which he has selected. The numbers are effectively concealed from the purchasers and prospective purchasers until the disks are pushed or separated from the card. The prices of said boxes of candy are thus determined wholly by lot or chance.

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Another of said assortments consist of 19 boxes of candy and a punchboard. Appearing on the face of the punchboard is the following inscription.

5¢ A SALE 5¢
 -20-40-60-80-100-120-140-Wins
 ½ # Picture Top Box
 160-180-200-220-240-260-280-300-210-Wins
 1 # Picture Top Box
 Last Punch in 1st 2 sections gone Wins
 1½ # Picture Top Box
 Last Punch on Board Wins 3 # Picture Top Box

Said candy is distributed to the purchasing public by means of said punchboard in the following manner:

Sales are 5 cents each, and when a punch is made, a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence and said numbers are arranged in three sections. The board bears a statement informing purchasers and prospective purchasers that certain specified numbers entitle the purchaser thereof to receive a box of candy, and the purchaser of the last sale in each of the first two sections completely sold is also entitled to receive a box of candy, and the last punch on the board entitles the purchaser to receive a box of candy. A customer who does not qualify by obtaining one of the specified numbers or the last punch in the first two sections of the last punch on the board, receives nothing for his money. The boxes of candy are worth more than 5 cents each, and the purchaser who obtains a number calling for one of the boxes of candy receives the same for 5 cents. The numbers are effectively concealed from purchasers or prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The candy is thus distributed to the purchasers of punches from the board wholly by lot or chance.

The respondent furnishes and has furnished various push cards and punchboards for use in the sale and distribution of its candy by means of a game of chance, gift enterprise, or lottery scheme. Such push cards or punchboards are similar to the ones herein described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's candy, directly or indirectly, expose and sell the same to the purchasing public in accordance with the sales plan aforesaid. 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. The use by respondent of said sales plan or method in the sale of its candy by and through the use thereof and by the aid

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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. The sale of candy to the purchasing public by the method or plan hereinabove set forth involves a game of chance or the sale of a chance to procure candy at prices much less than the normal retail price thereof. Many persons, firms, and corporations who sell and distribute candy in competition with respondent, as above alleged, do not use said method or any method involving a game of chance or the sale of a chance to win something by chance or any other method contrary to public policy. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of its candy and in the element of chance involved therein and are thereby induced to buy and sell respondent's candy in preference to candy of said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent because of said game of chance has a tendency and capacity to unfairly divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondent from its said competitors who do not use the same 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 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 May 7, 1942, issued and thereafter served its complaint in this proceeding upon respondent, Sierra Candy Co., Inc., a corporation, charging it with the use of unfair methods of competition in commerce and unfair acts and practices in commerce in violation of the provisions of said act. On May 25, 1942, the respondent filed its original answer in this proceeding. In its answer the respondent admitted all the material allegations charged in the complaint to be true and, in accordance with rule IX of the Commission's Rules of Practice, by such an answer the respondent is deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true. Thereafter, the proceeding regularly came on for final hearing before the Commission on said complaint and answer thereto, and the Commission, having duly considered the

matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Sierra Candy Co., Inc., is a corporation, organized and doing business under the laws of the State of California with its office and principal place of business located at 2203 Third Street, San Francisco, Calif. Respondent is now and for more than 6 months last past has been engaged in the manufacture and in the sale and distribution of candy to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States and in the District of Columbia. Respondent causes and has caused said candy, when sold, to be transported from its principal place of business in the city of San Francisco, Calif., to purchasers thereof at their respective points of location in various States of the United States other than California and in the District of Columbia. There is now and has been for more than 6 months last past a course of trade by 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 said business respondent is and has been in competition with other corporations and with partnerships and individuals engaged in the sale and distribution of candy in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, respondent sells and has sold to wholesale dealers, jobbers, and retail dealers certain assortments of candy so packed and assembled as to involve the use of games of chance, gift enterprises, and lottery schemes when sold and distributed to the consumers thereof. Two of said assortments are hereinafter described for the purpose of showing the methods used by the respondent and are as follows:

One assortment includes 24 one-pound boxes of candy of uniform size and shape together with a device commonly called a push card. The said push card has 24 partially perforated disks on the faces of which is printed the word "Push." Concealed within the said disks are numbers ranging from 1 to 39 inclusive. When the disks are pushed or separated from the card, a number is disclosed. Purchasers pushing No. 1 pay 1 cent; those pushing Nos. 2, 8, or 39 pay 2 cents, 8 cents and 39 cents, respectively, each purchaser paying the amount revealed by the punch which he has selected. The

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numbers are effectively concealed from the purchasers and prospective purchasers until the disks are pushed or separated from the card. The prices of said boxes of candy are thus determined wholly by lot or chance.

Another of said assortments consists of 19 boxes of candy and a punchboard. Appearing on the face of the punchboard is the following inscription:

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Said candy is distributed to the purchasing public by means of said punchboard in the following manner:

Sales are 5 cents each, and when a punch is made, a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence and said numbers are arranged in three sections. The board bears a statement informing purchasers and prospective purchasers that certain specified numbers entitle the purchaser thereof to receive a box of candy, and the purchaser of the last sale in each of the first two sections completely sold is also entitled to receive a box of candy, and the last punch on the board entitles the purchaser to receive a box of candy. A customer who does not qualify by obtaining one of the specified numbers or the last punch in the first two sections of the last punch on the board, receives nothing for his money. The boxes of candy are worth more than 5 cents each, and the purchaser who obtains a number calling for one of the boxes of candy receives the same for 5 cents. The numbers are effectively concealed from purchasers or prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The candy is thus distributed to the purchasers of punches from the board wholly by lot or chance.

The respondent furnishes and has furnished various push cards and punchboards for use in the sale and distribution of its candy by means of a game of chance, gift enterprise, or lottery scheme. Such push cards or punchboards are similar to the one herein described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's candy directly or indirectly expose and sell the same to the purchasing public in ac-

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cordance with the sales plan aforesaid. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its product in accordance with the sales plan hereinbefore set forth.

PAR. 4. The respondent's sales plan involves a game of chance, gift enterprise, or lottery scheme to procure candy at prices much less than the normal retail prices thereof. Many of respondent's competitors mentioned in paragraph 1 hereof do not use said method, or any method involving a game of chance, gift enterprise, or lottery scheme.

Many persons are attracted by respondent's sales method and the element of chance involved therein, and are thereby induced to buy and sell respondent's candy in preference to the candy of said competitors, and the use of said method by respondent has the tendency and capacity to, and does, unfairly divert trade, in commerce between and among various States of the United States and in the District of Columbia, to respondent from its said competitors. As a result thereof injury is being and has been done by respondent to competition in commerce between and among various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, are all to the prejudice and injury of the public and of respondent's competitors, are contrary to the public policy of the Government of the United States of America, 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 and answer of the respondent, in which answer respondent admitted all the material allegations of the Commission's complaint to be true, and by which answer, in accordance with rule IX of the Commission's Rules of Practice, respondent was deemed to have waived a hearing on all the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence or other intervening procedure to find such facts to be true; and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act.

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

1. Selling or distributing candy or any other merchandise so packed or assembled that sales of such candy or other merchandise are to be made, or may be made, by means of a game of chance, gift enterprise, or lottery scheme.

2. Supplying to and placing in the hands of others, push or pull cards, punchboards, or other lottery device, either with assortments of candy or other merchandise, or separately, which said push or pull cards, punchboards, or other lottery device are to be or may be used in selling or distributing said candy or other 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 the 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

MATHEW W. M. DEVITT, ROY D. SCHLEGEL AND ROBERT
E. SARGENT, TRADING AS AUTOGROOM COMPANY

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

Docket 3702. Complaint, Feb. 7, 1939—Decision, June 24, 1942

Where three individuals, engaged in manufacture and competitive interstate sale and distribution of their "Auto-Groom" for cleaning and polishing automobiles, and previously in the employ of a concern which made and sold its similar "Karsmetik" product; in soliciting sales from garages, service stations, and distributors, upon many of whom they had formerly called as salesmen for said "Karsmetik"—

Represented to such former purchasers that the company which formerly made "Karsmetik" was no longer in business, and that such product was no longer being offered; that the chemist who was formerly employed by it and developed the formula was in their employ, and that "Auto-Groom" was the same product as the other, differing therefrom only in trade name and color;

The facts being that said older concern was then manufacturing and offering its said product in active competition with them; formula for the new product was not developed as claimed, but obtained from a collection of formulae distributed by a chemical manufacturer, and while similar to that for the older product, was not in all respects the same; and they did not have any such chemist in their employ;

With effect of causing former purchasers of said competitive "Karsmetik" mistakenly to believe that aforesaid representations were true, and with consequence that many of them, particularly those formerly making their purchases from one of said individuals, discontinued purchasing it, and they and others purchased "Auto-Groom" instead of "Karsmetik"; whereby trade was diverted to them from said competitor:

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

Before *Mr. John W. Addison*, trial examiner.

Mr. S. Brogdyne Teu, II for the Commission.

Mr. Joseph A. Kaufmann, of Washington, D. C., 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 Mathew W. M. Devitt, Roy D. Schlegel, and Robert E. Sargent, trading as Autogroom