

Syllabus

IN THE MATTER OF

HAPPY HOSTESS CANDY COMPANY, INC., AND HARRY RACHLIN, PRESIDENT OF HAPPY HOSTESS 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 4842. Complaint, Sept. 29, 1942—Decision, Feb. 8, 1945

Where a corporation and an individual, its president and general manager, engaged in interstate sale and distribution of various kinds of candy, including its "Vanity Fair," "Cow Boy Bunny," and "Brazil Nut" assortments, which were so packed and assembled as to involve use of games of chance, gift enterprizes or lottery schemes when sold and distributed to the consuming public under such arrangements, as typical, that chance selection of certain numbers on a ten section, 550 hole punch board secured the customer for the 2 cents paid, one half pound "Picture Package" box of candy, the last punch in each of the first 9 sections received a one-pound "Picture Package," and the last punch on the board received the two-pound "Framed Picture Package," others receiving nothing for their money—

Sold and distributed such assortments to jobbers and wholesalers, and thereby supplied to and placed in the hands of others the means of conducting a lottery in the sale of their products in accordance with aforesaid sales plans; contrary to an established public policy of the United States Government and in competition with others who did not use any sales method involving chance or contrary to public policy;

With the result that many persons were attracted by said sales plan and the element of chance therein, and were thereby induced to buy and sell their candy in preference to that of said competitors, and with tendency and capacity thereby unfairly to divert trade in commerce from said competitors to them:

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

As respects the denial of the president of a corporation charged along with it with the use of lottery methods in sale and distribution of candy, of any individual responsibility for such corporate acts, and his assertion that as a member of its Board of Directors, he opposed and voted against the use of such methods, but that the policy of the company was determined by the majority of the Board: Where it appeared that for some eleven years immediately preceding the organization of the corporation in question, he was the vice president of the B Candy Company of which he and his wife owned about 45 percent of the stock; that after the issuance of a complaint against said company by the Commission charging it with the use of lottery methods, but before the issuance of a cease and desist order, he and his wife sold their stock therein; that among the incorporators of the present corporation and officers thereof and members of its Board were two former salesmen of said B Candy Company who had a substantial following in the trade for punch board deals, and participated in the organization and operation of the instant company upon the understanding and condition that it would engage in the sale of punchboard deals; and that he and his wife owned more than half the stock; the Commission concluded that any objections to punchboard deals by said individual were *pro forma* only and that in fact he aided, cooperated with, and assisted said corporate concern in such acts and practices.

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

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

Mr. Oscar Salenger, of Chicago, Ill., for Happy Hostess Candy Co., Inc.

Mr. Solomon Axelrod, of Chicago, Ill., for Harry Rachlin.

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 Happy Hostess Candy Company, Inc., a corporation, and Harry Rachlin, an individual, and President, of Happy Hostess Candy Company, Inc., hereinafter referred to as respondents, have 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 public, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Happy Hostess Candy Company, Inc., is a corporation, organized and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 615-17 South Peoria Street, Chicago, Ill.

Respondent, Harry Rachlin, is the president and a director, of respondent, Happy Hostess Candy Company, Inc., and formulates, controls and directs its policies and practices. Respondent, Harry Rachlin, has his offices at the same address as that of the corporate respondent. Said respondents act together and in cooperation with each other in doing the acts and things hereinafter alleged:

Respondents are now, and for more than six months last past, have 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. Respondents cause and have caused said candy when sold to be transported from their place of business in the city of Chicago, Ill., to purchasers thereof at their respective points of location in various States of the United States other than Illinois and in the District of Columbia. There is now and has been for more than six months last past a course of trade by respondents 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, respondents are and have been in competition with 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 their business as described in paragraph 1 hereof, respondents sell and have 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 or lottery schemes when sold and distributed to the consuming public. One of said assortments is hereinafter described for the purpose of showing the method used by respondents and is as follows:

This assortment includes 32 boxes of candy and a punch board.

Appearing on the face of the punch board is the following legend:

VANITY FAIR ASSORTMENT

Numbers

25-50-75-100-125-150-175-200-225

250-275-300-325-350-375-400-425

450-475-500-525-550 Each Receive $\frac{1}{2}$ Lb.

Picture Package

(Picture
of
Girl)Last Sale in Each of First
9 Sections Receives
1 Lb. Picture PackageLast Sale on Board Receives
2 Lb. Framed Picture Package.2¢
Per Sale

Said candy is distributed to the purchasing public in accordance with the foregoing legend in the following manner: Sales are 2¢ 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 said board but the numbers are not arranged in numerical sequence and said punches and numbers are arranged in ten 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 last sale in each of the first nine sections completely sold entitles the purchaser to receive a larger box of candy and the last punch on the board entitles the purchaser to receive a 2 pound box of candy. A customer who does not qualify by obtaining one of the specified numbers or the last punch in a section or the last punch on the board receives nothing for his money. The boxes of candy are worth more than 2¢ each and the purchaser who obtains a number calling for one of the boxes of candy receives the same for 2¢. The numbers are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The candy is thus distributed to purchasers of punches from the board wholly by chance.

The respondents furnish and have furnished various punch board and candy assortments for use in the sale and distribution of their candy by means of a game of chance, gift enterprise or lottery scheme. Such punch board and candy assortments are similar to the one herein described and vary only in detail.

PAR. 3. Retail dealers who purchase respondents' candy, directly or indirectly, expose and sell the same to the purchasing public in accordance with the sales plan aforesaid. 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. The use by respondents of said sales plan or method in the sale of their candy and the sales 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. 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 respondents, as above alleged, do not use any method or

methods 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 respondents in the sale and distribution of their candy and in the element of chance involved therein and are thereby induced to buy and sell respondents' candy in preference to the candy of said competitors who do not use the same or equivalent methods. The use of said method by respondents 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 respondents from their said competitors who do not use the same or equivalent methods.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' 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 September 29, 1942, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them 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. After the issuance of said complaint and the filing of respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before an examiner 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, this proceeding regularly came on for final hearing before the Commission on the complaint, the answers thereto, testimony and other evidence, report of the trial examiner and exceptions thereto, briefs in support of and in opposition to the complaint, and oral arguments of counsel; 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. (a) Respondent, Happy Hostess Candy Company, Inc., is a corporation, organized and existing under the laws of the State of Illinois, with its office and principal place of business at 615-17 South Peoria Street, Chicago, Ill. It is now, and since its organization in November 1941 has been, engaged in the sale and distribution of various kinds of candy.

(b) Respondent, Harry Rachlin, an individual, is president and general manager of Happy Hostess Candy Company, Inc., with his office and principal place of business at 615-17 South Peoria Street, Chicago, Ill. The other officers of said company are Fred W. Findeisen, vice president; Norman Brown, second vice president; Robert Rachlin (a brother of respondent, Harry Rachlin), treasurer; and Oscar Salenger, secretary.

PAR. 2. In the course and conduct of the aforesaid business the respond-

ents cause their said candy, when sold to jobbers and wholesale dealers, to be transported from their place of business in Chicago, Ill., to said purchasers at their respective points of location in States other than the State of Illinois, and maintain, and have maintained, a course of trade in said candy in commerce between and among various States of the United States.

PAR. 3. Respondent, Harry Rachlin, has denied any individual responsibility for the acts charged in the complaint herein and asserted that in his capacity as a member of the board of directors he opposed and voted against the use of lottery methods in the sale and distribution of candy, but the policy of the company in using such methods was determined by the majority of the board of directors, which board consists of the aforesaid officers of the corporation. For some 11 years immediately preceding the organization of the Happy Hostess Candy Company, Inc., respondent, Harry Rachlin, was the vice president of the Boulevard Candy Company and he and his wife owned about 45 percent of the stock in that company. After the issuance of a complaint against the Boulevard Candy Company by this Commission charging it with the use of lottery methods in the sale and distribution of candy, but before the issuance of an order to cease and desist from the use of such methods, Rachlin and his wife sold their stock in said company. Among the incorporators of the Happy Hostess Candy Company, Inc., were Fred W. Findeisen and Norman Brown, formerly employees of the Boulevard Candy Company and now vice president and second vice president, respectively, of the corporate respondent herein. Findeisen and Brown were active in the sales department of the Boulevard Candy Company and each has a substantial following in the trade for punchboard deals (assortments of candy accompanied by a lottery device for use in distributing said candy to the public). In the case of Findeisen this following was said to amount to about \$150,000 in sales. The participation of Findeisen and Brown in the organization and operation of the Happy Hostess Candy Company, Inc., was upon the understanding and condition that the new company would engage in the sale of punchboard deals. At the time of the first hearings in this proceeding, Harry Rachlin owned 10 percent of the stock of the corporate respondent; his brother, Robert Rachlin, owned 15 percent; the secretary of the company, Oscar Salenger, owned 10 percent; and Mrs. Harry Rachlin owned the remainder. Some months later, at the time of the last hearing in this proceeding, the secretary of the company testified that there had been some changes in the stock ownership and respondent, Harry Rachlin, then owned 15 percent of the stock and his wife 42½ percent. Mrs. Rachlin has not been actively connected with the management of the company and her stockholdings therein are said to constitute merely an investment. Upon the basis of the record in this case the Commission concludes that any objections to punchboard deals by respondent, Harry Rachlin, were pro forma only and that in fact said respondent aided, cooperated with, and assisted the corporate respondent in the various acts and practices herein found.

PAR. 4. (a) In the course and conduct of the aforesaid business, the respondents sell and distribute assortments of candy so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when said candy is sold and distributed to the consuming public. For the purpose of illustrating said assortments, respondents' "Vanity Fair Assortment" is described herein. This assortment includes 32 boxes

Findings

40 F. T. C.

of candy (22 $\frac{1}{2}$ -pound boxes, 9 1-pound boxes, and 1 2-pound box), and a punchboard. On the face of the punchboard is the following legend:

VANITY FAIR ASSORTMENT
NUMBERS

25-50-75-100-125-150-175-200-225

250-275-300-325-350-375-400-425

450-475-500-525-550 Each Receive

$\frac{1}{2}$ lb. PICTURE PACKAGE

Last Sale in Each of First

9 Sections Receives

1 lb. PICTURE PACKAGE

2¢
Per Sale

LAST SALE ON BOARD RECEIVES

2 lb. FRAMED PICTURE PACKAGE

The candy in said assortment was intended to be, and frequently was, distributed to the purchasing public in accordance with the legend on the punchboard. Sales are 2¢ each, and when a punch is made a number is disclosed. The numbers concealed in the punches of said board begin with one and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The punches and numbers are arranged in 10 sections on the board. The legend on the board informs purchasers and prospective purchasers that certain specified numbers entitle the purchaser thereof to receive a $\frac{1}{2}$ -pound box of candy, that the last punch in each of the first 9 sections completely sold entitles the purchaser to receive a 1-pound box of candy, and that the last punch on the board entitles the purchaser to receive a 2-pound box of candy. A customer who does not qualify by purchasing one of the specified numbers, the last punch in a section, or the last punch on the board, receives nothing for his money. The boxes of candy are worth more than 2¢ each, and the purchaser who obtains a number calling for one of the boxes of candy receives the candy for 2¢. The numbers are effectively concealed from purchasers and prospective purchasers until a punch has been made, and the candy is thus distributed to purchasers of the punches wholly by chance.

(b) Respondents have sold and distributed various other candy assortments and punchboards, including a "Cowboy Bunny Assortment" and a "Brazil Nut Assortment," all of which are similar to the assortment above described and vary from it only in detail. Said assortments and punchboards were intended for use in the sale and distribution of said candy by means of a game of chance, gift enterprise, or lottery scheme.

PAR. 5. The aforesaid assortments and sales plans, and others similar thereto, are used in the sale of candy to the purchasing public in accordance with the sales plans furnished by respondents. Respondents thus supply to and place in the hands of others a means of conducting a lottery in the sale of their products. The use by respondents of such sales plans in the sale of their candy, and the sales of such candy by and through the use thereof and with the aid of such sales plans, is a practice of a sort which is contrary to an established public policy of the Government of the United States.

PAR. 6. There are persons, firms, and corporations who sell and distribute candy in competition with respondents and who do not use 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 respondents in the sale and distribution of their candy and the element of chance therein, and are thereby induced to buy and sell respondents' candy in preference to the candy of said competitors who do not use the same or equivalent methods. The use of such plans and methods by respondents, because of the element of chance contained therein, has the tendency and capacity unfairly to divert trade in commerce between and among the various States of the United States to respondents from their said competitors who do not use the same or equivalent methods.

CONCLUSION

The aforesaid acts and practices of respondents are all to the prejudice and injury of the public and of respondents' 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, the answers of respondents, testimony and other evidence taken before an examiner of the Commission theretofore duly designated by it, report of the trial examiner and exceptions thereto, briefs filed herein, and the oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondent, Happy Hostess Candy Company, Inc., its officers, representatives, agents and employees, and respondent, Harry Rachlin, an individual, his 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 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 other merchandise so packed and assembled that sales of said candy or other merchandise to the public are to be made or, due to the manner in which such candy or other merchandise is packed and assembled at the time it is sold by respondents, 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 punchboards, push or pull cards, or other lottery devices, either with assortments of candy or other merchandise or separately, which said punchboards, push or pull cards, or other lottery devices are to be used, 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 respondents shall, within 60 days after the 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

MAYO BROTHERS VITAMINS, INC., TRADING IN ITS OWN NAME AND IN THE NAME OF MAYO BROS., AND IRBY L. MAYO, ORAN FRANK F. MAYO, AND PAUL T. MURRY, INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION

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

Docket 5044. Complaint, Sept. 10, 1943—Decision, Feb. 9, 1945

Where a corporation and its three officers, engaged in the interstate sale and distribution of their "Mayo Bros. Vitamin B Complex," "Mayo Bros. Vitamin B₁" and "Mayo Bros. Family Formula"; through advertisements in newspapers and other periodicals, circulars, leaflets, pamphlets and other printed material, and by radio broadcasts, directly and by implication—

- (a) Falsely represented that human health and well-being require vitamins in addition to the supply ordinarily obtained in a well-balanced diet;
- (b) Represented that sickness, lackadaisical, run-down and nervous conditions, mental and physical sluggishness, lack of energy, fatigue, lack of coordination, and lessened physical capacity are usually due to a deficiency of B Complex vitamins, and that the use of their preparations would effectively overcome such conditions, bring about immediate and quick restoration of energy and health, and result in calmer and steadier nerves, better coordination, greater physical capacity, new strength, and higher mental efficiency;

The facts being that conditions above referred to are not ordinarily due to a deficiency of B Complex vitamins; while some may be due to a deficiency of Vitamin B₁, which cases their preparations might have a tendency to overcome, any beneficial results would arise only after continuous and long usage; their preparations contained insufficient quantities of B Complex vitamins other than B₁ to exercise any beneficial effect on conditions involving deficiency of such other vitamins; and any relief afforded in any condition by the use of their preparations would not be immediate or quick;

- (c) Falsely represented that the use of said preparations would eliminate the ill effects of hurried eating, intense work, and hard play, and would insure health and vitality;
- (d) Represented falsely that physicians consider molasses as a potent source of food minerals, and that two tablespoonfuls of the preparation "Mayo Bros. Family Formula" supplied the daily requirements of iron, manganese, and iodine;
- (e) Represented through use of words "Mayo Brothers" in their corporate name and "Mayo Bros." in the trade names of their products, and such statements—notwithstanding disclaimer of being connected with any other organization—as
 " * * * scientific research and careful study was carried on for months before this High Potency B. Complex was ready to be offered to the public and worthy of bearing the name and trade-mark of Mayo Bros. * * *" "No need to tell you that a line of vitamins bearing this name—means more business and more profits for you . . ." "A Great NAME, A Great PRODUCT, a Great SALES PLAN, Announcing MAYO BROS. FAMILY FORMULA," that they were connected with the well-known and highly regarded Mayo Clinic of Rochester, Minnesota, commonly referred to as Mayo Brothers, or that the aforesaid individual officers were members of the family of brothers who founded the clinic, or that their said preparations were produced or sponsored by the clinic;