

Syllabus

IN THE MATTER OF
CHARLES R. LUCE, INDIVIDUALLY AND AS TRUSTEE,
TRADING AS LUCE & COMPANY

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

Docket 2780. Complaint, Apr. 23, 1936—Decision, Feb. 9, 1937

Where an individual engaged in manufacture and sale of "straight" goods candy and of so-called "break and take" assortments, principal trade demand for which comes from the small retailers with stores, in many instances, near schools and patronized by school children, and sale and distribution of which candy, giving with sale thereof to public opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children, largest class by far of purchasers and consumers of such type thereof, who buy same in preference to so-called "straight" candy when displayed side by side, by reason of lottery or gambling feature connected with former, and selling of which in the market of the other, i. e., the "straight" goods, has been followed by marked decrease in sales of such "straight" candy, due to gambling or lottery feature connected with so-called "break and take" merchandise—

Sold to wholesalers and jobbers assortments variously designated as "Lucky Winner," "Lucky Smokes," and "Big Winner," and composed of a number of penny pieces of uniform size and shape, the concealed colored centers of some of which differed from those of the majority, together with number of packages of candy, to be given as prizes to those procuring one of said pieces, colored center of which differed as aforesaid from majority thereof, and together with explanatory display cards with said "Lucky Winner" assortments for retailers' use is offering same to public; so assembled and packed that such assortments might be and were displayed and sold by numerous retail dealer purchasers thereof in accordance with above described plan, and with knowledge and intent that such assortments could and would thus be resold to public by retail dealers as above set forth, in violation of public policy and in competition with many who regard such method of sale and distribution as morally bad and as encouraging gambling, and especially among children, as injurious to the industry through resulting in the merchandising of a chance or lottery instead of candy, and as providing retailers with a means of violating the laws of the several States, and some of whom, for such reasons, refuse to sell candy so packed and assembled that it can be resold to public by lot or chance;

With result that retailers, finding such candy more salable, purchased products of said individual and others employing similar methods, some competitors began sale and distribution of candy for resale to public by lot or chance to meet competition of manufacturers who thus sell and distribute their products, "straight" goods sales of aforesaid refusing competitors, who can compete on even terms only by giving same or similar devices to retail dealers, showed a continued decrease in their unwillingness to do so, public and competitors were prejudiced and injured, and trade was

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diverted to him from said competitors, and there was a restraint upon and a detriment to the freedom of fair and legitimate competition in industry concerned:

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

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank and *Mr. P. C. Kolinski* for the Commission.
Sperry & Yankauer, of New York City, 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 Charles R. Luce, individually, and as trustee, trading as Luce & Company, 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. Respondent is an individual, operating his business as a common law trust of the type known as "Massachusetts Trust Estate," organized and filed under the laws of New Jersey, and using the trade name of Luce & Company, with his principal office and place of business located at 350 Mercer Street, in the city of Jersey City, State of New Jersey. Respondent is now, and for several years last past, has been engaged in the manufacture of candy and in the sale and distribution thereof to wholesale dealers located at points in the various States of the United States, and causes said products, when so sold, to be transported from his place of business in the city of Jersey City, State of New Jersey, to purchasers thereof in other States of the United States at their respective places of business, and there is now, and has been for several years 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 the said business, respondent is in competition with other individuals and with corporations and partnerships engaged in the sale and distribution of candy and candy products in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his business, as described in paragraph 1 hereof, respondent sells and has sold since on or about

December 1935, to wholesale dealers, packages or assortments of candy 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 consists of a number of pieces of candy of uniform size and shape, together with a number of packages of candy, which packages of candy are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner: The majority of the said pieces of candy of uniform size and shape have centers of the same color, but a small number of said pieces of candy have centers of a different color. The said pieces of candy of uniform size and shape in said assortment retail at the price of 1¢ each, but the purchaser who procures one of said candies having a center colored differently from the majority is entitled to receive, and is to be given free of charge, one of the said packages of candy heretofore referred to. The color of the centers of said pieces of candy of uniform size and shape is effectively concealed from the purchaser and prospective purchaser until a selection has been made and the piece of candy broken up. The aforesaid purchasers of said candies, who procure a candy having a center colored differently from the majority of said pieces of candy of uniform size and shape in said assortment, thus procure one of the said packages of candy wholly by lot or chance.

PAR. 3. The wholesale dealers, to whom respondent sells his assortment, resell said assortment to retail dealers, and said retail dealers expose said assortment 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 his product in accordance with the sales plan hereinabove set forth, as a means of inducing purchasers thereof to purchase respondent's said product in preference to candy offered for sale and sold by his 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 packages of candy.

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 the common law and criminal statutes have long deemed contrary to public policy; and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has the dangerous 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 branch of the candy trade involved in this proceed-

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ing 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 the 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 equivalent methods. 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 his 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 the 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. Many of said competitors of respondent are unwilling to adopt and 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 that is contrary to public policy.

PAR. 7. The aforementioned method, acts and practices of the respondent are all to the prejudice of the public and of respondent's competitors as hereinabove alleged. Said method, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

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, on April 23, 1936, issued and served its complaint in this proceeding upon the respondent, Charles R. Luce, individually and as trustee, trading as Luce & Company, charging him with the use of unfair methods of competition in commerce in violation of the provisions of said act. Respondent did not file answer to said complaint, and, commencing July 10, 1936, testimony and other evidence in support of the allegations of the complaint were introduced by Henry C. Lank and P. C. Kolinski, attorneys for the Commission, before Miles J. Furnas, 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. Respondent was represented by counsel but offered no testimony or other evidence in opposition to the charges of the complaint.

Thereafter this proceeding regularly came on for final hearing before the Commission on said complaint, the testimony and other evidence duly recorded and filed in the office of the Commission, respondent having indicated that he did not desire to file any brief or to orally argue the matter; and the Commission, having duly considered the matter and being 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 is an individual and the sole trustee of the trust estate doing business as Luce & Company. He has his principal office and place of business at 350 Mercer Street, in the city of Jersey City, State of New Jersey, and is now, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to wholesale dealers and jobbers located at points in the various States in the eastern part of the United States, and causes said candy when so sold to be shipped or transported from his principal place of business in the State of New Jersey to purchasers thereof in New Jersey and in other States in the eastern part of the United States at their respective places of business. In so carrying on said business respondent is and has been

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engaged in interstate commerce and is and has been in active competition with other individuals and with partnerships and corporations engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. Among the candy manufactured and sold by respondent were assortments known and designated by respondent as "Lucky Winner," "Lucky Smokes," and "Big Winner." Said assortments were composed of a number of pieces of candy of uniform size and shape, together with a number of packages of candy, which packages of candy were given as prizes to purchasers of said pieces of candy of uniform size and shape, in the following manner:

The majority of said pieces of candy of uniform size and shape in said assortment had centers of the same color, but a small number of said pieces of candy had centers of a different color. Said pieces of candy of uniform size and shape retailed at the price of 1¢ each, but the purchasers who procured one of the said pieces of candy having a center colored differently from the majority were entitled to receive, and were to be given free of charge, one of the said packages of candy heretofore referred to. The color of the center of said pieces of candy of uniform size and shape was effectively concealed from purchasers and prospective purchasers until a selection had been made and the piece of candy selected broken open. The aforesaid purchasers, who procured a piece of candy of uniform size and shape having a center colored differently from the majority, thus procured one of the said packages of candy wholly by lot or chance.

Respondent furnished to said wholesale dealers, with the "Lucky Winner" assortment, a display card to be used by the retail dealer in offering said assortment for sale to the public. The display card bore a legend or legends informing the prospective purchaser that the said assortment was being distributed in accordance with the above-described sales plan.

PAR. 3. The candy assortments involving the lot or chance feature, as described in paragraph 2 above, are generally referred to in the candy trade or industry as "break and take" assortments. Assortments of candy without the lot or chance feature in connection with their resale to the public are generally referred to in the candy trade or industry as "straight" goods. These terms will be used hereafter in these findings to designate these types of assortments.

PAR. 4. Numerous retail dealers purchased the said assortments described in paragraph 2 above from wholesale dealers and jobbers who in turn had purchased said assortments from respondent. Such retail dealers displayed said assortments for sale to the public as packed

and assembled by the respondent, and the candy contained in said assortments was sold and distributed to the consuming public in accordance with the above described sales plan.

PAR. 5. All sales made by respondent of assortments described in paragraph 2 hereof were absolute sales, and respondent retained no control in any way over the goods after they were delivered to the wholesale dealer or jobber. The assortments were assembled and packed in such manner that they were and might be displayed by the retail dealer for sale and distribution to the purchasing public in accordance with the sales plan described in said paragraph 2. The respondent had knowledge that said assortments would be resold to the purchasing public by retail dealers by lot or chance, and packed and assembled such candy in the way and manner described so that it could and would be resold to the public by retail dealers in the manner described.

PAR. 6. The sale and distribution of candy by the retail dealers by the method herein described is a sale and distribution of candy by lot or chance and constitutes a lottery or gaming device.

Competitors of respondent appeared as witnesses in this proceeding and testified, and the Commission finds as a fact, that many competitors regard such methods of sale and distribution as morally bad and as encouraging gambling especially among children; as injurious to the candy industry because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several States. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. The retailers, finding that they could dispose of more candy by the "break and take" method, bought from respondent and others employing the same methods of sale, and thereby trade was diverted to respondent and others using similar methods from said competitors. Said competitors can compete on even terms only by giving the same or similar devices to retail dealers. This they are unwilling to do, and their sales of "straight" candy show a continued decrease.

In order to meet the competition of manufacturers who sell and distribute candy which is resold by such methods, some competitors of respondent have begun the sale and distribution of candy for resale to the public by lot or chance. The use of such methods by respondent in the sale and distribution of his candy was prejudicial and injurious to the public and his competitors and resulted in the diversion of trade to respondent from said competitors, and was a restraint

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upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 7. There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize assortments and who sold their "straight" candy in interstate commerce in competition with the "break and take" assortments of respondent and other manufacturers of similar candy. The sale of candy without a lottery or gaming feature in connection therewith is adversely affected by the sale of "break and take" candy, and manufacturers of the former type of candy have noted a marked decrease in the sales of their products whenever and wherever the lottery or prize candy has appeared in their market. This decrease in the sales of "straight" candy is principally due to the gambling or lottery features connected with the "break and take" candy.

PAR. 8. The principal demand in the trade for the "break and take" candy comes from the small retailers. The stores of these small retailers are in many instances located near schools and attract the trade of school children. The consumers or purchasers of the lottery or prize assortments are principally children, and because of the lottery or gambling feature connected with the "break and take" assortments and the possibility of becoming a winner it has been observed that the children purchase them in preference to the "straight" candy when the two types of assortments are displayed side by side.

The children prefer to purchase the lottery or prize assortments of candy because of the gambling feature connected with their sale. The sale and distribution of "break and take" assortments of candy, or of candy which has connected with its sale to the public the means or opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children who comprise by far the largest class of purchasers and consumers of this type of candy.

PAR. 9. The respondent testified, and the Commission finds, that the gross annual sales of the respondent are between \$80,000 and \$90,000; that the respondent sold his "break and take" assortments described in paragraph 2 hereof for a few months only, discontinuing the sale thereof during March or April 1936; and that the "break and take" assortments were a minor part of the respondent's total business.

PAR. 10. The Commission further finds that the sale and distribution in interstate commerce of assortments so packed and assembled as to enable retail dealers, without alteration, addition or rearrangement, to resale the same to the consuming public by lot or chance is contrary to public policy.

Order

CONCLUSION

The aforesaid acts and practices of the respondent, Charles R. Luce, individually and as trustee, trading as Luce & Company, under the conditions and circumstances set forth in the foregoing findings of fact, were all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in commerce and constitute a violation of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the testimony and other evidence taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint, no testimony or other evidence haveing been offered for or on behalf of respondent in opposition thereto; and the Commission having made its findings as to the facts and its conclusion that said respondent has violated 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."

It is ordered, That the respondent, Charles R. Luce, individually and as trustee, trading as Luce & Company, his agents, representatives, and employees, in the offering for sale, sale, and distribution in interstate commerce of candy, do cease and desist from:

1. Selling and distributing to jobbers and wholesale dealers for resale to retail dealers candy so packed and assembled that sales of such candy to the general public are to be made or may be made by means of a lottery, gaming device, or gift enterprise.

2. Supplying to or placing in the hands of wholesale dealers and jobbers assortments of candy which are used or which may be used, without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy contained in said assortments to the public.

3. Packing or assembling in the same assortment of candy for sale to the public at retail pieces of candy of uniform size and shape having centers of different color, together with small packages of candy, which said small packages of candy are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

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4. Furnishing to wholesale dealers and jobbers display cards, either with assortments of candy or separately, bearing a legend or legends informing the purchaser that the candy is being sold to the public by lot or chance, or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

It is further ordered, That the respondent shall, within 30 days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

MEMORANDUM

The Commission, as of February 11, 1937, made substantially similar findings and orders in two other cases, namely:

GEORGE CLOSE COMPANY, Docket 2688, in which complaint issued on Jan. 18, 1936, and in which respondent, Massachusetts corporation with principal office and place of business in Cambridge, Mass., sold similarly arranged assortments of penny candies with display cards, with the different colored centers entitling chance purchasers to one of the larger pieces included, and in which Commission found, as respects respondent's annual business (as set forth in Par. 9), that it was substantial, that it sold both its "straight" merchandise and "break and take" assortments in all states east of the Mississippi and in states west of the Rocky Mountains, and that the "break and take" assortments constituted the lesser part of the total volume of its business, but that it had been and was distributing numerous assortments involving same lot or chance principle and varying only in detail; and

YORK CARAMEL COMPANY, Docket 2747, in which complaint issued on Mar. 16, 1936, and in which respondent, Pennsylvania corporation with principal office and place of business in York, Pa., sold assortments of individually wrapped penny caramels of uniform size and shape, the concealed different color of a small number of which entitled person procuring such a piece to one of the larger pieces included, and in which Commission found, as set forth in Par. 9, that respondent's gross annual sales were about \$200,000, that it sold its aforesaid "break and take" assortments for a short time only and discontinued sale thereof shortly before issuance of Commission's complaint in matter, and that such "break and take" assortments were a minor part of its total volume of business.

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank and *Mr. P. C. Kolinski* for the Commission.

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IN THE MATTER OF
GRANITE ARTS, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2610. Complaint, Nov. 2, 1935—Decision, Feb. 16, 1937*

Where a corporation engaged in manufacture of monuments, tombstones and grave markers, through mixing granite chips or powder with cement and molding same into cast stone, and in the sale of its said products, which simulated in appearance and were used as a substitute for granite; in advertising its said products in farm papers of interstate circulation and through descriptive circulars mailed to prospective purchasers—

- (a) Represented its said monuments, etc., as "Victoria Granite" and featured the corporate and trade name adopted by it, in which were included words "Granite Arts," in its said advertising and in correspondence with customers and prospective customers, and caused its address in said newspaper advertisements to appear as "Graniteway, Omaha," and represented that its said products constituted "A Permanent Lasting Tribute of Love and Respect," and that "Our Memorials Will Endure Far into the Centuries," facts being it did not make any products from true granite, almost everlasting solid rock formation of great strength, etc., and known universally as a substance from which tombstones, monuments, and grave markers have long been made, and of which Victoria Granite is an old established type and well-known to trade, aforesaid address was purely fictitious, and aforesaid representations were otherwise false;
- (b) Represented, in its advertising matter, that its memorials were standardized to dimensions which had the official approval of practically every cemetery in the United States, facts being many such cemeteries have rules and regulations prohibiting any such markers, excepting those made of granite, bronze, or marble, and do not allow cast stone monuments, etc., to be placed therein, and such representations were false; and
- (c) Mailed circulars to prospective purchasers offering discount of 10% for ten days only from price listed in circulars, and sent, thereafter, to such prospects who did not reply, card, at end of such period, offering 20% discount, and third card thereafter to non-replying customers offering 30%, facts being price thus finally arrived at was not a special one for its products, but was regular and usual price at which it sold the same;

With effect of misleading purchasing public into false and erroneous belief that said representations were true, and into purchase of substantial quantities of its products on account of such belief, thus induced, and of unfairly diverting trade to it from competitors who did not make use of same or similar representations in manufacture, sale and distribution of aforesaid products; to the injury of competition in commerce:

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

Before *Mr. W. W. Sheppard*, trial examiner.

Mr. Morton Nesmith for the Commission.