

IN THE MATTER OF
MARYLAND BAKING COMPANY

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

Docket 3058. Complaint, Feb. 15, 1937—Decision, Aug. 18, 1937

Where a corporation engaged in manufacture, sale, and distribution of ice cream cones, including cones packed and assembled with small printed slips bearing various legends so as to involve use of a lottery scheme when sold and distributed by retail dealers to consumers thereof, and including legend "LUCKY! U-WIN-A Cone FREE With this COUPON," chance recipient of which thereby, and in accordance with explanatory display circulars furnished by it, depicting a child with ice cream cone and winning ticket, became entitled to receive, free of charge, another such cone—

Sold, thus packed, to wholesalers, jobbers, and ice cream manufacturers, for use, sale, and distribution by their retail dealer purchasers to purchasing public, in accordance with aforesaid sales plan, said cones and slips, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of its product in accordance with such sales plan, contrary to public policy long recognized by the common law and criminal statutes and to an established public policy of the United States Government, and in competition with many who, unwilling to offer or sell ice cream cones with printed slips as above described, or otherwise arranged and packed for sale to purchasing public so as to involve game of chance, refrain therefrom;

With capacity and tendency to induce purchasers to buy its said product in preference to cones offered and sold by its competitors, and with result that many dealers in and ultimate purchasers of ice cream cones were attracted by its said method and manner of inserting in a number thereof printed slips entitling purchasers to free ice cream cones, and by element of chance involved in sale thereof as above described, and were thereby induced to buy its said products, containing such printed slips and sold by it, in preference to those offered and sold by said competitors who do not use same or equivalent method, and with tendency and capacity, by reason of said game of chance, to divert to it trade and custom from its said competitors who do not use such or equivalent method, exclude from said trade all competitors who are unwilling to and do not use such method because unlawful, lessen competition therein, and tend to create a monopoly thereof in it and such other distributors of ice cream cones as do use same or equivalent method, deprive purchasing public of benefit of free competition in trade involved, and eliminate therefrom all actual, and exclude therefrom all potential, competitors who do not adopt and use said or equivalent method:

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

Complaint

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

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

Mr. Leslie E. Salter, of Chicago, Ill., 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 Maryland Baking Company, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, 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, Maryland Baking Company, is a corporation organized and operating under the laws of the State of Maryland, with its principal office and place of business located at 1200 South Eutaw Street, Baltimore, Md. Respondent is now, and for several years last past has been, engaged in the manufacture of ice cream cones and in the sale and distribution thereof to wholesale dealers, jobbers, and ice cream manufacturers. It causes, and has caused, its said products when sold to be transported from its principal place of business in Baltimore, Md., to purchasers thereof in the State of Maryland and in other States of the United States at their respective places of business. There is now, and has been for several years last past, a constant course of trade and commerce by said respondent in said ice cream cones between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other corporations and with partnerships and individuals engaged in the manufacture of ice cream cones and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent, on or about May 1, 1936, began the sale and distribution, and since said date has continued the sale and distribution to wholesale dealers and jobbers and ice cream manufacturers of ice cream cones packed and assembled with small printed slips therein so as to involve the use of a lottery scheme when sold and distributed by retail dealers to the consumers thereof. Respond-

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ent has had printed small slips of paper bearing various legends, and a few of said printed slips bear the following legend, to wit:

LUCKY!
U-WIN-A Cone
FREE
with this
COUPON

The ultimate consumer procuring a cone containing one of the above printed slips is entitled to receive, and is to be given free of charge, another ice cream cone. The printed slips are so placed in the cones that the ultimate consumer cannot ascertain whether or not he is entitled to a free ice cream cone until after his purchase has been made and the cone partially consumed. The fact as to whether the ultimate purchaser receives an additional ice cream cone free of charge is thus determined wholly by lot or chance. Respondent furnishes with cartons of ice cream cones containing the above described printed slips a display circular bearing the following legends, to wit:

(Representation of a child holding an
ice cream cone and a winning ticket)
GEE—AM I LUCKY!
U-WIN-A FREE
cone if you find a
winning slip in the tip

PAR. 3. The wholesale dealers and jobbers and ice cream manufacturers to whom respondent sells the above described ice cream cones containing said printed slips resell said cones, as packed by respondent, to retail dealers and said retail dealers sell and distribute said cones, after placing ice cream therein, 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 its product in accordance with the sales plan hereinabove set forth, and said sales plan has the capacity and tendency to induce purchasers thereof to purchase respondent's said product in preference to ice cream cones offered for sale and sold by its competitors.

PAR. 4. The sale of said ice cream cones to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure an additional ice cream cone. The use by respondent of said method in the sale of ice cream cones, and the sale of ice cream cones 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. Many persons, firms, and corporations who make and sell ice cream cones in competition with respondent are unwilling to offer for sale or sell said ice cream cones with printed slips 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 and ultimate purchasers of ice cream cones are attracted by respondent's said method and manner of inserting in some of the cones printed slips entitling ultimate purchasers to free ice cream cones and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said ice cream cones containing said printed slips and sold by respondent in preference to ice cream cones 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 its said competitors who do not use the same or an equivalent method; to exclude from said 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 trade and to tend to create a monopoly of said trade in respondent and such other distributors of ice cream cones as use the same or an equivalent method; and to deprive the purchasing public of the benefit of free competition in said trade. The use of said method by respondent has the tendency and capacity to eliminate from said 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. 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 February 15, 1937, issued and on

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February 17, 1937, served its complaint in this proceeding upon the respondent, Maryland Baking Company, a corporation charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, the Commission by order entered herein on August 9, 1937, granted respondent's request for permission to withdraw said answer and to file in lieu thereof its substitute answer (undated) admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the substitute answer; 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, Maryland Baking Company, is a corporation organized and operating under the laws of the State of Maryland, with its principal office and place of business located at 1200 South Eutaw Street, Baltimore, Md. Respondent is now, and for several years last past has been engaged in the manufacture of ice cream cones and in the sale and distribution thereof to wholesale dealers, jobbers, and ice cream manufacturers. It causes and has caused, its said products when sold to be transported from its principal place of business in Baltimore, Md., to purchasers thereof in the State of Maryland and in other States of the United States at their respective places of business. There is now, and has been for several years last past, a constant course of trade and commerce by said respondent in said ice cream cones between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other corporations and with partnerships and individuals engaged in the manufacture of ice cream cones and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent on or about May 1, 1936, began the sale and distribution, and since said date has continued the sale and distribution to wholesale dealers and jobbers and ice cream manufacturers of ice cream cones packed and assembled with small

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printed slips therein so as to involve the use of a lottery scheme when sold and distributed by retail dealers to the consumers thereof. Respondent has had printed small slips of paper bearing various legends, and a few of said printed slips bear the following legend, to wit:

LUCKY!
U-WIN-A Cone
FREE
With this
COUPON

The ultimate consumer procuring a cone containing one of the above printed slips is entitled to receive, and is to be given free of charge, another ice cream cone. The printed slips are so placed in the cones that the ultimate consumer cannot ascertain whether or not he is entitled to a free ice cream cone until after his purchase has been made and the cone partially consumed. The fact as to whether the ultimate purchaser receives an additional ice cream cone free of charge is thus determined wholly by lot or chance. Respondent furnishes with cartons of ice cream cones containing the above described printed slips a display circular bearing the following legends, to wit:

(Representations of a child holding an
ice cream cone and a winning ticket)

GEE—AM I LUCKY!

U-WIN-A FREE

cone if you find a winning slip in the tip

PAR. 3. The wholesale dealers and jobbers and ice cream manufacturers to whom respondent sells the above described ice cream cones containing said printed slips resell said cones as packed by respondent, to retail dealers and said retail dealers sell and distribute said cones, after placing ice cream therein 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 its products in accordance with the sales plan hereinabove set forth and said sales plan has the capacity and tendency to induce purchasers thereof to purchase respondent's said product in preference to ice cream cones offered for sale and sold by its competitors.

PAR. 4. The sale of said ice cream cones to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure an additional ice cream cone. The use by respondent of said method in the sale of ice cream cones, and the sale of ice cream cones by and through the use thereof and by the aid of

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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. Many persons, firms, and corporations who make and sell ice cream cones in competition with respondent are unwilling to offer the sale or sell said ice cream cones with printed slips as above described, 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 and ultimate purchasers of ice cream cones are attracted by respondent's said method and manner of inserting in some of the cones printed slips entitling ultimate purchasers to free ice cream cones and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said ice cream cones containing said printed slips and sold by respondent in preference to ice cream cones offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method. 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 its said competitors who do not use the same or an equivalent method; to exclude from said 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 trade and to tend to create a monopoly of said trade in respondent and such other distributors of ice cream cones as use the same or an equivalent method; and to deprive the purchasing public of the benefit of free competition in said trade. The use of said method by respondent has the tendency and capacity to eliminate from said trade all actual competitors and to exclude therefrom all potential competitors who do not adopt and use said method or an equivalent method.

CONCLUSION

The aforesaid method, acts, and practices of respondent, Maryland Baking Company, a corporation, under the conditions and circumstances set forth in the foregoing findings of fact, are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the substitute answer (undated) filed herein by respondent admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, 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, Maryland Baking Company, a corporation, its subsidiaries, officers, agents, representatives, and employees, in connection with the offering for sale, sale, and distribution in interstate commerce of ice cream cones, do forthwith cease and desist from:

1. Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, ice cream cones so packed and assembled that sales of such ice cream cones 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 or retail dealers, packages or assortments of ice cream cones 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 ice cream cones in said packages or assortments to the public.

3. Packing or assembling in packages or assortments of ice cream cones, for sale to the public at retail, printed slips which are for use, or which may be used, in distributing or selling said ice cream cones to the public at retail.

4. Furnishing to retail and wholesale dealers and jobbers printed slips, either with packages or assortments of ice cream cones or separately, a small number of which printed slips bear a legend or legends or statements informing the purchasing public that another ice cream cone will be delivered free of charge or as a prize.

5. Furnishing or supplying to wholesale dealers and jobbers, for distribution to retail dealers or to retail dealers direct, display circulars or other advertising material bearing a legend or legends or statements informing the purchasing public that the ice cream cones

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are being sold to the public in accordance with a sales plan which constitutes a lottery, gaming device or gift enterprise.

It is further ordered, That the respondent, Maryland Baking Company, a corporation, shall, within 60 days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth.

Syllabus

IN THE MATTER OF

WESLEYAN DIESEL SERVICE, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3097. Complaint, Apr. 6, 1937—Decision, Aug. 18, 1937*

Where a corporation engaged in sale and distribution of correspondence courses of study in the installation, care, and maintenance of Diesel engines to members of the public in the various States and in the District of Columbia, in substantial competition with others engaged in sale and distribution of such courses of study and instruction in the same and allied fields in commerce among the various States and in aforesaid District, and including among those engaged in sale of such courses pertaining to Diesel engines as aforesaid, competitors who do not misrepresent the nature of their courses nor make untrue claims therefor; in soliciting sale of its said courses through statements and representations circulated among the various States in newspapers, periodicals, booklets, circulars, and general business correspondence, and through agents and radio broadcasts, to pupils and prospective pupils—

- (a) Represented that there was a great demand for men trained to work with Diesel engines, and that it had not been able to fill the demand therefor, and that it wanted "to consider a few young men mechanically inclined" and was selecting and training for service and installation work on such engines a limited number of young men, and that a job was "practically certain," facts being there was no great demand for such men, it was not selecting or restricting number of its pupils for such courses to those possessing certain qualifications, but accepting all members of the public paying the required price, and positions were not available to all students completing its courses;
- (b) Represented that its instruction service included careful handling and grading of the written work of students by instructors who were competent and qualified to do such work, and that students finishing its said course were qualified to install, maintain, and service such engines, facts being its said instruction service did not include careful handling and grading of written work, such work was not handled or graded by any competent person or persons qualified so to do or to make constructive suggestions in regard thereto, and students finishing its course were not qualified and did not acquire sufficient knowledge therefrom to enable them properly to install, operate, or service such engines;
- (c) Represented that after the completion of its said course, the students had the privilege of entering another institution for practical shop training at a named total tuition fee, and that such tuition was "special" to such students and lower than the usual amount charged therefor, facts being practical training in shop work referred to as "special" in price of tuition to those students was not such, in that tuition fee to said students was not lower than usual amount charged therefor; and
- (d) Represented that it maintained branches of its school in certain named cities other than the city of its location, and maintained a free employment service for a period of two years for the benefit of those students com-