

Syllabus

IN THE MATTER OF

MILKO CONE & BAKING CO., INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 3046. Complaint, Feb. 1, 1937—Decision, Sept. 3, 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 "Your lucky day. Return this slip where you bought your Milko cone, and get a FREE package of gum," chance recipient of which printed slip, so placed in cones that ultimate consumer could not ascertain whether or not he was entitled to free package of chewing gum until after his purchase had been made and cone partially consumed, became entitled thereby, and in accordance with verses on explanatory display circulars furnished by it free of charge, to such "5¢ package of chewing gum"—

Sold, thus packed, said cones to wholesalers, jobbers, and ice cream manufacturers for use, sale, and distribution by their retail dealer purchasers in accordance with aforesaid sales plan, 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, and in competition with many unwilling to adopt and use said or any method involving game of chance to win by chance or any other method contrary to public policy;

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 packages of chewing gum, 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:

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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.

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

Mr. Henry C. Lank and *Mr. P. C. Kolinski* for the Commission.
Beach, Fathchild & Scofield, 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 Milko Cone & Baking Co., Inc., 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 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, Milko Cone & Baking Co., Inc., is a corporation organized and operating under the laws of the State of Illinois, with its principal office and place of business located at 431 North Lincoln Street, Chicago, Ill. 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 located at points in the State of Illinois and in other States of the United States, and causes and has caused its said products when so sold to be transported from its principal place of business in Chicago, Ill., to purchasers thereof in the State of Illinois and 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 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, 1935, 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

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and distributed by retail dealers to the consumers thereof. Respondent has had printed small slips of papers bearing various legends, and a few of said printed slips bear the following legend, to wit:

Your lucky day

Return this slip where you bought your Milko
cone, and get a FREE package of gum

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, a package of chewing gum. The printed slips are so placed in the cones that the ultimate consumer cannot ascertain whether or not he is entitled to a free package of chewing gum until after his purchase has been made and the cone partially consumed. The fact as to whether the ultimate purchaser receives a package of chewing gum 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:

Your FORTUNE told
with ice cream cold

5¢

Look for a lucky ticket.

Get your prize if you pick it!

A FREE 5¢ package of chewing gum
for the lucky ticket

Milko SUR-PRIZE ice cream cone

PAR. 3. The wholesale dealers and jobbers and ice cream manufacturers to whom respondent sells the above described ice cream cones containing 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 of inducing 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 a package of chewing gum. 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

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to an established public policy of the Government of the United States. The use by respondent of said method has the tendency unduly to hinder competition or to create a monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the ice cream cone manufacturing business competitors who do not adopt and use the said 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 ice cream cones in competition with respondent, as above alleged 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 printed slips entitling ultimate purchasers to free packages of chewing gum 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. 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 February 1, 1937, issued and on February 4, 1937, served its complaint in this proceeding upon the respondent, Milko Cone & Baking Co., Inc., 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 dated July 9, 1937, 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, Milko Cone & Baking Co., Inc., is a corporation organized and operating under the laws of the State of Illinois, with its principal office and place of business located at 431 North Lincoln Street, Chicago, Ill. 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 located at points in the State of Illinois and in other States of the United States, and causes and has caused its said products, when so sold, to be transported from its principal place of business in Chicago, Ill., to purchasers thereof in the State of Illinois and 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 said ice cream cones between and

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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, 1935, 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. Respondent has had printed small slips of paper bearing various legends, and a few of said printed slips bear the following legend, to wit:

Your lucky day
Return this slip where you bought your Milko
cone, and get a FREE package of gum

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, a package of chewing gum. The printed slips are so placed in the cones that the ultimate consumer cannot ascertain whether or not he is entitled to a free package of chewing gum until after his purchase has been made and the cone partially consumed. The fact as to whether the ultimate purchaser receives a package of chewing gum 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: .

Your FORTUNE told
with ice cream cold
5¢
Look for a lucky ticket
Get your prize if you pick it!
A FREE 5¢ package of chewing gum
for the lucky ticket
Milko SUR-PRIZE ice cream cone

PAR. 3. The wholesale dealers and jobbers and ice cream manufacturers, to whom respondent sells the above described ice cream cones containing 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 of inducing 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 a package of chewing gum. 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. The use by respondent of said method has the tendency unduly to hinder competition or to create a monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the ice cream cone manufacturing business competitors who do not adopt and use the said 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 ice cream cones in competition with respondent are unwilling to offer for 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 printed slips entitling ultimate purchasers to free package of chewing gum 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

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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. 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.

CONCLUSION

The aforesaid method, acts and practices of respondent, Milko Cone & Baking Co., Inc., 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 dated July 9, 1937, filed herein by the 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, Milko Cone & Baking Co., Inc., a corporation, its 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 mean 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 a 5¢ package of chewing gum 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 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, Milko Cone & Baking Co., Inc., 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.

IN THE MATTER OF
WOLF DRUG COMPANY ET AL.

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

Docket 3124. Complaint, May 6, 1937—Decision, Sept. 3, 1937

Where four corporations engaged in sale, distribution, and transportation of products of a purported medicinal character, into and through the various States and the District of Columbia, under direction and control of certain individuals, owners of all, or virtually all, of their capital stock, and said individuals, in substantial competition with others engaged in sale, distribution, and transportation, as aforesaid, of medicinal products sold and intended for sale and use for same purposes for which said products of said corporations and individuals were sold and intended for sale and use, and including among their competitors those engaged in manufacture, sale, and distribution in commerce, as above set forth, of commodities represented as effective remedies or cures for similar diseases, but who do not falsely represent the curative value thereof or falsely represent that they maintain an "institute," laboratories or other establishments at Battle Creek, Mich., or at any other place, or that the commodities to be purchased from them have been prepared and manufactured according to a prescription of an accredited physician or physicians, or tested by accredited chemists—

- (a) Caused trade name "Health Institute, Battle Creek, Michigan," to be prominently and conspicuously displayed and featured, together with various statements describing their aforesaid products, in newspaper advertisements, advertising folders, pamphlets, circulars, letters, and other literature, circulated through the several States and aforesaid District to customers and prospective customers, and through radio broadcasts into other States, notwithstanding fact they maintained no laboratories or clinics at aforesaid city or at any other place, had in their employ no chemists or others trained in the conduct of analyses, and neither undertook nor carried on any researches, experiments, or analyses, and, other than maintenance or a mailing address for reception and forwarding of mail to their various places of business, had no connection with aforesaid city, but adopted aforesaid term to capitalize upon the particular significance associated by medical profession and general public with name "Battle Creek" as standing for locality associated with efficient, reliable, and successful conduct of institutions, asylums, sanitoriums, and hospitals;
- (b) Represented, as aforesaid, through use of such words as "W. J. Jones, M. D.," or "Dr. Kenyon," in connection with commodities offered and sold by them, that commodities in question were made according to formula, or under the supervision, of a doctor of medicine, notwithstanding facts none of such commodities, as sold or offered by them, were or had been prepared according to any formula discovered or prescribed by any such doctor, there was no accredited physician bearing such name or names connected with them in any capacity, and commodities thus sold were not