

IN THE MATTER OF
THE WM. M. HARDIE COMPANY

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

Docket 3209. Complaint, Aug. 21, 1937—Decision, Nov. 1, 1937

Where a corporation engaged in manufacture and sale of candy, including certain assortments which were so packed and assembled as to involve, or which were designed to or might involve, use of a lottery scheme when sold and distributed to ultimate consumers thereof, and which were composed of two packages separately packed, as a subterfuge and in an effort to avoid effect of selling candy to be distributed by lottery scheme, and sometimes separately billed, but with knowledge and intent that assortments might be, and in many cases would be, resold at retail by lottery scheme, and containing, respectively, number of small penny pieces of uniform size and shape, a few of which had centers of a color different from that of those of majority, and number of larger pieces or bars of candy, to be given without charge to those securing, by chance, one of said penny pieces, colored center of which differed, as aforesaid, from that of the majority of pieces—

Sold, to wholesalers, jobbers, and retailers, for display and resale to purchasing public in accordance with aforesaid sales plan, said assortments, and thereby supplied to and placed in the hands of others the means of conducting, and by which they did conduct, lotteries in the sale of its said products in accordance with such 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 candy so packed and assembled as above described, or otherwise arranged and packed for sale to purchasing public, as to involve a game of chance, refrain therefrom;

With capacity and tendency to induce purchasers to buy its said product in preference to candy offered and sold by its competitors, and with result that many dealers in and ultimate purchasers of candy were attracted by said method and manner of packing same and by element of chance involved in sale thereof as above described, and were thereby induced to purchase its candy, so packed and sold by it, in preference to that offered and sold by its competitors who do not use same or equivalent method, and with tendency and capacity, because of said game of chance, to divert trade and custom from its competitors as aforesaid, exclude from candy trade all competitors who are unwilling to and do not use such or an equivalent method as unlawful, lessen competition therein, and tend to create a monopoly thereof in it and such other distributors as do use same or equivalent method, deprive purchasing public of benefit of free competition in trade in question, and eliminate from said trade all actual, and exclude therefrom all potential competitors who do not adopt and use such or an equivalent method:

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Complaint

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 in commerce.

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

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

Bulkley, Hauxhurst, Inglis & Sharp, of Cleveland, Ohio, 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 The Wm. M. Hardie 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 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. The respondent, The Wm. M. Hardie Company, is a corporation organized and doing business under the laws of the State of Ohio, with its principal office and place of business located at 1584 East 19th Street, Cleveland, Ohio. Respondent is now, and for several years last past has been, engaged in the manufacture, sale, and distribution of candy to wholesale dealers and jobbers and to retail dealers located at points in the various States of the United States. Respondent causes and has caused its said products when sold to be transported from its principal place of business in the city of Cleveland, State of Ohio, to purchasers thereof in Ohio and in other States of the United States at their respective points of location. 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 said business, respondent is in competition with other corporations and with partnerships and individuals engaged in the manufacture, sale, and distribution of candy 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, the respondent sells and has sold to wholesale dealers and jobbers and retail dealers various assortments of candy so packed and assembled as to involve, or which are designed to or may involve, the use of a lottery scheme when sold and dis-

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tributed to the ultimate consumers thereof. Said assortments are composed of two separate packages of candy. One package contains a number of small pieces of candy of uniform size and shape, the majority of which have centers of the same color, but a small number of which have centers of a different color. The other package contains a number of larger pieces or bars of candy, the number thereof being approximately the same as the number of small pieces of candy of uniform size and shape with centers colored differently from the majority in the package first above described. The color of the centers of the small pieces of candy in the package first above described is effectively concealed from customers and prospective customers until a selection has been made and the piece of candy selected broken open. The said pieces of candy of uniform size and shape retail at the price of 1¢ each, but the purchaser who procures one of the 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 larger pieces or bars of candy contained in the second package referred to above. The aforesaid purchasers of said candy of uniform size and shape, who procure a piece of candy having a center colored differently from the majority, thus procure one of the said larger pieces or bars of candy wholly by lot or chance.

While the two packages above described are sometimes billed separately, the respondent sells, in practically all instances, the same number of each to its customers. The purpose of respondent in so packing this assortment in separate packages is a subterfuge and an effort to avoid the effect of selling candy to be distributed by a lottery scheme, and the respondent is placing in commerce merchandise to be sold by means of a lottery scheme. Respondent packs this assortment so that it may be resold at retail by a lottery scheme, and respondent knows that in many cases it will be and is sold by means of a lottery scheme.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortment resell said assortment to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct 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 its products in accordance with the sales plan hereinabove set forth. Said sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its 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 larger pieces or bars 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 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 candy trade 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 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 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 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 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. The aforementioned method, acts, and practices of 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, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

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 August 21, 1937, issued and on August 23, 1937, served its complaint in this proceeding upon the respondent, The Wm. M. Hardie Company, a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. On September 29, 1937, respondent filed its answer dated September 15, 1937, in which answer it admitted all the material allegations of the complaint to be true and stated that it waived hearing on the charges set forth in said complaint and consented that, without further evidence or other intervening procedure, the Commission might issue and serve upon it findings as to the facts and conclusion and an order to cease and desist from the violations of law charged in the complaint. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the answer thereto, and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, The Wm. M. Hardie Company, is a corporation organized and doing business under the laws of the State of Ohio, with its principal office and place of business located at 1584 East 19th Street, Cleveland, Ohio. Respondent is now and for several years last past has been, engaged in the manufacture, sale, and distribution of candy to wholesale dealers and jobbers and to retail dealers located at points in the various States of the United States. Respondent causes and has caused its said products when sold to be transported from its principal place of business in the city of Cleveland, State of Ohio, to purchasers thereof in Ohio and in other States of the United States at their respective points of location. 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 said business, respondent is in competition with other corporations

and with partnerships and individuals engaged in the manufacture, sale, and distribution of candy 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, the respondent has sold to wholesale dealers and jobbers and to retail dealers various assortments of candy so packed and assembled as to involve, or which were designed to or might involve, the use of a lottery scheme when sold and distributed to the ultimate consumers thereof. Said assortments were composed of two separate packages of candy. One package contained a number of small pieces of candy of uniform size and shape, the majority of which had centers of the same color but a small number of which had centers of a different color. The other package contained a number of larger pieces or bars of candy, the number thereof being approximately the same as the number of small pieces of candy of uniform size and shape with centers colored differently from the majority in the package first above described. The color of the centers of the small pieces of candy in the package first above described was effectively concealed from customers and prospective customers until a selection had been made and the piece of candy selected broken open. The said pieces of candy of uniform size and shape retailed at the price of 1¢ each, but the purchaser who procured one of the said candies having a center colored differently from the majority was entitled to receive and was to be given free of charge one of the larger pieces or bars of candy contained in the second package referred to above. The aforesaid purchasers of said candy of uniform size and shape, who procured a piece of candy having a center colored differently from the majority, thus procured one of the said larger pieces or bars of candy wholly by lot or chance.

While the two packages above described were sometimes billed separately, the respondent sold in practically all instances the same number of each to its customers. The purpose of respondent in so packing said assortment in separate packages was a subterfuge and an effort to avoid the effect of selling candy to be distributed by a lottery scheme, and the respondent was placing in commerce merchandise to be sold by means of a lottery scheme. Respondent packed this assortment so that it might be resold at retail by a lottery scheme, and the respondent knew that in many cases it would be and was sold by means of a lottery scheme.

PAR. 3. The wholesale dealers and jobbers to whom respondent sold its assortments resold the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sold direct exposed said assortments for sale and sold said candy to the purchasing public

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in accordance with the aforesaid sales plan. Respondent thus supplied to and placed 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 had the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure larger pieces or bars 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 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 candy trade 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, sell or distribute candy in competition with respondent are unwilling to offer for sale or sell candy so packed and assembled 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 in and ultimate purchasers of candy were 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 were 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 or did not use the same or an equivalent method. The use of said method by the respondent had the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from its said competitors who do or did 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 in 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

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method by respondent had the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do or did not adopt and use said method or an equivalent method.

The answer of the respondent states, and the Commission finds, that the respondent discontinued the sale and distribution of the assortments described in paragraph 2 hereof prior to the issuance of the said complaint.

CONCLUSION

The aforesaid method, acts and practices of the respondent, The Wm. M. Hardie Company, a corporation, 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 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 answer of 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 conclusion that the 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, The Wm. M. Hardie Company, a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution in interstate commerce of candy, 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, 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 or retail dealers assortments of candy which are used, or which may be used, without alternation or rearrangement of the contents of such assortments, to conduct a lottery, gaming device,

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or gift enterprise in the sale or distribution of the candy contained in said assortments to the public.

3. Packing or assembling, for sale to the public at retail, assortments of candy composed of two separate packages of candy, one package containing small pieces of candy of uniform size and shape having centers of different colors, and the other package containing larger pieces or bars of candy, which said larger pieces or bars of candy are to be given as prizes to the purchaser procuring a piece of candy having a center of a particular color from the first above described package.

It is further ordered, That the respondent, The Wm. M. Hardie Company, a corporation, shall, within 30 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

D. GOLDENBERG, INC., IN ITS OWN NAME AND RIGHT
AND TRADING AS P. C. SALES COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 1810. Complaint, May 19, 1937¹—Decision, Nov. 2, 1937*

Where a corporation engaged in manufacture and sale of candy, including certain assortments which were so packed and assembled as to involve, or which were designed to or might involve use of a lottery scheme when sold and distributed to ultimate consumers thereof, and which included assortments composed of (1) number of penny pieces of chocolate covered candy of uniform size and shape, together with number of larger pieces of candy to be given as prizes to chance purchasers of one of a relatively small number of said penny pieces, color of centers of which differed from that of those of the majority, and also together with small package of candy to be given, likewise free of charge, to purchaser of last of said penny pieces in assortment; and (2) number of individually wrapped bars of uniform size, shape and quality, price of which was one cent, two cents, or three cents, as determined by figure contained on slip of paper enclosed as concealed within the individual wrappings of said various pieces—

Sold, to wholesalers and to retailers for display and resale to purchasing public in accordance with aforesaid sales plan, said assortments, and thereby supplied to and placed in the hands of others the means of conducting and by which they did conduct, lotteries in the sale of such products in accordance with such plans, 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 candy so packed and assembled, or otherwise arranged and packed for sale to purchasing public, as to involve a game of chance, refrain therefrom;

With capacity and tendency to induce purchasers to buy its said products in preference to candy offered and sold by its competitors, and with result that many dealers in and ultimate purchasers of candy were attracted by its said methods and manner of packing same, and by element of chance involved in sale thereof, as above set forth, and thereby induced to purchase its said candy, thus packed and sold by it, in preference to that offered and sold by said competitors who do not use same or equivalent methods, and with tendency and capacity, because of said game of chance, to divert to it trade and custom from its said competitors as aforesaid, exclude from said trade all competitors who are unwilling to and do not use such or equivalent methods as unlawful, lessen competition therein and tend to create a monopoly thereof in it and such other distributors of candy as do use same or equivalent method, and deprive purchasing public of benefit of free competition in trade in question, and eliminate

¹ Amended and supplemental.