

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

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from said trade all actual, and exclude therefrom all potential, competitors who do not adopt and use such or equivalent methods:

Held, That such methods, 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 for the Commission.

Mr. William Ginsburg and *Mr. Isaac Ash*, of Philadelphia, Pa., for respondent.

AMENDED AND SUPPLEMENTAL COMPLAINT

Whereas, The Federal Trade Commission did heretofore, to wit, on May 1, 1930, issue its complaint herein charging and alleging that respondent herein was and had been guilty of unfair methods of competition in interstate 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"; and

Whereas, This Commission having reason to believe that respondent herein has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, other than and in addition to those in relation to which the Commission issued its complaint as aforesaid, and it appearing to said Commission that a further proceeding by it in respect thereof would be in the public interest;

Now, therefore, Acting in the public interest, pursuant to the provisions of the Act of September 26, 1914, aforesaid, the Federal Trade Commission charges that D. Goldenberg, Inc., a corporation, in its own name and right and trading as P. C. Sales Company, has been and now is using unfair methods of competition in commerce, as "commerce" is defined in said act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at I and Ontario Streets, in the city of Philadelphia, State of Pennsylvania. Respondent is, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to wholesale and 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 Philadelphia, State of Pennsylvania, to purchasers thereof in Pennsylvania and in other States of the United States at their re-

spective 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 of candy 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 sells and has sold to wholesale and retail dealers 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 distributed to the ultimate consumers thereof.

(a) One of said assortments of candy is composed of a number of pieces of chocolate covered candy of uniform size and shape, together with a number of larger pieces of candy and a small package of candy, which larger pieces of candy and small package of candy are to be given as prizes to purchasers of said chocolate covered candies in the following manner: the majority of the said chocolate covered candies in said assortment have centers of the same color, but a small number of said chocolate covered candies 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¢, but the purchaser who procures one of the said candies having a center of a color different from the majority of said candy is entitled to receive and is to be given free of charge one of the said larger pieces of candy, and the purchaser of the last piece of the aforesaid chocolate covered candy of uniform size and shape in said assortment is entitled to receive and is to be given free of charge the small package of candy heretofore referred to. The aforesaid purchasers of said candy, who procure a piece of candy having a center colored differently from the majority of the said pieces of candy, and the purchaser of the last piece of candy in said assortment, are thus to procure one of the said larger pieces of candy or the small package of candy wholly by lot or chance.

(b) Another assortment of candy which respondent was formerly distributing was composed of a number of candy bars of uniform size, shape, and quality, and each of said bars of candy was contained within a wrapper. Also, within each of said wrappers was a slip of paper which had printed thereon the retail price at which said piece of candy was to be sold to the consuming public. Said printed slip was effectually concealed from consumers and prospective consumers until a purchase had been made and the wrapper removed. The

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retail prices printed on said slips were 1¢, 2¢, or 3¢, and these were the prices which the purchaser paid the retail merchant. The ultimate consumers thus procured bars of candy of uniform size, shape and quality at a price of 1¢, 2¢, or 3¢, the said price being determined wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells and has sold its assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose and have exposed said assortments for sale and sell and have sold said candy to the purchasing public in accordance with the aforesaid sales plans. 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 plans hereinabove set forth; and said sales plans have 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 of candy or small packages of candy or bars of candy at a price less than 3¢. The use by respondent of said methods in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said methods, 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 methods 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 methods or equivalent or similar methods 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 methods 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 methods 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 equivalent methods; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are 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 equivalent methods; and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said methods 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 methods or equivalent methods.

PAR. 6. The aforementioned methods, acts and practices of respondent are all to the prejudice of the public and of respondent's competitors, as hereinabove alleged. Said methods, 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 May 19, 1937, issued and on May 20, 1937, served its amended and supplemental complaint in this proceeding upon the respondent, D. Goldenberg, Inc., a corporation in its own name and right and trading as P. C. Sales Company, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. On September 30, 1937, respondent filed its answer in which answer it admitted all the material allegations of the amended and supplemental complaint to be true and stated that it waived hearing on the charges set forth in said amended and supplemental 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 amended and supplemental complaint. Thereafter, this proceeding regularly came on for final hearing before the Commission

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on the said amended and supplemental 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. Respondent is a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at I and Ontario Streets, in the city of Philadelphia, State of Pennsylvania. Respondent is, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to wholesale and 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 Philadelphia, State of Pennsylvania, to purchasers thereof in Pennsylvania 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 of candy 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, the respondent sold to wholesale and retail dealers 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.

(a) One of said assortments of candy was composed of a number of pieces of chocolate covered candy of uniform size and shape, together with a number of larger pieces of candy and a small package of candy, which larger pieces of candy and small package of candy were given as prizes to purchasers of said chocolate covered candies in the following manner: The majority of the said chocolate covered candies in said assortment had centers of the same color, but a small number of said chocolate covered candies had centers of a different color. The said pieces of candy of uniform size and shape in said assortment retailed at the price of 1¢, but the purchaser who procured one of the said candies having a center of a color

different from the majority of said candy was entitled to receive and was to be given free of charge one of the said larger pieces of candy, and the purchaser of the last piece of the aforesaid chocolate covered candy of uniform size and shape in said assortment was entitled to receive and was to be given free of charge the small package of candy heretofore referred to. The aforesaid purchasers of said candy, who procured a piece of candy having a center colored differently from the majority of the said pieces of candy, and the purchaser of the last piece of candy in said assortment, were thus to procure one of the said larger pieces of candy or the small package of candy wholly by lot or chance.

(b) Another assortment of candy which respondent was formerly distributing was composed of a number of candy bars of uniform size, shape, and quality, and each of said bars of candy was contained within a wrapper. Also, within each of said wrappers was a slip of paper which had printed thereon the retail price at which said piece of candy was to be sold to the consuming public. Said printed slip was effectually concealed from consumers and prospective consumers until a purchase had been made and the wrapper removed. The retail prices printed on said slips were 1¢, 2¢, or 3¢, and these were the prices which the purchaser paid the retail merchant. The ultimate consumers thus procured bars of candy of uniform size, shape, and quality at a price of 1¢, 2¢, or 3¢, the said price being determined wholly by lot or chance.

PAR. 3. The wholesale dealers 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 have exposed said assortments for sale and have sold said candy to the purchasing public in accordance with the aforesaid sales plans. 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 plans hereinabove set forth; and said sales plans 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 (a) larger pieces of candy or small packages of candy, or (b) bars of candy at a price less than 3¢. The use by the respondent of said methods in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said methods, is a practice of the sort which the common law and crim-

inal 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 methods 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 methods or equivalent or similar methods 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 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 methods 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 equivalent methods. The use of said methods 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 equivalent methods; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are 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 equivalent methods; and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said methods 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 methods or equivalent methods.

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 filing of its answer.

CONCLUSION

The aforesaid methods, acts and practices of the respondent, D. Goldenberg, Inc., a corporation in its own name and right and trading as P. C. Sales Company, under the conditions and circum-

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stances 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 amended and supplemental complaint of the Commission and the answer of the respondent, admitting all the material allegations of the amended and supplemental 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, D. Goldenberg, Inc., a corporation, in its own name and right and trading as P. C. Sales Company, or trading under any other name, 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 alteration or rearrangement of the contents of such 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 package or assortment of candy for sale to the public at retail, pieces of candy of uniform size and shape having centers of different colors, together with larger pieces of candy and a small package of candy, which said larger pieces of candy and small package of candy are to be given as prizes to the purchaser procuring a piece of candy having a center of a particular color.

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4. Packing or assembling in the same package or assortment of candy for sale to the public at retail, bars of candy of uniform size, shape and quality containing within their wrappers tickets or printed slips bearing different prices.

It is further ordered, That the respondent, D. Goldenberg, Inc., 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.

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IN THE MATTER OF
HOFFMAN BEVERAGE COMPANY

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

Docket 2819. Complaint, May 26, 1936—Decision, Nov. 2, 1937

Where a corporation engaged in sale of beer, subjected to treatment and process making pasteurization unnecessary, and in distribution of said product in trade and commerce among the various States and in the District of Columbia, in substantial competition with those engaged in similar sale and distribution of such product—

Falsely and misleadingly disparaged products of competitors through representing, in advertising of its said product, that "Heat treating beer during bottling operations spoils the fresh taste," in conjunction with statement that such treating "is necessary in all other American breweries" except its own, and that its product was only unpasteurized bottled beer in America and through such label statements as that, due to avoidance of pasteurization, as above noted, "its fine vat quality is fully retained"; facts being that heat treating does not spoil fresh taste of properly pasteurized beer, as now treated pasteurization flavor is avoided, and ordinary consuming public would not be able to detect difference in taste due to pasteurization between pasteurized and other beer;

With effect of misleading and deceiving dealers and purchasing public into belief that beer products of its competitors were inferior in quality, purity or taste to its own, and with result that such dealers and purchasing public were induced, in reliance upon truth of its aforesaid representations, to purchase its said beer in preference to other products which were competitive as to price, quality, taste, and purity, and with effect of thereby diverting trade to it from its competitors who do not, in the aforesaid or any other manner, falsely disparage competitive products; to the substantial injury of substantial competition in commerce:

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

Before *Mr. John L. Hornor* and *Mr. John W. Norwood*, trial examiners.

Mr. PGad B. Morehouse for the Commission.

Mr. Walter H. Free of Hoguet, Neary & Campbell, of New York City, and *Mr. Edwin L. Gidley*, of Newark, N. J., 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 Hoffman Beverage Company, a corporation, hereinafter referred to as