

Syllabus

IN THE MATTER OF

BRADAS & GHEENS, INCORPORATED, AND C. E. GHEENS,
AN INDIVIDUAL TRADING AS BRADAS & GHEENSCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2914. Complaint, Jan. 14, 1937¹—Decision, Jan. 29, 1938*

Where a corporation engaged in manufacture and sale of candy, including packages or assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and which included assortments composed of number of penny pieces of uniform size and shape, together with number of larger pieces, to be given as prizes to chance purchasers of relatively few of said uniform pieces, centers of which differed in color from those of the majority—
Sold, to wholesalers 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 means of conducting lotteries in the sale of its products in accordance with said plan involving game of chance or sale of a chance to procure larger pieces, 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, so as to involve a game of chance or any other method of sale contrary to public policy, refrain therefrom;

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

Held, That such acts and practices were 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.

Guesmer, Carson & MacGregor, of Minneapolis, Minn., for respondents.

¹ Amended and supplemental.

AMENDED AND SUPPLEMENTAL COMPLAINT

Whereas, 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 heretofore on the 28th day of August 1936, issued its complaint charging C. E. Gheens, an individual trading as Bradas & Gheens, with using certain unfair methods of competition in commerce, as "commerce" is defined in said act, and it since having appeared to the Commission that Bradas & Gheens, Incorporated, a body corporate, with the aforesaid C. E. Gheens as principal stockholder thereof, on January 1, 1935, became and was the successor to the business theretofore carried on by the aforesaid C. E. Gheens:

Now, therefore, Pursuant to the provisions of the aforesaid act, the Commission having reason to believe that Bradas & Gheens, Incorporated, a corporation, as well as C. E. Gheens, an individual trading as Bradas & Gheens, hereinafter referred to as respondents, have been and are using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to the said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this its amended and supplemental complaint stating its charges in that respect as follows:

PARAGRAPH 1. The respondent, C. E. Gheens, from December 31, 1920, to December 31, 1934, was the sole owner of and conducted the business known as Bradas & Gheens, with his principal office and place of business located at 817 South Floyd Street in the city of Louisville, State of Kentucky, and was engaged in the business of manufacturing, selling, and distributing candy to wholesale and retail dealers located at points in the various States of the United States, and caused said products, when so sold, to be transported from his place of business in the State of Kentucky to purchasers thereof in other States of the United States at their respective places of business, and there was a constant course of trade and commerce between and among the various States of the United States.

The respondent, Bradas & Gheens, Incorporated, is a corporation organized and doing business under the laws of the State of Kentucky, with its office and principal place of business located at 817 South Floyd Street in the city of Louisville, State of Kentucky, and on the said 1st day of January 1935, said corporation became and was the successor to the business theretofore carried on by the aforesaid C. E. Gheens and thereafter was and has been engaged in manufacturing candy and in the sale and distribution thereof to wholesale and retail dealers located at points in the various States of the

United States, and causes said products, when so sold, to be transported from its place of business in the State of Kentucky to purchasers thereof in the State of Kentucky and in the other States of the United States at their respective places of business, and there is now and has been since January 1, 1935, a course of trade and commerce by said respondent in such candy between and among the States of the United States.

In the course and conduct of the said business, respondents have been in competition with other corporations and individuals and partnerships engaged in the sale and distribution of candy and candy products in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of the business as described in paragraph 1 hereof, respondents sell and have sold since on or about November 1935, to wholesale and retail dealers packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

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

PAR. 3. The wholesale dealers to whom respondents have sold said assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondents sell and have sold direct expose said assortments for sale and sell said candy to the purchasing public in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their product in accordance with the sales

plan hereinabove set forth, with the capacity and tendency of inducing purchasers thereof to purchase respondents' said product in preference to candy offered for sale and sold by their competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure packages of candy.

The use by respondents 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 respondents of said method has the dangerous tendency unduly to hinder competition or create monopoly in this, to wit: That the use thereof has the tendency and capacity to exclude from the branch of the candy trade involved in this proceeding competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme.

Many persons, firms, and corporations who make and sell candy in competition with the respondents, 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 respondents' 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 respondents in preference to candy offered for sale and sold by said competitors of respondents who do not use the same or equivalent methods. The use of said method by respondents has the tendency and capacity, because of said game of chance, to divert to respondents trade and custom from their 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 respondents and such other distributors of candy as use the same or an equivalent method; and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by the respondents has the tendency and capacity to eliminate from said candy trade all actual competitors and to exclude therefrom all

potential competitors who do not adopt and use said method or an equivalent method.

PAR. 6. Many of said competitors of respondents 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 respondents are all to the prejudice of the public and of respondents' 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 August 28, 1936, issued and served its complaint in this proceeding upon the respondents, Bradas & Gheens, Incorporated, a corporation, and C. E. Gheens, an individual trading as Bradas & Gheens, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. Thereafter, on January 14, 1937, the Commission issued and served its amended and supplemental complaint on the respondents, charging them with the use of unfair methods of competition in commerce other than and in addition to those in relation to which the Commission issued its complaint on August 28, 1936, as aforesaid. After the issuance of said complaint and the filing of respondents' answers, the Commission, by order entered herein, granted the request of respondent, Bradas & Gheens, Incorporated, for permission to withdraw its answer and to substitute therefor an amended answer 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, which amended 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 amended and supplemental complaint and amended answer of respondent, Bradas & Gheens, Incorporated; and answer of respondent, C. E. Gheens; 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, C. E. Gheens, from December 31, 1920, to December 31, 1934, was the sole owner of and conducted the business known as Bradas & Gheens, with his principal office and place of business located at 817 South Floyd Street in the city of Louisville, State of Kentucky, and was engaged in the business of manufacturing, selling, and distributing candy to wholesale and retail dealers located at points in the various States of the United States, and caused said products, when so sold, to be transported from his place of business in the State of Kentucky to purchasers thereof in other States of the United States at their respective places of business. On January 1, 1935, said respondent, C. E. Gheens, transferred and conveyed his said business known as Bradas & Gheens to the respondent, Bradas & Gheens, Incorporated. Respondent, C. E. Gheens, as an individual, has not engaged in the manufacture and sale of candy since January 1, 1935.

The respondent, Bradas & Gheens, Incorporated, is a corporation organized and doing business under the laws of the State of Kentucky, with its office and principal place of business located at 817 South Floyd Street in the city of Louisville, State of Kentucky, and on the said 1st day of January 1935, said corporation became and was the successor to the business theretofore carried on by the afore-said C. E. Gheens and thereafter was and has been engaged in manufacturing candy and in the sale and distribution thereof to wholesale and retail dealers located at points in the various States of the United States, and causes said products, when so sold, to be transported from its place of business in the State of Kentucky to purchasers thereof in the State of Kentucky and in the various other States of the United States at their respective places of business. There is now and has been since January 1, 1935, a course of trade and commerce by said respondent in such candy between and among the States of the United States.

In the course and conduct of the said business, respondent, Bradas & Gheens, Incorporated, is in competition with other corporations and individuals and partnerships engaged in the sale and distribution of candy and candy products in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of the business as described in paragraph 1 hereof, respondent, Bradas & Gheens, Incorporated, sells and has sold since on or about November 1935, to wholesale and retail dealers packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

One of said assortments consists of a number of pieces of candy of uniform size and shape, together with a number of larger pieces of candy, which larger pieces of candy are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner:

The majority of the said pieces of candy of uniform size and shape have centers of the same color, but a small number of said pieces of candy have centers of a different color. The said pieces of candy of uniform size and shape in said assortment retail at the price of 1 cent each, but the purchaser who procures one of said candies having a center colored differently from the majority is entitled to receive, and is to be given free of charge, one of the larger pieces of candy heretofore referred to. The color of the centers of said pieces of candy of uniform size and shape is effectively concealed from the purchaser and prospective purchaser until a selection has been made and the piece of candy broken open. The aforesaid purchasers of said candies, who procure a candy having a center colored differently from the majority of said pieces of candy of uniform size and shape in said assortment, thus procure one of the said larger pieces of candy wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent has sold said assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells and has sold direct expose said assortments 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 product in accordance with the sales plan hereinabove set forth, with the capacity and tendency of inducing purchasers thereof to purchase respondent's said product 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 found involves a game of chance or the sale of a chance to procure a number of larger pieces of candy.

The use by respondent of said method in the sale of candies, and the sale of candies 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 branch of the candy trade involved in this proceeding

competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme.

Many persons, firms, and corporations who make and sell candy in competition with the respondent 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, or any other method of sale that is contrary to public policy, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said method and manner of packing said candy, and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent, in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from 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 the respondent has the capacity and tendency 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.

CONCLUSION

The aforesaid acts and practices of the respondent, Bradas & Gheens, Incorporated, a corporation, are to the prejudice of the public and of 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, the answer of C. E. Gheens dated February 3, 1937, denying

the allegations of the said amended and supplemental complaint, and the amended answer of respondent, Bradas & Gheens, Incorporated, 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 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, Bradas & Gheens, Incorporated, its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of candy in interstate commerce or in the District of Columbia, do forthwith cease and desist:

1. Selling and distributing 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 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 which said larger pieces of candy are to be given as prizes to the purchaser procuring a piece of candy having a center of a particular color.

It is further ordered, That the amended and supplemental complaint herein be, and the same hereby is, dismissed as to the individual respondent, C. E. Gheens.

It is further ordered, That the respondent, Bradas & Gheens, Incorporated, 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.

IN THE MATTER OF
JOSEPH WEIDENHOFF, INC.

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

Docket 2675. Complaint, Dec. 31, 1935—Decision, Jan. 31, 1938

Where a corporation engaged in manufacture of electrical devices and automobile motor-testing devices, together with accessories, and constituting largest manufacturer and distributor of such devices in the United States, and in selling and shipping its various products among the various States to customers consisting generally of wholesale automotive supply dealers, for resale to purchasing public; following purchase of patent on vacuum gauge which it included as one of numerous parts made use of in its manufacture of certain testing devices or motor analyzers, and which (1) was only part therein so patented, (2) constituted only a small and minor part thereof in cost, in relative value, and in functioning of the complete device, and (3) was unrelated to many of the other unpatented parts included therein as aforesaid; and in competition with others likewise engaged in manufacturing, assembling, and selling in commerce similar testing devices consisting of a large number of separate and unrelated parts and items assembled as aforesaid—

- (a) Entered into and carried out agreements and understandings between itself and other manufacturers or distributors of such devices to fix and maintain prices to be exacted from purchasers thereof through the medium of license agreements or contracts negotiated by it through threatened infringement suits based on said patented vacuum gauge; and
- (b) Coerced, intimidated, and induced competitor manufacturers and distributors of such devices to raise and change their quoted prices to uniform prices fixed by understanding and agreement between it and them through such threatened suits based on presence of such small and relatively unimportant patented item in its said devices, and without confining itself in its said agreements to the use of said gauge as described and covered by its said patent or confining same to gauge itself, but including complete device with all its separate and unrelated parts and items in no way covered by its said patent;

With result that it was enabled, through said unlawful plan and scheme to control and restrain interstate commerce in such devices extending far beyond limits of its rights as owner of patent on specified use of said gauge, to control and restrain, as aforesaid, competition in commerce in such devices, and particularly and to a substantial extent, prices paid and to be paid for such devices by purchasers thereof, and to bring about an enhancement of such prices over those prevailing prior to said unlawful acts, and which, but therefor, would have continued to prevail, competitors were coerced and compelled by such acts to enter involuntarily into agreements restricting and preventing sales of such devices as aforesaid in free and open competition with each other or otherwise than at stipulated and fixed minimum prices, and there was a tendency to restrain, suppress, and unduly hamper and restrict free flow of said motor-testing devices in commerce among the various States and in said District, and otherwise to prejudice and injure