

IN THE MATTER OF
GUM, INCORPORATED

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

Docket 3467. Complaint, June 22, 1938—Decision, Aug. 31, 1938

Where a corporation engaged in manufacture and sale of assortments of chewing gum 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 large number of pieces of gum, together with push card, for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser received for penny paid pieces of gum ranging in number from 1 to 20, in accordance with particular number pushed by chance, and last sale in each of first 3 sections of card received 5 pieces, and last sale received 15, and other assortments involving lottery or chance feature similar to aforesaid, from which they varied in detail only—

Sold to retailers for display and resale to purchasing public, in accordance with aforesaid sales plans, such assortments, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of its said products in accordance with such plans, contrary to an established public policy of the United States Government and in violation of the criminal laws, and in competition with many who, unwilling to offer and sell gum or other confections so packed and assembled, or otherwise arranged and packed for sale to purchasing public, 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 gum or other confections offered and sold by its competitors, and with result that many dealers in and ultimate purchasers of such products were attracted by its said method and manner of packing same and by element of chance involved in sale thereof as above set forth, and thereby induced to buy its said gum, thus packed and sold by it, in preference to gum or other confections offered and sold by said competitors who do not use same or equivalent or similar method, and with tendency and capacity, because of said game of chance, to divert to it trade and customers from its said competitors as aforesaid, exclude from chewing gum and confection trade all competitors who are unwilling to and do not use such or equivalent or similar method as unlawful, lessen competition in said trade, and create monopoly thereof in it and such other distributors of such products as use same or equivalent methods, 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 methods:

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

Complaint

Mr. D. C. Daniel for the Commission.

Mr. Harry Shapiro, of Philadelphia, Pa., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Gum, Incorporated, a corporation, hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the 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, Gum, Incorporated, 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 3233 Woodland Avenue, Philadelphia, Pa. Respondent is now, and for some time last past has been, engaged in the manufacture of chewing gum and in the sale and distribution thereof to dealers. Respondent causes and has caused its said products, when sold, to be transported from its principal place of business aforesaid to purchasers thereof in various States of the United States and in the District of Columbia at their respective places of business. There is now, and has been for some time last past, a course of trade in such chewing gum by respondent in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of chewing gum or other confections in commerce between and among various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, the respondent sells and has sold to dealers certain assortments of chewing gum so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One of respondent's assortments substantially illustrates the sales plan or method used in the sale and distribution of its chewing gum to the purchasing public, and is as follows:

This assortment consists of 200 pieces of chewing gum together with a device commonly called a push card. Sales are 1 cent each. The card contains a number of partially perforated discs which are divided into four sections. Within each of such discs is printed a number. The card bears statements or legends informing purchasers

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and prospective purchasers that the said pieces of chewing gum will be distributed in accordance with the numbers pushed, as follows:

Number 5 Receives.....	20 Pieces of Gum
Numbers 10-15 Each Receive.....	10 Pieces of Gum
Numbers 20-25-30-35-40 Each Receive.....	5 Pieces of Gum
Numbers 45-50-55-60-65 Each Receive.....	3 Pieces of Gum
Numbers 70-75-80-85 Each Receive.....	2 Pieces of Gum
All Other Numbers Each Receive.....	1 Piece of Gum

Last Sale in Each of First 3 Sections Completed Receives 5 Pieces of Gum
LAST SALE ON CARD RECEIVES 15 PIECES OF GUM.

The said numbers are effectively concealed from purchasers and prospective purchasers until a push has been made and the discs separated from the card. The said pieces of chewing gum are thus distributed to the purchasing public wholly by lottery or chance.

The respondent manufactures, sells, and distributes various assortments of chewing gum involving a lottery or chance feature. Such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's said assortments of chewing gum directly, or indirectly, expose and sell the same to the purchasing public in accordance with 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 to induce purchasers of such chewing gum to purchase respondent's products in preference to chewing gum or other confections offered for sale and sold by its competitors. The sale of said chewing gum to the purchasing public by the method above described involves a game of chance, or the sale of a chance, to procure additional pieces of chewing gum without additional cost. The use by respondent of said method in the sale of chewing gum, and the sale of chewing gum by and through the use thereof, and by the aid of said method is a practice of the sort which is contrary to an established public policy of the Government of the United States and which is in violation of the criminal laws. The use by respondent of said method has a tendency and capacity unduly to hinder competition or create a monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the chewing gum trade competitors who do not adopt and use the same or an equivalent or similar element of chance or lottery scheme. Many persons, firms, and corporations who make and sell chewing gum or other confections in competition with respondent as above alleged

are unwilling to offer for sale or sell chewing gum or other confections 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, or any other method of sale that is contrary to public policy, and such competitors refrain therefrom.

PAR. 4. Many dealers in, and ultimate purchasers of, chewing gum or other confections are attracted by respondent's said method and manner of packing said 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 chewing gum so packed and sold by respondent in preference to chewing gum or other confections offered for sale and sold by said competitors of respondent who do not use the same or an equivalent or similar 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 customers from its said competitors who do not use the same or an equivalent or similar method; to exclude from said chewing gum and confection trade all competitors who are unwilling to and who do not use the same or an equivalent or similar method, because the same is unlawful; to lessen competition in said chewing gum and confection trade; to create a monopoly of said chewing gum and confection trade in respondent and in such other distributors of chewing gum or other confections as use the same or an equivalent or similar 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 chewing gum and confection trade all actual competitors and to exclude therefrom all potential competitors who do not adopt and use the same or an equivalent or similar method.

PAR. 5. The aforesaid acts and practices of respondent, as herein alleged are all 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 the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on June 22, 1938, issued and served its complaint in this proceeding upon respondent, Gum, Incorporated, a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. On July 15, 1938, respondent filed its answer in which answer it admitted all

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the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearing as to said facts. Thereafter, the 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. Respondent, Gum, Incorporated, 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 3233 Woodland Avenue, Philadelphia, Pa. Respondent is now, and for some time last past has been, engaged in the manufacture of chewing gum and in the sale and distribution thereof to dealers. Respondent causes and has caused its said products, when sold, to be transported from its principal place of business aforesaid to purchasers thereof in various States of the United States and in the District of Columbia at their respective places of business. There is now, and has been for some time last past, a course of trade in such chewing gum by respondent in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of chewing gum or other confections in commerce between and among various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, the respondent sells and has sold to dealers certain assortments of chewing gum so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One of respondent's assortments substantially illustrates the sales plan or method used in the sale and distribution of its chewing gum to the purchasing public, and is as follows:

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pective purchasers that the said pieces of chewing gum will be distributed in accordance with the numbers pushed, as follows:

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The respondent manufactures, sells, and distributes various assortments of chewing gum involving a lottery or chance feature. Such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's said assortments of chewing gum directly, or indirectly, expose and sell the same to the purchasing public in accordance with 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 to induce purchasers of such chewing gum to purchase respondent's products in preference to chewing gum or other confections offered for sale and sold by its competitors. The sale of said chewing gum to the purchasing public by the method above described involves a game of chance, or the sale of a chance, to procure additional pieces of chewing gum without additional cost. The use by respondent of said method in the sale of chewing gum, and the sale of chewing gum by and through the use thereof, and by the aid of said method is a practice of the sort which is contrary to an established public policy of the Government of the United States and which is in violation of the criminal laws. The use by respondent of said method has a tendency and capacity unduly to hinder competition or create a monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the chewing gum trade competitors who do not adopt and use the same or an equivalent or similar element of chance or lottery scheme. Many persons, firms and corporations who make and sell chewing gum or other confections in competition with respondent as above alleged are unwilling to offer for sale or sell

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chewing gum or other confections 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, or any other method of sale that is contrary to public policy, and such competitors refrain therefrom.

PAR. 4. Many dealers in, and ultimate purchasers of, chewing gum or other confections are attracted by respondent's said method and manner of packing said 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 chewing gum so packed and sold by respondent in preference to chewing gum or other confections offered for sale and sold by said competitors of respondent who do not use the same or an equivalent or similar 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 customers from its said competitors who do not use the same or an equivalent or similar method; to exclude from said chewing gum and confection trade all competitors who are unwilling to and who do not use the same or an equivalent or similar method, because the same is unlawful; to lessen competition in said chewing gum and confection trade; to create a monopoly of said chewing gum and confection trade in respondent and in such other distributors of chewing gum or other confections as use the same or an equivalent or similar 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 chewing gum and confection trade all actual competitors and to exclude therefrom all potential competitors who do not adopt and use the same or an equivalent or similar method.

CONCLUSION

The aforesaid acts and practices of respondent, as herein alleged are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

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 respondent in which answer respondent admits all the material allegations of fact set forth in said complaint and states that it waives all intervening procedure and further hearing as to said facts, and the

Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Gum, Incorporated, a corporation, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of chewing gum in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Selling and distributing chewing gum so packed or assembled that sales of such chewing gum 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 chewing gum 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 chewing gum contained in said assortments to the public.

3. Supplying to or placing in the hands of dealers, assortments of chewing gum together with a push card or other lottery device for use or which may be used in distributing or selling such chewing gum to the public at retail.

It is further ordered, That the respondent 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 this order.

IN THE MATTER OF
SAMUEL STORES, INC.

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

Docket 3210. Complaint, Aug. 21, 1937—Decision, Sept. 2, 1938

UNFAIR METHODS OF COMPETITION—"FREE GOODS" MERCHANDISING—IN GENERAL

The lawfulness, in connection with a merchandising plan, of "free goods" offers, recognized as powerful psychological magnets to draw trade and source from which merchant expects to benefit, either through immediate direct profit on some other article which must be purchased, or indirectly through increased good will and future patronage, depends on the terms of the offer and the underlying and surrounding facts, and the real test, except where the practice is employed by large concerns to eliminate weaker competitors, is whether there is a deception of the purchaser or use of a lottery method or chance device in distribution of such goods, in which event transaction would fall within purview of *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304.

UNFAIR METHODS OF COMPETITION—"FREE GOODS" MERCHANDISING—PURCHASER
DECEPTION—GOODS' COST—CONDITIONAL PURCHASE MERCHANDISE—WHERE LIM-
ITED SACRIFICE NORMAL PROFIT IN OFFER AND SALE

Where the merchant, to attract new customers, sacrifices, for a limited period of time, portion of his normal profit on his entire line, he may receive no immediate direct profit from the transaction, and merchandise required to be purchased must bear not only its own cost and its own share of the general operating overhead, but also cost of the "free goods" and said goods' overhead share, in which event "free goods" offer is hardly deceptive, since purchaser actually does obtain specified "free goods" at no additional cost over the ordinary and regular price of the merchandise required to be purchased, and, therefore, actually receives such goods without cost; the practice in such a case, in reality, being a convenient and impelling method of calling public attention to price reductions in goods which must be purchased.

UNFAIR METHODS OF COMPETITION—"FREE GOODS" MERCHANDISING—PURCHASER
DECEPTION—GOODS' COST—CONDITIONAL PURCHASE MERCHANDISE—WHERE COST
RECOUPMENT BY PREJUDICIAL CHANGE IN PRICE OR QUALITY OF

Purchaser has right to believe that merchant will not directly and immediately recover, in whole or in part, cost of the "free goods" by marking up price of article which must be purchased or substitution of inferior merchandise, and where merchant recovers any portion of cost of such "free goods" directly from the immediate transaction through use of such methods, there is necessarily deception of purchaser, since so-called "free goods" are not in any sense free. *Standard Education Society v. Federal Trade Commission*, 302 U. S. 112, 116.