

IN THE MATTER OF

JOHN B. ARATA

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

Docket 3464. Complaint, June 21, 1938—Decision, Sept. 20, 1938

Where an individual engaged in manufacture and sale of candy, including certain assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to the consumers thereof, and which were composed of (1) number of pieces of candy of varying sizes, together with corresponding number of small slips of paper or tickets, number concealed within which, and ranging from one to five, determined, in accordance with chance selection of penny purchaser, size of piece received, or (2) of other assortments and methods of sale and distribution varying in detail, but similar in method or plan—

Sold, to dealers and retailers, for display and resale to purchasing public in accordance with aforesaid sales plan, such assortments, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of its product in accordance with such plan, involving game of chance or sale of a chance to secure piece of candy at price greatly below normal retail price thereof, 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 or sell candy 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 contrary to public policy, refrain therefrom;

With capacity and tendency to induce purchasers to buy his said products in preference to candy offered and sold by 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 set forth, and thereby induced to purchase such candy, thus packed and sold by him, 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 him trade and custom from his competitors as aforesaid, exclude from said 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 tend to create monopoly thereof in him and such other distributors as 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 equivalent method:

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

Mr. Henry C. Lank and Mr. D. C. Daniel for the Commission.
Mr. Ned Stein, of Philadelphia, Pa., for respondent.

Complaint

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 John B. Arata, hereinafter referred to as respondent, has violated the provisions of the 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, John B. Arata, is an individual, trading under his own name, with his principal office and place of business located at Front and Lombard Streets, Philadelphia, Pa. Respondent is now, and for some time last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to dealers. Respondent causes and has caused his said candy when sold to be transported from his principal place of business in Philadelphia, Pa., to the purchasers thereof located in the various States of the United States other than the State of Pennsylvania and in the District of Columbia. Respondent now maintains, and for some time last past has maintained, a course of trade in said candy 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 and has been in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of candy in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business as described in paragraph 1 hereof, respondent sells and has sold to dealers certain 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 is sold and distributed to the purchasing public in the following manner:

This assortment is composed of a number of pieces of candy, together with a corresponding number of small slips of paper or tickets. Sales are 1 cent each. The pieces of candy are in five different sizes. Each of said tickets has printed thereon either No. 1, 2, 3, 4, or 5. A person drawing a ticket bearing No. 1 is entitled to and receives one of the smallest pieces of said candy. A person drawing a ticket bearing No. 2 is entitled to and receives a slightly larger piece of candy. Persons drawing tickets bearing Nos. 3, 4, and 5 are entitled to and receive proportionately larger pieces of candy. The numbers on said tickets are effectively concealed from

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the purchasers until a purchase is made and a ticket drawn. The pieces of candy are thus distributed to the purchasing public wholly by lot or chance.

Respondent manufactures, sells and has sold, distributes and has distributed, various assortments of candy by means of sales plans or methods involving lot or chance features, but such assortments and the method of sale and distribution thereof are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's said candy directly or indirectly, expose and sell the same 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 his products in accordance with the sales plan hereinabove set forth and said sales plan has the tendency and capacity to induce purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by his 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 secure a piece of candy at a price greatly below the normal retail price thereof. The use by respondent of said method in the sale of candy and the sale of candy through and by 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 a violation of the criminal laws. The use by respondent of said method has the tendency unduly to hinder competition or to create a monopoly in this, to wit, that the use thereof has the tendency and capacity to exclude from the 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 the respondent, as above alleged, are unwilling to offer for sale and 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 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 an equivalent or similar method. The use of said method by respondent has a tendency and capacity, because of said game of chance, to divert to respondent trade and custom from his said competitors who do not use the same or an equivalent or similar method; to exclude from said candy 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 candy trade; to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent or similar 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 a 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 or similar method.

PAR. 6. 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 21, 1938, issued and thereafter served its complaint in this proceeding upon respondent, John B. Arata, charging him with the use of unfair methods of competition in commerce in violation of the provisions of said act. On August 21, 1938, the respondent filed his answer, in which answer he admitted all 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 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, John B. Arata, is an individual, trading under his own name, with his principal office and place of business located at Front and Lombard Streets, Philadelphia, Pa. Respondent is now, and for some time last past has been, engaged in the manufac-

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ture of candy and in the sale and distribution thereof to dealers. Respondent causes and has caused his said candy when sold to be transported from his principal place of business in Philadelphia, Pa., to the purchasers thereof located in the various States of the United States other than the State of Pennsylvania and in the District of Columbia. Respondent now maintains, and for some time last past has maintained, a course of trade in said candy 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 and has been in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of candy in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business as described in paragraph 1 hereof, respondent sells and has sold to dealers certain 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 is sold and distributed to the purchasing public in the following manner:

This assortment is composed of a number of pieces of candy, together with a corresponding number of small slips of paper or tickets. Sales are 1 cent each. The pieces of candy are in five different sizes. Each of said tickets has printed thereon either No. 1, 2, 3, 4, or 5. A person drawing a ticket bearing No. 1 is entitled to and receives one of the smallest pieces of said candy. A person drawing a ticket bearing No. 2 is entitled to and receives a slightly larger piece of candy. Persons drawing tickets bearing Nos. 3, 4, and 5 are entitled to and receive proportionately larger pieces of candy. The numbers on said tickets are effectively concealed from the purchasers until a purchase is made and a ticket drawn. The pieces of candy are thus distributed to the purchasing public wholly by lot or chance.

Respondent manufactures, sells and has sold, distributes and has distributed, various assortments of candy by means of sales plans or methods involving lot or chance features, but such assortments and the method of sale and distribution thereof are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's said candy directly or indirectly, expose and sell the same 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 his products in accordance with the sales plan hereinabove set forth and said sales plan has the tendency and

capacity to induce purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by his 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 secure a piece of candy at a price greatly below the normal retail price thereof. The use by respondent of said method in the sale of candy and the sale of candy through and by 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 a violation of the criminal laws. The use by respondent of said method has the tendency unduly to hinder competition or to create a monopoly in this, to wit, that the use thereof has the tendency and capacity to exclude from the 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 the respondent, as above alleged, are unwilling to offer for sale and 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 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 an equivalent or similar method. The use of said method by respondent has a tendency and capacity, because of said game of chance, to divert to respondent trade and custom from his said competitors who do not use the same or an equivalent or similar method; to exclude from said candy 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 candy trade; to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent or similar 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 a 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 or similar method.

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CONCLUSION

The aforesaid acts and practices of respondent, as herein found, are all to the injury and 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.

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 he 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, John B. Arata, his agents, representatives, 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 from:

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 said assortment to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy contained in said assortments to the general public.
3. Selling and distributing assortments of candy containing pieces of candy of different sizes together with tickets with numbers printed thereon which said tickets are to be used or may be used in selling or distributing the said candy to the general public by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the respondent shall, within 60 days after service upon him 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.

Syllabus

IN THE MATTER OF

THE GOUDEY GUM COMPANY, ALSO TRADING AS
AROUND THE WORLD GUM COMPANY; AND RAINBOW
GUM COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3313. Complaint, Jan. 25, 1938—Decision, Sept. 27, 1938*

Where two corporations engaged in manufacture and sale of chewing gum, including certain assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to the consumers thereof, and which were composed of large number of individually wrapped penny pieces of uniform size and shape, together with number of small flags, to be given as prizes to those procuring by chance one of a number of said sticks, color of which was found to be black, and to purchaser of last stick in assortment, and also together with explanatory display card for retailer's use—

Sold to wholesalers and jobbers, for display and resale to purchasing public by retailer-dealer purchasers thereof, in stores of which were also offered and sold assortments of gum without such lot or chance feature, and penny and 5-cent candies, said assortments, in accordance with aforesaid plan and knowingly so packed and assembled that gum in question, along with aforesaid display cards, could and would thus be resold to public by lot or chance by such retailers, and thereby supplied to and placed in the hands of others means of conducting lotteries, games of chance, or gift enterprises in the sale of their said assortments as above set forth, contrary to public policy of the United States Government, and in competition with those who do not use such methods and those, able, but unwilling, to compete on even terms only by furnishing same or similar assortments of such products, opposed by many as teaching and encouraging gambling and especially among children, substantial purchasers thereof, and as injurious to chewing gum and candy industry in leading to merchandising of chance or lottery in sale of said products and as providing retail merchants with a means of violating laws of the several States, and numbers of whom, and of distributors, refuse, for such reasons, to sell said products, so packed and assembled that they can be resold to public by lot or chance;

With result that retailers purchased as more salable by reason of particular lot or chance appeal connected therewith, candy or gum thus packed and assembled from them, and others employing similar methods, and trade was thereby diverted to them and such others from competitors who did not use such methods, sales of aforesaid unwilling competitors showed continued decrease, and there was a restraint upon and a detriment to the freedom of fair and legitimate competition; to the prejudice and injury of the public and competitors:

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