

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.

Complaint

27 F. T. C.

Before *Mr. William C. Reeves*, trial examiner.

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

Mr. Martin R. Durkin, of Boston, Mass., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that The Goudey Gum Co., a corporation, also trading as Around the World Gum Co., and Rainbow Gum Co., a corporation, 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 said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Goudey Gum Co. is a corporation organized and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 52 Everett Street, Allston Station, in the city of Boston, State of Massachusetts. In the course and conduct of its business, as hereinafter described, said respondent trades under its own corporate name and also under the trade name Around the World Gum Co.

Respondent Rainbow Gum Co. is a corporation organized and doing business under the laws of the State of Massachusetts, is a subsidiary of and has the same officers as respondent The Goudey Gum Co., and has its principal office and place of business at the same address thereof. Said respondents act together and in cooperation with each other in doing the acts and things hereinafter alleged.

Respondents are now, and for some time last past have been, engaged in the manufacture of chewing gum and in the sale and distribution thereof to wholesale and retail dealers and jobbers. Respondents cause and have caused their products when sold to be transported from their principal places of business in the city of Boston, Mass., to purchasers thereof in the State of Massachusetts and in other States of the United States at their respective places of business. There is now, and has been for some time last past, a course of trade and commerce by said respondents in such chewing gum between and among the various States of the United States. In the course and conduct of said business respondents are in competition with other corporations and with partnerships and individuals en-

gaged in the sale and distribution of chewing gum or other confections, in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of their business, as described in paragraph 1 hereof, the respondents sell and have sold to wholesale and retail dealers and jobbers 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 respondents' assortments substantially illustrates the sales plan or method used in the sale and distribution of their products to the purchasing public and is as follows:

One of said assortments consists of 100 sticks of chewing gum of uniform size and shape, together with a number of small flags and one larger flag, which said flags are to be given as prizes to purchasers of individual sticks of chewing gum in the following manner: The said sticks of chewing gum in said assortment are wrapped in individual wrappers. A number of said sticks of chewing gum are black in color, but the color thereof cannot be ascertained until a purchase is made and the wrapper removed. The individual sticks of chewing gum retail at the price of 1 cent each, and the purchaser procuring a black stick of chewing gum receives one of the small flags without additional charge and as a prize. The purchaser of the last stick of gum in the assortment receives the large flag. The purchasers of the remaining sticks of chewing gum receive only the said sticks of chewing gum. The said small flags contained in said assortments are thus distributed to purchasers of chewing gum from said assortment wholly by lot or chance.

The respondents manufacture, sell, and distribute various assortments of chewing gum involving a lot or game of chance feature, but such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondents' said assortments of chewing gum, directly or indirectly, expose and sell the same 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 products in accordance with the sales plan hereinabove set forth. Said sales plan has a capacity and tendency to induce purchasers thereof to purchase respondents' chewing gum in preference to chewing gum or other confections offered for sale and sold by their 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 an additional article

of merchandise. The use by respondents 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 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 a tendency 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 method or equivalent or similar methods involving the same or equivalent or similar elements of chance or lottery schemes. Many persons, firms, and corporations who make and sell chewing gum or other confections in competition with respondents, 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 respondents' 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 respondents in preference to chewing gum or other confections 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 equivalent methods, to exclude from said chewing gum and confection 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 chewing gum and confection trade, to tend to create a monopoly of said chewing gum and confection trade in respondents and in such other distributors of chewing gum or other confections as use the same or equivalent methods, and to deprive the purchasing public of the benefit of free competition in said trade. The use of said method by respondents 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 said method or equivalent methods.

PAR. 5. The aforementioned method, acts, and practices of respondents are all to the prejudice and injury 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, 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 the Federal Trade Commission Act, the Federal Trade Commission on January 25, 1938, issued and served its complaint in this proceeding upon the respondents' The Goudey Gum Co., a corporation, also trading as Around The World Gum Co., and Rainbow Gum Co., a corporation, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answer thereto, testimony, and other evidence in support of the allegations of said complaint were introduced by Henry C. Lank, attorney for the Commission, and in opposition to the allegations of the complaint by Martin R. Durkin, attorney for the respondents, before William C. Reeves, an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by the Commission on the said complaint, the answer thereto, the testimony and other evidence and briefs in support of the complaint and in opposition thereto (oral argument not having been requested); and the Commission having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, The Goudey Gum Co., is a corporation organized and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 52 Everett Street, Allston Station, in the city of Boston, State of Massachusetts. In addition to doing business under its own corporate name, said respondent also has adopted and uses the trade name "Around The World Gum Company."

The respondent, Rainbow Gum Co., is a corporation organized and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 52 Everett Street, Alston Station, in the city of Boston, State of Massachusetts. Said Rainbow Gum Co. occupies the same office and place of business as the respondent, The Goudey Gum Co., and has the same officers as the said Goudey Gum Co. The said respondents act together and in co-operation with each other in doing the acts and things hereinafter described.

The respondents are now, and for some time last past have been, engaged in the manufacture of chewing gum and in the sale and distribution thereof to wholesale dealers and jobbers located in practically all States of the United States. Respondents cause and have caused their products when sold to be transported from their principal place of business in the city of Boston, Mass., to the purchasers thereof at their respective places of business. There is now and has been for some time last past, a course of trade by said respondents in such chewing gum in commerce between and among the various States of the United States.

In the course and conduct of their business, respondents are in competition with other corporations and with partnerships and individuals engaged in the sale and distribution of chewing gum and other confections in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of their business as described in paragraph 1 hereof, the respondents, beginning about March 13, 1937, manufactured, sold, and distributed to wholesale dealers and jobbers 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. This assortment consisted of 100 sticks of chewing gum of uniform size and shape together with a number of small flags, which flags were to be given as prizes to purchasers of individual sticks of chewing gum in the following manner:

The said sticks of chewing gum in said assortment were wrapped in individual wrappers. A number of said sticks of chewing gum were black in color but the color thereof could not be ascertained until a purchase was made and the wrapper removed. The individual sticks of chewing gum retailed at the price of 1 cent each and the purchaser procuring a black stick of chewing gum received one of the small flags without additional charge and as a prize. The purchaser of the last stick of gum in the assortment also received one of the flags. The purchasers of the remaining sticks of chewing gum (those not black in color) received only the said chewing gum. The said small flags

contained in said assortment were thus distributed to purchasers of chewing gum from said assortment wholly by lot or chance. Along with the above described assortment containing 100 sticks of chewing gum and a number of small flags, the respondents included a display card advising the purchasers and prospective purchasers that the chewing gum was being offered for sale in accordance with the above-described sales plan.

The manufacture, sale, and distribution of the above-described assortment was discontinued by the respondents some time during the month of April 1937, and has not since been manufactured or distributed. The respondents, however, refused to furnish satisfactory assurances to the Commission that such practices would not be resumed.

PAR. 3. The wholesale dealers and jobbers who purchased assortments of chewing gum as above described, sold, and distributed the same to retail dealers and said retail dealers exposed such assortments for sale and sold the same to the purchasing public in accordance with the aforesaid sales plan. The chewing gum contained in said assortments was thus sold and distributed to the consuming public by means of a lottery scheme, game of chance, or gift enterprise, and respondents thus supplied to and placed in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the sale of their said assortments as hereinabove set forth.

All sales made by respondents were absolute sales and the respondents retained no control over the merchandise after it was delivered to the wholesale dealers and jobbers. However, after the respondents discontinued the manufacture and distribution of said assortments they permitted such assortments which dealers still had on hand to be returned to them and allowed full credit for such returns.

In the sale and distribution of the assortments as above described, the respondents had knowledge that the said chewing gum would be resold to the purchasing public by retail dealers by the sales plan or method above described, and they packed and assembled such chewing gum in the way and manner described and furnished the said display card with each of the said assortments so that it could and would be resold to the public by lot or chance as above described, by said retail dealers.

PAR. 4. The assortments of chewing gum as above described are offered for sale and sold in retail stores which also offer for sale and sell assortments of chewing gum without the lot or chance feature. And in such stores, penny and 5-cent candies are also offered for sale and sold. The assortments of chewing gum as above described, are in

competition with assortments of chewing gum having no lot or chance feature connected with their resale to the public, and are in competition with penny and 5-cent candies offered for sale and sold without any lot or chance feature as herein described.

PAR. 5. There are many manufacturers of chewing gum who do not pack and assemble their merchandise so as to be resold to the consuming public by means of a lottery scheme, gift enterprise, or game of chance. There are also many manufacturers of penny and 5-cent candies who do not pack and assemble their merchandise so as to be sold to the consuming public by methods similar to the one hereinabove described, and such manufacturers are opposed to the methods used by respondents as above described because the same teaches and encourages gambling, especially among children, who are substantial purchasers of such products; because the same is injurious to the chewing gum and candy industry as it results in the merchandising of a chance or lottery in the sale of chewing gum or candy; and as providing retail merchants with a means of violating the laws of the several States. Because of these reasons, numerous manufacturers and distributors refuse to sell chewing gum or candy so packed and assembled that it can be resold to the public by lot or chance.

Assortments of chewing gum and candy involving a lot or chance feature as herein described, have a particular appeal because of the gambling feature connected with the sale thereof, and said retail dealers who find that they can dispose of more chewing gum or candy when packed and assembled as above described buy respondents' products and the products of others employing the same method, and thereby trade is diverted to respondents and others using similar methods, from competitors who do not use such methods. Such competitors can compete on even terms only by furnishing the same or similar assortments. This they are unwilling to do and their sales show a continued decrease. The use of such method by the respondents in the sale and distribution of their chewing gum is prejudicial and injurious to the public and to respondents' competitors and has resulted in the diversion of trade to respondents from their said competitors and is a restraint upon and a detriment to the freedom of fair and legitimate competition.

PAR. 6. The sale and distribution of chewing gum by lot or chance is contrary to the public policy of the Government of the United States.

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Order

CONCLUSION

The aforesaid acts and practices of the respondents are all to the prejudice and injury of the public and of respondents' 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, the answer of the respondents, testimony, and other evidence taken before William C. Reeves, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs of counsel filed herein (oral argument not having been requested), and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered. That the respondent, The Goudey Gum Co., a corporation, in its own name or trading as Around The World Gum Co., or under any other name, its officers, representatives, agents, and employees; and the respondent, Rainbow Gum Co., a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of chewing gum in interstate commerce, do cease and desist from:

1. Selling and distributing to wholesale dealers and jobbers for resale to retail dealers, chewing gum so packed and assembled that sales of such chewing gum to the general public are to be made or are designed to be made by means of a lottery scheme, gaming device, or gift enterprise.

2. Supplying to or placing in the hands of wholesale dealers and jobbers, assortments of chewing gum which are used or are designed to 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 chewing gum contained in said assortments to the public.

3. Packing or assembling in the same package or assortment of chewing gum, for sale to the public at retail, pieces of chewing gum of uniform size and shape but of different colors, together with small flags or other articles of merchandise, which said small flags or other articles of merchandise are to be given as prizes to the purchaser of a piece of chewing gum of a particular color.

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4. Furnishing to wholesale dealers and jobbers display cards, either with assortments of chewing gum or separately, bearing a statement or statements informing the purchaser that the chewing gum is being sold to the public by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

It is further ordered, That the respondents shall, within 60 days after the service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order.

Syllabus

IN THE MATTER OF

FAN TAN COMPANY, INC., ALSO TRADING AS LOU RAY COMPANY, GRO PRES COMPANY, AND BISHOP JONES COMPANY

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

Docket 3352. Complaint. Mar. 9, 1938—Decision, Sept. 27, 1938.¹

Where a corporation engaged, under various trade names, in the sale and distribution of numerous cosmetics and preparations under brand names "Fan Tan," "Lou Ray," "Gro Pres," and "Bishop Jones"; in advertising and describing its said products through circulars, pamphlets, catalogs, newspapers, and other advertisements circulated generally throughout the United States, and by labels attached thereto—

- (a) Represented that various creams, powders, soaps, and lotions offered and sold under such various names would, as the case might be, end oily skin problems, melt into the pores, prevent blackheads and wrinkles, nourish and sterilize the skin, reduce enlarged pores, cause pimples to vanish, whiten the skin, and clear up and remove blemishes and correct skin eruptions and pimples; and
- (b) Represented that various hair preparations and products offered and sold by it under various brand names, as aforesaid, and including hair medicine, shampoo soap, so-called "hair grower," "Hot Oil Treatment," "Pomade," would, as the case might be, promote growth of longer, straighter hair, recondition the hair, vitalize scalp roots, get rid of, prevent, and end dandruff, clean hair roots, grow hair, rout cause of hair and scalp trouble, increase length of hair and make same longer, straighter, smoother, and softer, and end falling hair;

Facts being that aforesaid representations were extravagant, false, misleading, and deceptive, said various preparations would not cause or bring about the results nor produce effects claimed, either as to skin or hair, and were not efficacious in restoration and treatment of hair and skin and would not produce such results and did not have any beneficial value in treatment of various conditions for which they were represented as beneficial;

With capacity and tendency to mislead and deceive public into erroneous and mistaken belief that representations made by it were true, and that various products sold and distributed by it would actually accomplish the results claimed, and to induce a number of purchasing public to buy said products as result of such erroneous and mistaken belief, and with result that trade was diverted unfairly to it from competitors in commerce among the several States and in the District of Columbia, including many who do not in any manner misrepresent their products or the efficacy thereof:

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

¹ Order published as modified November 1, 1938.