

IN THE MATTER OF
SWEETS COMPANY OF AMERICA, INC.

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

Docket 2959. Complaint, Oct. 30, 1936—Decision, Dec. 7, 1938

Where a corporation engaged in manufacture and sale of assortments of candy, so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, or so-called "break and take," "draw," or "deal" assortments, purchasers and consumers of which type comprise children to substantial extent, and purchase of which type is preferred by consumers because of gambling feature connected with sale thereof, and appearance of which in the markets of manufacturers of "straight" merchandise, many of whom do not make and sell such "break and take," "draw," or "deal" assortments, but sell their "straight" merchandise in commerce in competition with the other, has been followed, as noted by them, by marked decrease in sales of their "straight" goods—
Sold to dealers such lottery assortments composed of (a) separately packed, large number of individually wrapped penny pieces of uniform size and shape, small number of which, in same box but divided from others by partition, had enclosed concealed centers of different color from others, and (b), separately containered small number of larger pieces corresponding in number to quantity of said uniform pieces, color of which differed as aforesaid, and were to be given as prizes to purchasers securing such differently colored uniform pieces, to dealer purchasers, of whom many bought from it equal numbers of boxes of said uniform pieces and of said larger pieces and removed partition separating said different colored uniform penny pieces from the others contained therein and mixed together such various uniform pieces, and sold same with larger pieces as prizes, in accordance with arrangement aforesaid, and thereby supplied to and placed in the hands of retailers means of violating the laws of the several States, contrary to public policy, and in competition with those who refused to sell candy so packed or assembled that it may be resold to public by lot or chance;

With result that such competitors were put to a competitive disadvantage and purchasing public was denied benefit of free competition in sale of such product, and retailers, finding more salable such "break and take," "draw," or "deal" sold candy, purchased from it and others employing same or similar methods, and trade was thereby unfairly diverted from such competitors to it and such others; to the injury of such trade or industry, through sale and distribution as aforesaid and by other similar methods by lot or chance and through such lottery, gambling, or gift enterprise:

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

Before *Mr. Miles J. Furnas* and *Mr. William C. Reeves*, trial examiners.

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

Mr. Louis H. Solomon, of New York City, 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 Sweets Co. of America, Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, 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 Sweets Co. of America, Inc., is a corporation organized and operating under the laws of the State of Virginia, with its principal office and place of business located at 414 West Forty-fifth Street, New York City. Respondent is now, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to retail and wholesale dealers and jobbers located at points in the various States of the United States, and causes and has caused its said products when sold to be transported from its principal place of business in the State of New York to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for several years last past, a course of trade in commerce by said respondent in such candy between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other corporations and with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale and retail dealers 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 such assortment offered for sale, sold, and distributed by respondent is composed 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 in said assortment have the same color, but a small number of said pieces of candy have a different color; the said pieces of candy

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of uniform size and shape retail at the price of 1 cent each, but the purchasers who procure one of the said candies colored differently from the majority of said candies are entitled to receive, and are to be given free of charge, one of the said larger pieces of candy heretofore referred to. The pieces of candy of uniform size and shape are individually wrapped in nontransparent wrappers and the color of the said pieces of candy is thus effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper is removed. The aforesaid purchasers of said candies who procure a candy colored differently from the majority of said pieces of candy 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 sells its assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells 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 products in accordance with the sales plan hereinabove set forth, and said sales plan has 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 alleged, involves a game of chance or the sale of a chance to procure a larger piece of candy.

The use by respondent 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 respondent of said method has a 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 respondent, as above alleged, are unwilling to offer for sale or sell candy so packed and assembled as above alleged, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said 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 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 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 respondent 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 respondent are all to the prejudice of the public and respondent's 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 the Federal Trade Commission Act, the Federal Trade Commission, on October 30, 1936, issued, and thereafter served, its complaint in this proceeding upon the respondent, the Sweets Co. of America, Inc., a corporation, charging it 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 respondent's 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 Louis H. Solomon, attorney for the respondent, before Miles J. Furnas and William C. Reeves, examiners 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 hearing before the Commission on the complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of counsel aforesaid, and the Commission having duly considered the matter and being now fully advised in the premises finds that its 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, the Sweets Co. of America, Inc., is a corporation organized and doing business under the laws of the State of Virginia, with its principal office and place of business located at 414 West Forty-fifth Street, New York, N. Y. Respondent maintains warehouses located in Los Angeles, Calif., San Francisco, Calif., Kansas City, Mo., Minneapolis, Minn., and Chicago, Ill. Respondent is now, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to wholesale and retail dealers and jobbers located in the various States of the United States and in the District of Columbia. Respondent causes and has caused its said products, when sold, to be shipped or transported from its aforesaid place of business in New York to purchasers thereof in the various States of the United States and in the District of Columbia at their respective points of location. There is now, and for several years last past has been, a course of trade by said respondent in such candy in commerce between and among the various States of the United States and in the District of Columbia. In so carrying on said business, respondent is and has been engaged in active competition with other corporations and with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, the respondent has sold various 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 hereinafter described in detail for the purpose

of showing the methods used by the respondent, but this description does not include all of the details of the several sales plans which the respondent has used in the distribution of its assortments of candy by lottery or chance. Such assortment is composed of 150 small rolls or pieces of candy of uniform size and shape called "Little Rolls," which are packed in a box together with 24 larger pieces of candy called "Dinner For Six," packed in a separate box, which larger pieces of candy are to be given as prizes to purchasers of said small rolls or pieces of candy of uniform size and shape in the following manner:

The majority of the said small rolls or pieces of candy of uniform size and shape in said assortment have the same color but a small number of or a minority of said small rolls or pieces of candy have a different color. Said rolls or pieces of candy of uniform size and shape retail at the price of 1 cent each but the purchasers who procure one of the said rolls or pieces of candy colored differently from the majority of said rolls or pieces of candy are entitled to receive, and are given without charge, one of the said larger pieces of candy. The rolls or pieces of candy of uniform size and shape are individually wrapped in nontransparent wrappers and the color of the said pieces of candy is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper is removed. The said larger pieces of candy are thus distributed to the purchasing public wholly by lot or chance.

PAR. 3. Candy assortments involving the lottery or chance feature as described in paragraph 2 hereof are generally referred to in the candy trade or industry as "break and take," "draw," or "deal" assortments. Assortments of candy without any lottery or chance feature in connection with their resale to the public are generally referred to in the candy trade or industry as "straight" merchandise. These terms are being used hereafter in these findings to distinguish the various types of assortments.

PAR. 4. Many dealers buy from respondent equal numbers of boxes of said "Little Rolls" and said "Dinner For Six." Said "Little Rolls" are contained in a box and the majority of said rolls which are of one color are separated by a partition from the minority of said rolls which are of a different color. There are no indications on the wrappers of said rolls as to the colors thereof. Many retail dealers who purchase said "Little Rolls" and "Dinner For Six" mix the said rolls of different colors and sell them for 1 cent each and give said "Dinner For Six" pieces of candy as prizes to purchasers of said rolls of a different color than the majority of said rolls in accordance with the sales plan or method described in

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paragraph 2 hereof. The packing and distributing by respondent of candy in the manner above found is contrary to public policy. The annual dollar volume of business done by respondent for the year 1936 was \$1,588,000 and for the year 1937 it was approximately \$2,200,000, which amounts include the receipts from sales of the "Little Rolls" and "Dinner For Six" and various other items of merchandise sold and distributed by respondent.

PAR. 5. There are in the United States many manufacturers of candy who do not manufacture and sell "break and take," "draw," or "deal" assortments of candy and who sell their "straight" merchandise in interstate commerce in competition with the "break and take," "draw," and "deal" assortments of candy, and the manufacturers of "straight" merchandise have noted a marked decrease in the sales of their products whenever and wherever the "break and take," "draw," or "deal" assortments have appeared in their markets. This decrease in the sale of "straight" merchandise is due to the chance or lottery feature connected with the "break and take," "deal," or "draw" assortments of candy. Consumers prefer to purchase the "break and take," "draw," and "deal" assortments of candy because of the gambling feature connected with their sales. Children comprise a substantial number of the purchasers and consumers of this type of candy.

PAR. 6. The sale and distribution of candy by the methods described herein is the sale and distribution of candy by lot or chance and constitutes a lottery, gambling, or gift enterprise. Such sale and distribution of candy is injurious to the candy trade or industry. The sale and distribution by respondent of such assortments of candy supplies to and places in the hands of retail dealers a means of violating the laws of the several States. Some of the competitors of respondent refuse to sell candy so packed that it is to be or may be resold to the public by lot or chance. These competitors are thereby put to a competitive disadvantage and the purchasing public is denied the benefit of free competition in the sale of said candy. The retailers, finding that they can dispose of more candy by "break and take," "draw," or "deal" methods, buy from respondent and others employing the same or similar methods of sale and thereby trade is unfairly diverted from said competitors to respondent and others using the same or similar methods.

CONCLUSION

The aforesaid acts and practices of the respondents as herein found are all to the prejudice and injury of the public and of re-

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spondent'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, the answer of respondent, testimony, and other evidence taken before Miles J. Furnas and William C. Reeves, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein and oral arguments by Henry C. Lank, counsel for the Commission, and Louis H. Solomon, counsel for the respondent, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Sweets Co. of America, Inc., 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 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, gambling device, or gift enterprise.

2. Supplying to or placing in the hands of dealers packages or assortments of candy which are used or which may be used to conduct a lottery, gambling device, or gift enterprise in the sale or distribution of said candy contained in the said packages or assortments to the public.

3. Supplying to or placing in the hands of dealers for sale to the public packages or assortments of candy composed of individually wrapped pieces of candy of uniform size and shape and of different colors, together with larger pieces of candy or any other merchandise, which said larger pieces of candy or other merchandise are to be or may be given as prizes to the purchasers procuring pieces of said candy of a particular color.

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.

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IN THE MATTER OF
GIMBEL BROTHERS, INC.

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

Docket 3273. Complaint, Nov. 23, 1937—Decision, Dec. 7, 1938

Where a corporation engaged as department store operator in sale and distribution of women's wearing apparel and other allied products; in advertising women's undergarments in newspapers of interstate circulation and in labels attached thereto—

Represented said garments, as case might be, as "12½% silk and wool 10% wool" or "12½% to 25% silk and wool." notwithstanding fact that many of such articles did not in fact contain silk or wool in any quantity or percentage whatsoever;

With effect of misleading and deceiving purchasing and consuming public into mistaken and erroneous belief that articles thus described contained represented percentages of silk and wool, as, respectively, long definitely and favorably associated in mind of consuming public with product of cocoon of silk worm and fleece from sheep, products of which, respectively, have long been held in great public esteem and confidence for their preeminent qualities, and, in case of those herein concerned, purchased by substantial portion of public in preference to those not made of silk or wool; and

With capacity and tendency to induce purchase of such items of wearing apparel on account of mistaken and erroneous beliefs on part of substantial portion of purchasing public that such representations were true, and with result that trade was diverted unfairly to it from competitors engaged in sale of women's wearing apparel and other allied products, and who do not misrepresent the material of which such apparel is made:

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. George W. Williams for the Commission.

Chadbourne, Wallace, Parke & Whiteside, of New York City, 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 Gimbel Brothers, Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, 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: