

Complaint

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IN THE MATTER OF
GOOD HUMOR CORPORATION OF AMERICA

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

Docket 3516. Complaint, July 28, 1938—Decision, Mar. 15, 1939

Where owner of patents covering subject matter of confections frozen on sticks or handle members, and engaged for short period in sale and distribution to licensees of wooden sticks and paper bags including certain assortments thereof which involved use of a lottery scheme when sold and distributed as frozen confections to consumers thereof, and included assortments in which 10-cent consumer-purchaser securing by chance "lucky stick" concealed in confection, was entitled, without cost, to additional bar—

Sold as aforesaid such assortments to dealers by whom such sticks and bags were employed in sale and distribution of their frozen confections or bars to their customers and awards made as above described, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its products as above set forth, under aforesaid and similar plans, contrary to an established public policy of the United States Government and in violation of the criminal laws of several States and in competition with various manufacturers and distributors of such sticks and bags which, when used by retail dealers, do not constitute operation of game of chance, gift enterprise, or lottery scheme, and with many who make and sell various sticks and bags and devices for promoting or increasing sales of retail dealers and are unwilling to offer and sell their said products or devices so designed and arranged as above set forth or otherwise designed and arranged as to involve game of chance, lottery scheme, or gift enterprise and refrain therefrom;

With result that consuming public because of lottery scheme connected with its said sticks and bags was induced to deal with or purchase such frozen confections from dealers using its said devices, in preference to dealers using those of competitors, and dealers were thus induced to purchase its said sticks and bags in preference to devices of competitors, and substantial trade was thus unfairly diverted to it from its competitors aforesaid, and with capacity and tendency unduly to hinder competition or create monopoly through tendency and capacity to exclude competitors who do not use same or equivalent or similar method involving same or equivalent or similar elements of chance, lottery scheme, or gift enterprise:

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

Before *Mr. Randolph Preston*, trial examiner.

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

Mr. Daniel G. Albert, of Brooklyn, N. Y., 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 Good Humor Corporation of America, a corporation, 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, Good Humor Corporation of America, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 64-81 Metropolitan Avenue, Maspeth, Long Island, N. Y. Respondent owns two patents, one No. 1,470,524, being a process patent which teaches a method of inserting wooden handles or sticks into a container of partially frozen liquids, which, when subjected to further refrigeration causes a bond between the frozen confection and the stick, by congelation. The other patent, No. 1,718,997, a product patent, covers claims for the resulting product, to wit: A frozen confection on a wooden stick or handle. Respondent issues licenses to manufactures of ice cream to manufacture and sell frozen confections in accordance with the teachings of said patents. Respondent is now, and for some time last past has been, engaged in the issuing of licenses, as above mentioned, and in the sale and distribution of wooden handles or sticks and paper bags to dealers located in the various States of the United States and in the District of Columbia. Respondent causes and has caused its products, when sold, to be transported from its principal place of business in the State of New York, or from the respective points of location of the manufacturers of said products, to purchasers thereof in the various States of the United States and in the District of Columbia. There is now, and has been for some time last past, a course of trade and commerce by said respondent in said sticks and bags, between and among the various States of the United States and in the District of Columbia. In the course and conduct of its said business respondent is in competition with other corporations, and with partnerships and individuals likewise engaged in the manufacture, sale, and distribution of similar or like products and of various containers and holders for frozen confections 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 thereof, respondent sells and has sold to dealers assortments of sticks and paper bags, which sticks, when covered with ice cream as hereinbefore related, and packed in said bags, involve the use of a lottery scheme when sold and distributed to the consumers thereof. Assortments of said frozen confections or bars are sold to

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the consuming public in the following manner: This assortment consists of a number of frozen confections or bars packed in paper bags. Sales are 10 cents each. Through the center of each of said confections or bars is one of the small sticks or handles hereinabove mentioned. On certain of said handles or sticks appear the words "Lucky Stick," which words are effectively concealed until a purchaser has made a purchase and the frozen confection or bar has been consumed or removed from the stick. Purchasers who receive one of the sticks marked "Lucky Stick," are entitled to and do receive an additional frozen confection or bar without additional cost. The additional confections or bars are thus distributed to the purchasing public wholly by lot or chance. Respondent sells various assortments of sticks and bags to be used in the sale and distribution of such frozen confections or bars by lot or chance, but the above-described sales plan is illustrative of the principle involved in all such assortments.

PAR. 3. The dealers to whom respondent sells assortments of said sticks and bags employ them in the distribution of their frozen confections or bars to their customers, and make the awards as above described.

Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products.

PAR. 4. There are in competition with respondent various manufacturers and distributors of such sticks and bags, which, when used by the retail dealers, do not constitute a game of chance, gift enterprise, or lottery scheme. The consuming public is induced to deal with or purchase such products from dealers using respondent's said sticks and bags in preference to dealers using devices of respondent's competitors because of the lottery scheme connected with respondent's said sticks and bags. For that reason dealers are induced to purchase respondent's said sticks and bags in preference to devices of respondent's competitors, and trade is thus unfairly diverted to respondent from its said competitors.

PAR. 5. The use by respondent of said method in designing and arranging its said sticks and bags 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 criminal laws. The use by respondent of said method has a capacity and tendency unduly to hinder competition or create a monopoly, in this to wit: That the use thereof has a tendency and capacity to exclude competitors who do not use the same method or an equivalent or similar method, involving the same or an equivalent or similar element of chance, lottery scheme, or gift enterprise. Many persons, firms, and corporations

who make and sell various sticks and bags or devices for promoting or increasing the sales of retail dealers are unwilling to offer for sale and sell sticks and bags or devices designed or arranged so as to involve a game of chance, lottery scheme, or gift enterprise, and such competitors refrain therefrom.

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 July 28, 1938, issued, and thereafter served, its complaint in this proceeding upon said respondent Good Humor Corporation of America, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. On October 5, 1938, respondent filed its answer in this proceeding. Thereafter, a stipulation in lieu of testimony and other evidence was entered into by and between Daniel G. Albert, counsel for the respondent, and W. T. Kelley, chief counsel for the Federal Trade Commission. Thereafter this proceeding regularly came on for final hearing before the Commission on said complaint, answer, and stipulation, said stipulation having been approved, accepted, and filed, and the Commission having duly considered the same, 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, Good Humor Corporation of America, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 64-81 Metropolitan Avenue, Maspeth, Long Island, N. Y. Respondent owns two patents, No. 1,470,524 and No. 1,718,997, both covering the subject matter of confections frozen on sticks or handle members. Respondent has issued in the past licenses to manufacturers of ice cream to manufacture and sell frozen confections in accordance with the teachings of the said patents, but it no longer issues such licenses and its only business and function now is the collection of royalties from the holders of licenses which have been granted by it in the past. Respondent was engaged for a short period in the past in the sale and distribution of wooden

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sticks and paper bags to some of its licensees located in the various States of the United States. Respondent causes its products, when sold, to be transported from the respective points of location of the manufacturers of said products to purchasers thereof in the various States of the United States and in the District of Columbia. There was a course of trade by said respondent in said sticks and bags in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its said business, respondent was in competition with other corporations and with partnerships and individuals engaged in the sale and distribution of similar or like products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In so carrying on said business as described in paragraph 1 hereof, respondent has sold to dealers assortments of sticks and paper bags, which sticks when covered with ice cream, as hereinbefore described, and packed in said bags, involve the use of a lottery scheme, when sold and distributed to the consumers thereof. One of said assortments showing the method of sale and distribution to the consuming public, was as follows: This assortment consisted of a number of frozen confections or bars packed in paper bags. Sales were 10 cents each. Through the center of each of said confections or bars was one of the small sticks or handles hereinbefore described. On certain of said sticks appeared the words "Lucky Stick," which words were effectively concealed until a purchaser had made a purchase and the frozen confection or bar had been consumed or removed from the stick. Purchasers who received one of the sticks marked "Lucky Stick" were entitled to and did receive an additional frozen confection or bar without additional cost. The additional confections or bars were thus distributed to the purchasing public wholly by lot or chance. Respondent has sold and distributed various assortments of sticks and bags for use in the sale and distribution of such frozen confections or bars by lot or chance, but the above-described sales plan is illustrative of the principle involved in all such assortments.

PAR. 3. The dealers to whom respondent sold assortments of said sticks and bags employed them in the sale and distribution of their frozen confections or bars to their customers, and made the awards as above described. Respondent thus supplied to and placed in the hands of others the means of conducting lotteries in the sale of its products in the manner hereinbefore described.

PAR. 4. There are in competition with respondent various manufacturers and distributors of such sticks and bags, which, when used

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by retail dealers, do not constitute the operation of a game of chance, gift enterprise, or lottery scheme. Because of the lottery scheme connected with respondent's said sticks and bags, the consuming public was induced to deal with or purchase said products from dealers using respondent's said sticks and bags in preference to dealers using devices of respondent's competitors. As a result thereof, dealers were induced to purchase respondent's said sticks and bags in preference to devices of respondent's competitors, and substantial trade was thus unfairly diverted to respondent from its said competitors.

PAR. 5. The use by respondent of said method in designing and arranging its said sticks and bags 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 of several States of the United States. The use by respondent of said method has a capacity and tendency unduly to hinder competition or create a monopoly, in this, to wit: That the use thereof has a tendency and capacity to exclude competitors who do not use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance, lottery scheme, or gift enterprise. Many persons, firms, or corporations who make and sell various sticks and bags or devices for promoting or increasing the sales of retail dealers, are unwilling to offer for sale and sell sticks and bags or devices so designed and arranged as hereinabove described, or otherwise designed and arranged, so as to involve a game of chance, lottery scheme, or gift enterprise, and such competitors refrain therefrom.

CONCLUSION

The aforesaid acts and practices of respondent as hereinabove set forth 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, the answer of the respondent, and a stipulation as to the facts, in lieu of testimony and other evidence, entered into between the respondent herein and W. T. Kelley, chief counsel for the Federal Trade Commission, 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.

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It is ordered, That the respondent Good Humor Corporation of America, 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 sticks or any other merchandise in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or distributing sticks or other merchandise to dealers, which said sticks or other merchandise are to be used or may be used in the operation of a game of chance, gift enterprise, or lottery scheme.

2. Supplying to or placing in the hands of others, sticks or other articles of merchandise, which are used, or which may be used, without alteration thereof, to conduct a lottery, game of chance, or gift enterprise, when distributed to the consuming public.

3. Supplying to, or placing in the hands of, others any lottery device which is to be used, or may be used, in the sale and distribution of merchandise to the consuming public.

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.

Syllabus

IN THE MATTER OF

W. H. BARNARD, TRADING AS W. H. BARNARD RUBBER
COMPANY

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

Docket 3520. Complaint, July 30, 1938—Decision, Mar. 15, 1939

Where an individual engaged in sale of garden hose and other rubber goods to customers in other States and in the District of Columbia, in substantial competition with the others engaged in sale and distribution of such products in commerce and in said District, and including many jobbers and distributors of like and similar products who do not falsely and deceitfully represent to public that they are manufacturers thereof, or that their products have a value, merit, and quality that they do not have—

- (a) Represented to prospective customers and to buying public generally that he was manufacturer of such goods and products by causing to appear on his letterheads word "Manufacturers," along with trade name employed by him and statement of goods dealt in, and such references in correspondence with customers and prospective customers as " * * * We bought a lot of Extra Heavy Yarn, at a price, and used it to make this Hose * * *," and "In order to keep our factory running full time * * *," and "As soon as we have received enough orders to run us full time * * *," etc., and, through such letterheads and aforesaid and other similar statements in correspondence, informed customers that he was a manufacturer of such products and owned or operated a factory, mill, or plant for manufacture thereof;

Facts being all garden hose sold by him for many years last past had been made by another company, to which he transmitted all orders for such goods and which filled same and made shipment thereof in his name from its said factory direct to purchasers, he was only jobber of rubber goods and not manufacturer of such products, for direct purchase of which as from manufacturer there is marked preference on part of substantial portion of purchasing public, as affording better prices, products, and advantages not obtainable from jobbers or other middlemen, and representations made by him as aforesaid were false and misleading; and

- (b) Sent to customers and prospective customers samples of garden hose, together with quoted price thereon, and represented that product offered, and which would be shipped upon order, was of same quality, fabric, material, construction, merit, and value as sample thus enclosed;

Facts being garden hose sold and shipped as result of such solicitation was of an inferior grade and quality to sample originally forwarded to purchaser, in that it contained approximately one-third less fabric;

With tendency and capacity to mislead and deceive substantial portion of purchasing public into erroneous belief that all said representations were true, and with effect of leading such public into false and erroneous belief that garden hose and other products sold and distributed by him were made by him and had a greater value, quality, and merit than they actually