

Complaint

IN THE MATTER OF

HERSHEY CREAMERY COMPANY

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

Docket 3700. Complaint, Feb. 7, 1939—Decision, Mar. 27, 1939

Where a corporation engaged in sale and distribution of frozen confections and assortments thereof which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers, and including (a) a number of 5¢ so called "Fudgicle" and "Banjo" frozen confections for sale and distribution to purchasing public under plan by which purchaser securing handle of one of said confections displaying thereon, after confection's removal, words "Return this stick for free Banjo" (or "free Fudgicle") as case might be, was thus entitled to such additional frozen confection without additional cost, and (b) other assortments involving same principle—

Sold such assortments to dealers by whom same were sold as above described and awards made, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its products involving game of chance or sale of a chance to procure frozen confections at price much less than 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 sell or distribute such confections and are unwilling to adopt and use said or any method involving game of chance or sale of a chance or any other method contrary to public policy and refrain therefrom;

With result that many persons were attracted by its said sales plan or method employed in sale and distribution of its frozen confections and by element of chance involved therein and were thereby induced to buy and sell its said products in preference to such products offered and sold by said competitors who do not use same or equivalent methods, and with effect, by reason of said game of chance, of unfairly diverting trade to it from its said competitors who do not use such or equivalent method; to the substantial injury of competition in commerce:

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

Mr. L. P. Allen, Jr. for the Commission.

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 Hershey Creamery Co., 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. The respondent, Hershey Creamery Co., is a corporation, incorporated and doing business under the laws of the State of Delaware, with its principal office and place of business located at Harrisburg, Pa. Respondent is now, and for some time last past has been, engaged in the sale and distribution of frozen confections in commerce between and among the various States of the United States and in the District of Columbia. Respondent causes and has caused said products, when sold, to be transported from its aforesaid place of business in the State of Pennsylvania, to the purchasers thereof in the various States of the United States other than Pennsylvania and in the District of Columbia, at their respective points of location. There is now, and has been for some time last past, a course of trade by said respondent in said frozen confections 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 now and for some time last past has been in competition with other corporations, and with partnerships and individuals engaged in the manufacture of like or similar products 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 in said commerce as described in paragraph 1 hereof, respondent sells and has sold to dealers certain assortments of frozen confections so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. Assortments of said frozen confections are sold to the consuming public in the following manner: This assortment consists of a number of frozen confections packed in paper bags and known as "Fudgicle" and "Banjo." Sales are 5¢ each. Through the center of each of said confections is a small stick or handle used by the consumer to handle the confection. On certain of said handles or sticks appear the phrases "Return this stick for free Banjo" or "Return this stick for free Fudgicle." These phrases are effectively concealed until the purchaser has made a purchase and the frozen confection has been consumed or removed from the stick. Purchasers who receive one of the sticks marked with the said phrases are entitled to and do receive an additional frozen confection without additional cost. The additional confections are thus distributed to the purchasing public wholly by lot or chance. Respondent sells various assortments of frozen confections 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 such assortments of said confections 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. The use by the respondent of said method in distributing its said frozen confections is a practice of a sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws.

PAR. 4. The sale of frozen confections to the purchasing public in the manner above alleged, involves a game of chance or the sale of a chance to procure frozen confections at a price much less than the normal retail price thereof. Many persons, firms, and corporations, who sell or distribute frozen confections in competition with the respondent, as above alleged, 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 and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of its frozen confections and the element of chance involved therein, and are thereby induced to buy and sell respondent's frozen confections in preference to frozen confections offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method. The use of said method by respondent, because of said game of chance, has a tendency and capacity to and does unfairly divert trade to respondent from its said competitors who do not use the same or an equivalent method, and as a result thereof substantial injury is being and has been done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 the 7th day of February 1939, issued and served its complaint in this proceeding upon respondent, Hershey Creamery Co., charging it with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices

Findings

28 F. T. C.

in commerce in violation of the provisions of said act. On February 28, 1939, the respondent filed its answer, in which answer it 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 the answer thereto, and the Commission having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Hershey Creamery Co., is a corporation, incorporated and doing business under the laws of the State of Delaware, with its principal office and place of business located at Harrisburg, Pa. Respondent is now, and for some time last past has been, engaged in the sale and distribution of frozen confections in commerce between and among the various States of the United States and in the District of Columbia. Respondent causes and has caused said products, when sold, to be transported from its aforesaid place of business in the State of Pennsylvania, to the purchasers thereof in the various States of the United States other than Pennsylvania and in the District of Columbia, at their respective points of location. There is now, and has been for some time last past, a course of trade by said respondent in said frozen confections 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 now and for some time last past has been in competition with other corporations, and with partnerships and individuals engaged in the manufacture, sale, and distribution of like or similar products 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 in said commerce as described in paragraph 1 hereof, respondent sells and has sold to dealers certain assortments of frozen confections so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. Assortments of said frozen confections are sold to the consuming public in the following manner: This assortment consists of a number of frozen confections packed in paper bags and known as "Fudgicle" and "Banjo." Sales are 5¢ each. Through the center of each of said confection is a small stick

or handle used by the consumer to handle the confection. On certain of said handles or sticks appear the phrases "Return this stick for free Banjo" or "Return this stick for free Fudgicle." These phrases are effectively concealed until the purchaser has made a purchase and the frozen confection has been consumed or removed from the stick. Purchasers who receive one of the sticks marked with the said phrases are entitled to and do receive an additional frozen confection without additional cost. The additional confections are thus distributed to the purchasing public wholly by lot or chance. Respondent sells various assortments of frozen confections 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 such assortments of said confections 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. The use by the respondent of said method in distributing its said frozen confections is a practice of a sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws.

PAR. 4. The sale of frozen confections to the purchasing public in the manner above found, involves a game of chance or the sale of a chance to procure frozen confections at a price much less than the normal retail price thereof. Many persons, firms, and corporations, who sell or distribute frozen confections in competition with the respondent, as above found, 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 and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of its frozen confections and the element of chance involved therein, and are thereby induced to buy and sell respondent's frozen confections in preference to frozen confections offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method. The use of said method by respondent, because of said game of chance, has a tendency and capacity to and does unfairly divert trade to respondent from its said competitors who do not use the same or an equivalent method, and as a result thereof substantial injury is being and has been done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

Order

28 F. T. C.

CONCLUSION

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

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint, and states that it waives all intervening procedure and further hearing as to the said facts, and the Commission having made its findings as to the facts and conclusion that said respondent is violating the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Hershey Creamery Co., 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 frozen confections or any other merchandise in commerce as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling and distributing frozen confections or other merchandise so designed that the sale thereof by retail merchants constitutes or may constitute the operation of a game of chance, gift enterprise, or lottery scheme.

2. Supplying to, or placing in the hands of others frozen confections or other articles of merchandise which are used or which may be used without alteration or rearrangement 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

LANTEEN LABORATORIES, INC., LANTEEN MEDICAL
LABORATORIES, INC., ALSO TRADING AS MEDICAL
BUREAUS OF INFORMATION, AND RUFUS RIDDLES-
BARGERCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3051. Complaint, Feb. 5, 1937—Decision, Apr. 1, 1939*

Where two corporations and an individual, who was officer thereof and directed and controlled their sales policies and business operations, engaged in manufacture, advertisement, distribution, and sale of certain medical preparations and appliances for so-called feminine hygiene and contraceptive use, in substantial competition with others engaged in distribution and sale of similar products, and including those who do not in any way misrepresent the character, nature, and size of their respective businesses, and do not misrepresent in any way the nature and character of their respective products; in advertising said products through show window displays and in trade literature such as booklets, pamphlets, and circulars, distributed to members of purchasing public through medium of boxes in which said products were marketed, through drug stores, through mails and direct to prospective purchasers, and sometimes sold, and sometimes given away free—

- (a) Represented, in connection with its cap diaphragm and preparation sold therewith, that the "Diaphragm Method" was the standard prescription which was given by medical specialists and marriage hygiene clinics throughout the world, and was recognized as the superior of all other methods for such hygiene, and that its products were sold only for use by married couples on physician's prescription for cure or prevention of ill health, and that its said method was the only method for such hygiene that had the full approval of the medical specialists in this practice, and was the one and only method universally prescribed by the world's leading doctors, marriage hygiene clinics and hospitals, and that use thereof brought health, happiness, and freedom from worry; and
- (b) Represented that said cap diaphragm, in its one standard size, was adaptable to all normal anatomies and would function simply and effectively under all circumstances, and that said preparation would insure quick destruction of all germs and would destroy all germ life, and provided complete sterilization, and, used with said diaphragm, gave the well-known double protection and assured complete reliability, and that its said products were ethical and widely available through the drug or medical profession, but not otherwise distributed;

Facts being products in question did not form or constitute competent treatments, remedies, cures, and preventives of ill health, as represented by them, and were of no beneficial therapeutic value and not generally prescribed for cure or prevention of ill health, none of said products, when used in connection with applicators furnished by them and with said diaphragm as recommended, and used as directed, would in all cases serve as competent contraceptives, and would fit all normal anatomies, but were capable of causing