

Syllabus

IN THE MATTER OF
HOWARD D. JOHNSON COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3827. Complaint, June 21, 1939—Decision, Dec. 28, 1939*

Where a corporation engaged in manufacture of ice cream and other food products, and in sale and distribution thereof to purchasers in other States, in substantial competition with others engaged in sale and distribution of such various products, and including competitors selling and distributing in commerce and in the District of Columbia ice cream and food products, who do not misrepresent in any manner whatsoever the nature, character, quality, or method of manufacture of products thereof, nor make misrepresentations of any other character or nature to induce public to purchase their products; in advertisements which it disseminated through the mails, through newspapers of general circulation, and through circulars and other printed or written matter distributed among the various States, and through broadcasts from radio stations of extra-State audience and otherwise, and which were intended and calculated to induce purchase of its products—

Referred to its ice cream as "home made" and to its food as "wholesome—home cooked," and, in further connection with its trade name, referred to its business as makers of "home made ice cream, candies and pastries," and thereby represented to public that said products were in fact home made in the manner and of the ingredients characteristic of the preparation of such products in the home for consumption in the home, as distinguished from factory-made products made of ingredients and by ordinary means of production used in factories making such products for sale, facts being its said products were made in factory of the ordinary ingredients and by the ordinary methods of production used in factories making such products for sale;

With effect of deceiving and misleading prospective purchasers and purchasers of its products into belief that such representations were true, and with result, as consequence of such mistaken and erroneous beliefs, that substantial portion of purchasing public was induced to and did purchase ice cream and other food products from it, and trade was thereby unfairly diverted in such products to it from its competitors; to the injury of competition in commerce:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Randolph Preston*, trial examiner.

Mr. Karl Stecher for the Commission.

Mr. Joseph T. Brennan, of Wollaston, Mass., for respondent.

Complaint

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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 Howard D. Johnson Co., 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, Howard D. Johnson Co., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its principal place of business located at 89 Beale Street, in the city of Wollaston, Mass. It is now, and has been for several years heretofore, engaged in the manufacture of ice cream and other food products and in the sale and distribution thereof in commerce between and among the various States of the United States. Respondent causes said products when sold to be transported from its place of business in the State of Massachusetts to the purchasers thereof located at points in States of the United States other than the State of Massachusetts. It maintains, and for a period of more than 1 year last past has maintained, a course of trade in said products in commerce between and among the various States of the United States.

PAR. 2. Respondent has been, and is, engaged in substantial competition in the sale and distribution of said ice cream and other food products with other corporations and with partnerships and individuals likewise engaged in the business of selling and distributing ice cream and other food products in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of its aforesaid business, the respondent has disseminated and is now disseminating, and has caused and is now causing the dissemination of, false advertisements concerning its said products, by United States mails, by insertion in newspapers having a general circulation and also in circulars and other printed or written matter, all of which are distributed in commerce among and between the various States of the United States; and by continuities broadcast from radio stations which have sufficient power to, and do, convey the programs emanating therefrom to listeners located in various States of the United States other than the State in which said broadcasts originate and by other means in commerce, as commerce is defined in the Federal Trade Commission Act, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of its said products; and has disseminated and

is now disseminating, and has caused and is now causing the dissemination of, false advertisements concerning its said products, by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of its said products in commerce, as commerce is defined in the Federal Trade Commission Act. Among, and typical of the false statements and representations contained in said advertisements, disseminated and caused to be disseminated, as aforesaid, are the following:

Howard Johnson home made ice cream.

Howard Johnson food is wholesome—home cooked.

Howard D. Johnson Company. Home made food and ice cream.

Howard D. Johnson Company. Makers of Howard Johnson's home made ice cream, candies and pastries.

PAR. 4. The aforesaid statements made and disseminated by respondent in offering for sale and selling its ice cream and other food products, as set forth in paragraph 3 thereof, purport to be descriptive of its merchandise and serve as representations to the public that said products are in fact home made in the manner and of the ingredients characteristic of the preparation of such products in home for consumption in the home as distinguished from factory made of the ingredients and by the ordinary means of production used in factories manufacturing such products for sale.

PAR. 5. In truth and in fact the statements made and disseminated by respondent, as set out in paragraph 3 hereof, are false and misleading for the reason that said products are factory made of the ingredients and by the ordinary methods of production used in factories manufacturing such products for sale.

PAR. 6. There are now and have been competitors of respondent selling and distributing ice cream and other food products in commerce among and between the various States of the United States and in the District of Columbia who do not misrepresent in any manner whatsoever the nature, character, quality, or method of manufacture or production of the products offered for sale and sold by them, nor do they make misrepresentations of any other character or nature to induce the public to purchase the products offered for sale and sold by them.

PAR. 7. The use and dissemination by respondent of the false, deceptive, and misleading statements, representations, and advertisements set forth in paragraph 3 hereof, had and have the capacity and tendency to, and did and do, deceive and mislead prospective purchasers and purchasers of its products into the belief that such representations are true. On account of such mistaken and erroneous beliefs, a substantial portion of the purchasing public has been, and is, induced to purchase ice cream and other food products from respondent, and thereby

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trade has been, and is, unfairly diverted to respondent from competitors named in paragraphs 2 and 6 hereof. As a result thereof, injury has been, and is now being, done by respondent to competition in commerce among and between the various States of the United States.

· PAR. 8. 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 June 21, 1939, issued and on June 22, 1939, served its complaint in this proceeding upon respondent Howard D. Johnson Co., a corporation, charging it with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearings as to the facts, and stating further that prior to the issuance of said complaint the respondent had discontinued the use of the words "home made" or "home cooked" or any other words of similar import and meaning in describing or designating the ice cream and other food products sold by it, which substitute answer was duly filed in the office of the Commission. Thereafter this proceeding regularly came on for final hearing before the Commission on the said complaint and substitute answer, 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, Howard D. Johnson Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its principal place of business located at 89 Beale Street, in the city of Wollaston, Mass. It is now, and has been for several years heretofore, engaged in the manufacture of ice cream and other food products and in the sale and distribution thereof in commerce between and among the various States of the

United States. Respondent causes said products when sold to be transported from its place of business in the State of Massachusetts to the purchasers thereof located at points in States of the United States other than the State of Massachusetts. It maintains, and for a period of more than 1 year last past has maintained, a course of trade in said products in commerce between and among the various States of the United States.

PAR. 2. Respondent has been, and is, engaged in substantial competition in the sale and distribution of said ice cream and other food products with other corporations and with partnerships and individuals likewise engaged in the business of selling and distributing ice cream and other food products in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of its aforesaid business, the respondent has disseminated, and has caused the dissemination of, false advertisements concerning its said products, by United States mails, by insertion in newspapers having a general circulation and also in circulars and other printed or written matter, all of which were distributed in commerce among and between the various States of the United States; and by continuities broadcast from radio stations which had sufficient power to, and did, convey the programs emanating therefrom to listeners located in various States of the United States other than the state in which said broadcasts originated, and by other means in commerce, as commerce is defined in the Federal Trade Commission Act, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of its said products; and has disseminated, and has caused the dissemination of, false advertisements concerning its said products, by various means, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of its said products in commerce, as commerce is defined in the Federal Trade Commission Act. Among and typical of, the false statements and representations contained in said advertisements, disseminated and caused to be disseminated by the respondent, as aforesaid, were the following:

Howard Johnson home made ice cream.

Howard Johnson food is wholesome—home cooked.

Howard D. Johnson Company. Home made food and ice cream.

Howard D. Johnson Company. Makers of Howard Johnson's home made ice cream, candies and pastries.

PAR. 4. The aforesaid statements made and disseminated by respondent in offering for sale and selling its ice cream and other food products, as set forth in paragraph 3 hereof, purported to be descrip-

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tive of its merchandise and served as representations to the public that said products were in fact home made, in the manner and of the ingredients characteristic of the preparation of such products in the home for consumption in the home, as distinguished from factory made products made of the ingredients and by the ordinary means of production used in factories manufacturing such products for sale.

PAR. 5. In truth and in fact the statements made and disseminated by respondent, as set out in paragraph 3 hereof, were false and misleading for the reason that said products were made in a factory of the ordinary ingredients and by the ordinary methods of production used in factories manufacturing such products for sale.

PAR. 6. There are now, and have been, competitors of respondent selling and distributing ice cream and other food products in commerce among and between the various States of the United States and in the District of Columbia who do not misrepresent in any manner whatsoever the nature, character, quality, or method of manufacture or production of the products offered for sale and sold by them, nor do they make misrepresentations of any other character or nature to induce the public to purchase the products offered for sale and sold by them.

PAR. 7. The use and dissemination by respondent of the false, deceptive, and misleading statements, representations and advertisements as above set forth had the capacity and tendency to, and did, deceive and mislead prospective purchasers and purchasers of its products into the belief that such representations were true. On account of such mistaken and erroneous beliefs, a substantial portion of the purchasing public was induced to, and did, purchase ice cream and other food products from the respondent, thereby unfairly diverting trade in such products to the respondent from its competitors. As a result thereof, injury has been done by respondent to competition in commerce among and between the various States of the United States.

CONCLUSION

The aforesaid acts and practices of respondent Howard D. Johnson Co., 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.

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 the complaint to be true and states that it waives hearing on the charges set forth in said complaint and that without further evidence or other intervening procedure the case might proceed to final hearing upon the record, 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, Howard D. Johnson Co., a corporation, its officers, representatives, agents, and employees, directly or through any corporate or other device, do forthwith cease and desist from disseminating or causing to be disseminated any advertisement by means of the United States mails or in commerce, as commerce is defined in the Federal Trade Commission Act, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of its food products, or disseminating or causing to be disseminated, any advertisement by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as commerce is defined in the Federal Trade Commission Act, of said food products, which said advertisement represents, directly or through implication, that said food products are home made or home cooked, unless and until said products are in fact made or cooked in the manner and of the ingredients characteristic of the preparation of such products in the home for consumption in the home, as distinguished from factory made products made of the ingredients and by the ordinary means of production used in factories manufacturing such products for sale.

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.

IN THE MATTER OF
MERRILL CANDY COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 3128. Complaint, May 14, 1937—Decision, Dec. 29, 1939

Where a corporation engaged in manufacture of candy and in sale and distribution thereof to jobber and retailer purchasers in other States, including assortments with which, as case might be, it furnished (a) push cards designed and intended for use in distribution of said candy wholly by lot or chance under a plan in accordance with which and legend secured by chance, as displayed under disk selected and removed, purchaser or customer received by chance for 5 cents paid one candy bar, five candy bars, small canoe of candy, or package of choice candies, and maker of last sale on each of cards secured or was given larger canoe filled with candy, or (b) push cards of various types and design and punchboards for use in distribution of candy wholly by lot or chance and of same general nature and operation in substantially same manner as above described, and (c) articles of merchandise including pieces of glassware and chromium dishes for use as special prizes in operation of particular cards and boards;

Sold together with push cards or punchboards or both, such candies and articles of merchandise to jobbers and retailers by whom as said jobbers' vendees, or purchasers direct, such candies were resold to purchasing public by use of one or other of aforesaid devices and in manner and by sales plan above described; and supplied thereby to and placed in hands of others means by which games of chance, gift enterprises, and lotteries were conducted in said products' resale or distribution by retailers aforesaid, involving game of chance or sale of a chance and use of method or practice in such sale and distribution, contrary to established public policy of the United States Government and in violation of the laws of several of the States and in competition with those who are unwilling to employ in sale and distribution of candy and articles of merchandise dealt in by them any method or sales plan involving games of chance, gift enterprises, or lottery schemes and refrain from use thereof, to their competitive disadvantage;

With result that many purchasers of candy and articles of merchandise from it were attracted by element of chance involved in sale and distribution of such candies and articles through use of push cards and punchboards furnished by it and were thereby induced to purchase said candies and articles offered by it in preference to similar products offered by competitors who did not furnish with candies and articles sold by them similar push cards and punchboards or similar devices, and jobber and retail dealers purchased substantial amount of candies and articles of merchandise from it and trade was thereby diverted unfairly to it from its competitors aforesaid:

Held, that such acts and practices, under the circumstances set forth, were all to the injury and prejudice of the public and constituted unfair methods of competition.