

Complaint

36 F. T. C.

IN THE MATTER OF
MODERNISTIC CANDIES, INC., ET AL.

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

Docket 4605. Complaint, Oct. 6, 1941—Decision, May 25, 1943

Where, a corporation and two officers and stockholders, engaged in the manufacture and competitive interstate sale and distribution of chewing gum, including certain assortments which were so packed and assembled in "ballgum boards" as to involve the use of a lottery scheme in sale thereof and of other merchandise under a plan, as typical, by which the different color of 20 pieces—or other number, as indicated thereon—entitled the customer, in addition to the penny piece secured by all, to a merchandise prize of ordinarily greater value, as supplied by the wholesaler or retailer; and thereby Supplied to and placed in latter's hands the means of conducting games of chance in the sale and distribution of such gum in accordance with aforesaid sales plan involving the sale of a chance to obtain additional merchandise at less than its normal retail price, contrary to an established public policy of the United States Government and in competition with those who do not use such plans or methods;

With result that many persons were attracted by their method of packing their gum and by the element of chance involved therein, and were thereby induced to buy and sell it in preference to that of competitors aforesaid, whereby substantial trade was diverted unfairly from latter to them:

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

Before *Mr. John W. Addison*, trial examiner.

Mr. J. W. Brookfield, Jr., for the Commission.

Beach, Fathchild & Scofield, of Chicago, Ill., for respondents.

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 Modernistic Candies, Inc., a corporation, and Sol S. Leaf and Harry Leaf, individually, and as officers of Modernistic Candies, Inc., hereinafter referred to as respondents, have violated the provisions of said act and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues this complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Modernistic Candies, Inc., is a corporation, organized and doing business under the laws of the State of

Illinois, with its principal office and place of business located at 1734 West Hubbard Street, Chicago, Ill. Respondent, Sol S. Leaf, is the president of respondent, Modernistic Candies, Inc., and has his principal office and place of business at 1734 West Hubbard Street, Chicago, Ill. Respondent, Harry Leaf, is secretary-treasurer of Modernistic Candies, Inc., and has his principal office and place of business at 1734 West Hubbard Street, Chicago, Ill. All of said respondents act together and in cooperation with each other in doing the acts and things herein alleged. Respondents are now, and for more than 2 years last past have been, engaged in the manufacture of chewing gum 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. Respondents cause, and have caused, their products, when sold, to be transported from said place of business to purchasers thereof in the various States of the United States other than the State of Illinois and in the District of Columbia at their respective points of location. There is now, and for more than 2 years last past has been, a course of trade by said respondents in such merchandise 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, respondents are, and have been, in competition with other corporations and individuals and with partnerships engaged in the sale and distribution of like or similar merchandise 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 said business, as described in paragraph 1 hereof, respondents sell and distribute, and have sold and distributed, their said chewing gum so packed and assembled as to involve the use of a lottery scheme or gift enterprise when used by retail merchants in the sale or distribution of other merchandise to the consuming public. Said gum is packed and assembled in a corrugated paperboard in which there are 150 holes, each of which contains a ball of said gum. Nontransparent paper, which effectively conceals the said balls of gum, is pasted over the front and back of said board. Said boards containing said chewing-gum balls are commonly known as "ballgum" boards.

Many wholesale dealers who purchase said "ballgum" boards from respondents make up assortments composed of said boards and other articles of merchandise and sell and distribute said assortments to retail dealers who, in turn, sell and distribute, and have sold and distributed, the same to the purchasing public in substantially the following manner:

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The majority of said balls of gum are of one color and the minority thereof are of a different color. Sales are 1 cent each and each purchaser is entitled to, and receives, one of said balls of gum which he punches from said board. If said ball of gum, so punched, is one of said majority balls the purchaser receives nothing in addition thereto for his money, but, if said ball is one of said minority balls the purchaser is entitled to and receives in addition thereto, other merchandise as a prize without additional charge. The said other merchandise has a retail value greater than 1 cent. Said balls of gum are effectively concealed from purchasers and prospective purchasers until the same have been purchased and punched or removed from said board. The said balls of gum and other merchandise are thus distributed to the purchasing public wholly by lot or chance.

Other wholesale dealers purchase said "ballgum" boards and sell and distribute the same to retail dealers as separate items of merchandise without making up such assortments. Retail dealers who purchase said boards without said prizes use their own merchandise as prizes and sell or distribute the same to the purchasing public by means of said boards in accordance with the sales plan or method hereinabove described.

PAR. 3. In so selling and distributing said "ballgum" boards, respondents supply to, and place in the hands of, others the means of, and an instrumentality for, the conducting of lotteries in the sale and distribution of merchandise in accordance with the above-described sales plan. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure additional merchandise at a price which is much less than the normal retail price thereof. The use by respondents of said method in the designing, packing, and arranging of their chewing gum, and the sale and distribution of said chewing gum and other merchandise, as hereinbefore described, are practices of a sort which are contrary to an established public policy of the Government of the United States.

PAR. 4. Many persons, firms, and corporations, who sell or distribute and have sold and distributed chewing gum or other merchandise in competition with the respondents, 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 respondents in the sale and distribution of their said chewing gum and the element of chance involved therein, and are

thereby induced to buy and sell respondents' chewing gum in preference to chewing gum or other merchandise offered for sale and sold by said competitors of respondents who do not use the same or an equivalent method. The use of said method by respondents, because of said game of chance, has a tendency and capacity to unfairly divert trade in said commerce to respondents from its said competitors who do not use the same or an equivalent method. As a result thereof substantial injury is being, and has been done by respondents to said competitors in said commerce.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair 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 October 6, 1941, issued and subsequently served its complaint in this proceeding upon the respondents, Modernistic Candies, Inc., a corporation, and Sol S. Leaf and Harry Leaf, individually, and as officers of Modernistic Candies, Inc., charging them with the use of unfair methods of competition in commerce and unfair acts and practices in commerce in violation of the provisions of that act. After the filing of respondents' answer, testimony and other evidence in support of the allegations of the complaint were introduced by the attorney for the Commission, and in opposition thereto by the attorney for the respondents, before a trial examiner of the Commission theretofore duly designated by it, and such 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, report of the trial examiner upon the evidence, briefs in support of and in opposition to the complaint, and oral argument; 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, Modernistic Candies, Inc., is a corporation, organized and doing business under the laws of the State of Illinois, with its principal office and place of business located at 1734

West Hubbard Street, Chicago, Ill. Respondents, Sol S. Leaf and Harry Leaf, are president and secretary-treasurer, respectively, of the corporate respondent, and have their principal office and place of business at the same address as the corporate respondent. The individual respondents are the principal stockholders and the directing and controlling officers of the respondent corporation. They formulate and control the sales plans and merchandising policies of the corporation. All of the respondents have acted together and in cooperation with one another in carrying out the acts and practices herein described.

PAR. 2. The respondents are now and for a number of years last past have been engaged in the manufacture of chewing gum, and in the sale and distribution of such gum to wholesale dealers. In the course and conduct of their business respondents cause and have caused their products, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain and have maintained a course of trade in their products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. Respondents are and have been in substantial competition with other corporations and individuals, and with partnerships, engaged in the sale and distribution of similar merchandise in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their business respondents pack and assemble certain of their chewing gum in such manner as to involve the use of a lottery scheme, gift enterprise, or game of chance when such gum is sold by retail dealers to the consuming public and used by such dealers in the sale and distribution of other merchandise to the consuming public. This gum is packed and assembled in a corrugated paperboard in which there are 150 holes, each of which contains a ball of gum. The holes are covered with nontransparent paper which effectively conceals the balls of gum. These boards are commonly known as "ballgum boards."

The majority of the balls of gum contained in the board are of one color, the minority being of a different color. For example, one type of board contains 20 red balls of gum and 130 balls which are white or some color other than red. Sales are one cent each, and each purchaser is entitled to and receives for the 1 cent paid one of the balls of gum, which he punches from the board. If the ball of gum punched is one of the majority balls, the purchaser receives nothing for his money except the ball of gum. If, however, the ball of gum punched

happens to be one of the minority balls, the purchaser is entitled to and receives in addition to the gum other merchandise as a prize, such additional merchandise being without further cost to the purchaser. The prize merchandise usually has a retail value greater than 1 cent. All of the balls of gum are effectively concealed from purchasers and prospective purchasers until they have been purchased and punched from the board. The balls of gum and the other merchandise awarded as prizes are thus distributed to the public wholly by lot or chance.

Some of the wholesale dealers who purchase these ballgum boards from respondents make up assortments composed of such boards and other articles of merchandise, and sell and distribute such assortments to retail dealers who, in turn, sell and distribute such gum and other merchandise to the public in the manner described above. Other wholesale dealers purchasing such boards from respondents sell and distribute the boards to retail dealers as separate items of merchandise without combining them with other merchandise. Retail dealers who purchase the boards alone use their own merchandise as prizes and sell and distribute the gum and other merchandise to the public in accordance with the aforesaid sales plan.

The record indicates that rarely, if ever, do retail dealers purchase the boards as "straight" merchandise—that is, merely for the purpose of selling the gum itself. Almost invariably the board is purchased and used by the retailer as a lottery device, and it is obvious that the board is intended and designed by respondents for that purpose. Of significance in this connection is the fact that each board, when it leaves the respondents' hands, has imprinted thereon a certain number, as "20" or "24". This number indicates the number of red balls of gum contained in the particular board, and the retailer is thereby enabled to determine the number of prizes which will be required in the operation of the board.

PAR. 5. In selling and distributing gum packed and assembled in the manner described above, respondents supply to and place in the hands of others the means of conducting lotteries or games of chance in the sale and distribution of such gum to the public in accordance with the aforesaid sales plan. The sale of merchandise to the public in the manner described above involves a game of chance or the sale of a chance to obtain additional merchandise at a price less than the normal retail price thereof. The use by respondents of this method of packing and assembling their chewing gum, and the sale and distribution of such gum and of other merchandise to the public by means of the plan or method herein described, are practices of a sort which are contrary to an established public policy of the Government of the United States.

PAR. 6. Among the persons, partnerships, and corporations who sell and distribute chewing gum in competition with the respondents, as set forth in paragraph three hereof, are those who do not pack and assemble their chewing gum in the manner described above and who do not use any other plan or method involving a game of chance or lottery scheme in the sale of their gum to the consuming public. Many persons are attracted by respondents' method of packing and assembling their gum and by the element of chance involved in the sale of gum so packed and assembled to the consuming public, and are thereby induced to buy and sell respondents' chewing gum in preference to that offered for sale and sold by those competitors of respondents who do not so pack and assemble their gum. The use by respondents of such method of packing and assembling their gum has the tendency and capacity to divert, and has diverted, substantial trade unfairly to respondents from such competitors.

CONCLUSION

The acts and practices of the respondents as herein found are all to the prejudice of the public and of respondents' competitors, and constitute unfair methods of competition in commerce and unfair 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, the answer of respondents, testimony and other evidence in support of and in opposition to the allegations of the complaint taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence, briefs in support of and in opposition to the complaint, and oral argument; and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, Modernistic Candies, Inc., a corporation, its officers, and Sol S. Leaf and Harry Leaf, individually, and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of chewing gum or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of wholesale dealers, retail dealers, or others, "ballgum boards" or other lottery devices which are to be used or may be used in the sale or distribution of respondents' merchandise or any merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

2. Selling or distributing chewing gum or other merchandise so packed and assembled that sales of such chewing gum or other merchandise to the public are to be made or, due to the manner in which such gum or other merchandise is packed and assembled at the time it is sold by respondents, may be made by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the respondents shall, within 60 days after 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 this order.

IN THE MATTER OF
HECHT COMPANY ALSO TRADING AS HECHT BROS.

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

Docket 4840. Complaint, Sept. 28, 1942—Decision, May 25, 1943

Where a corporation engaged in the operation of department stores in Baltimore, Washington, and New York, and in interstate sale and distribution, among other things, of mattresses—

Falsely represented through statements in periodicals, catalogs, circulars, lists and other advertising material, that its \$19.75 price for mattresses was much less than the usual price therefor and was a special price, affording the purchaser a substantial saving over the customary one; when in fact such was its usual selling price;

With effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous belief that such representations were true, and of inducing it to purchase its said products:

Held, That said acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

Mr. J. W. Brookfield, Jr. for the Commission.

Lauchheimer & Frank, of Baltimore, Md., 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 the Hecht Co., a corporation, also trading as Hecht Bros., hereinafter referred to as respondent, has violated the provisions of 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, Hecht Co., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located in the city of Baltimore, State of Maryland. It also trades as and uses the name of Hecht Bros. Respondent is now and for some time last past has been engaged in the business of selling and distributing mattresses and other merchandise in commerce between and among the various States of the United States and in the District of Columbia. Respondent maintains and operates department stores in the cities of Baltimore, Md., Washington, D. C., and New York, N. Y. Respondent causes its merchandise when sold to be shipped from its