

Complaint

36 F. T. C.

IN THE MATTER OF
THE PREMIER CONE BAKING CO.

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

Docket 4947. Complaint, Apr. 19, 1943—Decision, June 24, 1943

Where a corporation, engaged in the manufacture and competitive interstate sale and distribution of boxes of ice-cream cones, a small number of which in each box were molded to show a star, for use by retailers and other ice-cream sellers in distribution of ice cream to their customers, under a plan involving use of a lottery scheme or game of chance, by which consumers who secured by chance one of said star-bearing cones received without further charge an additional cone;

Sold, along with display sheets depicting child, adult, and ice cream cones and bearing legend "Look, Mom! Lucky Star Gets You Another FREE," such assortments to wholesalers, jobbers, and ice-cream manufacturers by whom they were resold to retailers and employed as aforesaid in the sale of cones of ice cream to purchasing public; and thereby

Supplied to and placed in hands of the latter, means of conducting lotteries in the sale of its products and ice cream, in accordance with said plan involving sale of a chance to procure a free additional ice-cream cone, contrary to an established public policy of the United States Government and in competition with many who do not use any method contrary to public policy;

With result that many dealers and ultimate purchasers were attracted by said sales plan and the element of chance involved therein, and were induced to buy and sell its merchandise in preference to that sold by aforesaid competitors; and with tendency and capacity unfairly to divert trade in commerce to it from them:

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

Mr. J. W. Brookfield, 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 the Premier Cone Baking 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 interest of the public, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, the Premier Cone Baking Co., is a corporation, organized and operating under and by virtue of the laws of

the State of Ohio, with its principal office and place of business located at 2345 Florence Avenue, Cincinnati, Ohio. Respondent is now, and for some time last past has been, engaged in the manufacture of ice-cream cones and in the sale and distribution thereof to dealers, jobbers, and ice-cream manufacturers in commerce between and among the various States of the United States and in the District of Columbia. Respondent causes and has caused said ice-cream cones, when sold, to be transported from its aforesaid place of business in Cincinnati, Ohio, to purchasers thereof at their respective points of location in the various States of the United States other than the State of Ohio and in the District of Columbia. There is now and has been for some time last past a course of trade by respondent in said ice-cream cones 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 is now and has been in competition with other corporations and with individuals and firms engaged in the sale and distribution of ice-cream cones 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 respondent manufactures and sells, and has manufactured and sold and distributed to ice-cream manufacturers and dealers certain of its ice-cream cones so molded, packed, and assembled as to involve the use of a lottery scheme or game of chance, when used by retail dealers to distribute ice cream to the purchasing and consuming public.

Respondent's method of molding, packing, and assembling its ice-cream cones is as follows: In each box of cones packed and assembled by respondent there are a small number which are molded to show a star; the remainder of the cones in the box are plain. Its cones are sold to jobbers for resale to retailers of ice cream or are sold to retailers who distribute ice cream to the consuming public. Retail dealers and others who sell ice cream to the consuming public use the respondent's cones to distribute the cones and ice cream to their customers by chance or lottery in the following manner:

A customer who purchases one of the cones bearing the star is awarded another cone of ice cream without additional charge. Customers who receive one of the plain cones receive only the cone for which they pay. The consuming purchaser is unable to determine whether the ice-cream cone which he purchases bears the star until the purchase has been made, and thus whether the purchaser of ice cream packed in one of respondent's cones will receive an additional ice-cream cone without additional charge is determined wholly by lot or chance.

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Respondent supplies to the dealer selling its cones a display sheet bearing the following legend:

(Depicting child, adult and ice cream cones.)

LOOK, MOM! LUCKY STAR
Get You Another FREE!

Respondent has manufactured, packed, and assembled other ice-cream cones to be used in the distribution of ice cream by lottery or games of chance which vary in detail, but are the same in principle as those above-described.

PAR. 3. The wholesale dealers and jobbers and ice-cream manufacturers to whom respondent sells the above-described ice-cream cones resell said cones as packed by respondent to retail dealers, and said retail dealers sell and distribute cones 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 and ice cream in accordance with the sales plan hereinabove set forth. The use by respondent of said sales plan or method in the sale and distribution of its merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plan or method and practice is contrary to an established public policy of the Government of the United States.

PAR. 4. The sale of said ice-cream cones to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure an additional ice-cream cone free. Many individuals, firms, and corporations who manufacture, sell, and distribute ice-cream cones in competition with the respondent as above alleged do not use said sales plan or method or any sales plan or method involving a game of chance or the sale of a chance to win something by chance or any other sales plan or method that is contrary to public policy. Many dealers and ultimate purchasers of ice-cream cones are attracted by respondent's said method and sales plan and by the element of chance involved therein, and have been and are induced to buy and sell respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent who do not use the same or equivalent sales plans or methods. The use of said plan or method by respondent, because of said game of chance, has a tendency and capacity unfairly to divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondent from its said competitors who do not use the same or equivalent sales plans or methods.

PAR. 5. The aforesaid acts and practices of respondent as hereinabove alleged are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competi-

tion 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 April 19, 1943, issued and subsequently served its complaint in this proceeding upon respondent, the Premier Cone Baking Co., a corporation, charging it with the use of unfair methods of competition and unfair acts and practices in commerce in violation of the provisions of said act. On May 14, 1943, respondent filed its answer admitting all the material allegations of fact set forth in said complaint and waiving 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. Respondent, the Premier Cone Baking Co., is a corporation, organized and operating under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 2345 Florence Avenue, Cincinnati, Ohio. Respondent is now, and for some time last past has been, engaged in the manufacture of ice cream cones and in the sale and distribution thereof to dealers, jobbers, and ice-cream manufacturers. Respondent causes said product, when sold, to be transported from its aforesaid place of business in Cincinnati, Ohio, to purchasers thereof at their respective points of location in the various States of the United States other than the State of Ohio and in the District of Columbia. There is now, and has been for some time last past, a course of trade by respondent in said ice-cream cones 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 is now, and has been, in competition with other corporations and with individuals and firms engaged in the sale and distribution of ice-cream cones 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, respondent manufactures and sells, and has manufactured and sold and distributed, to ice-cream manufacturers and

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dealers certain of its ice-cream cones so molded, packed, and assembled as to involve the use of a lottery scheme or game of chance when used by retail dealers to distribute ice cream to the purchasing and consuming public.

Respondent's method of molding, packing, and assembling its ice-cream cones is as follows: In each box of cones packed and assembled by respondent there are a small number which are molded to show a star; the remainder of the cones in the box are plain. Its cones are sold to jobbers for resale to retailers of ice cream or are sold to retailers who distribute ice cream to the consuming public. Retail dealers and others who sell ice cream to the consuming public use the respondent's cones to distribute the cones and ice cream to their customers by chance or lottery in the following manner:

A customer who purchases one of the cones bearing the star is awarded another cone of ice cream without additional charge. Customers who receive one of the plain cones receive only the cone for which they pay. The consuming purchaser is unable to determine whether the ice-cream cone which he purchases bears the star until the purchase has been made, and thus whether the purchaser of ice cream packed in one of respondent's cones will receive an additional ice-cream cone without additional charge is determined wholly by lot or chance.

Respondent supplies to the dealer selling its cones a display sheet bearing the following legend:

(Depicting child, adult, and ice cream cones)

Look, Mom! Lucky Star,
Get You Another FREE!

Respondent has manufactured, packed, and assembled other ice-cream cones to be used in the distribution of ice cream by lottery or games of chance which vary in detail but are the same in principle as those above described.

PAR. 3. The wholesale dealers and jobbers and ice-cream manufacturers to whom respondent sells the above-described ice-cream cones resell said cones as packed by respondent to retail dealers, and said retail dealers sell and distribute cones 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 and ice cream in accordance with the sales plan hereinabove set forth. The use by respondent of said sales plan or method in the sale and distribution of its merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plan or method and practice is contrary to an established public policy of the Government of the United States.

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PAR. 4. The sale of said ice-cream cones to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure an additional ice-cream cone free. Many individuals, firms, and corporations who manufacture, sell, and distribute ice-cream cones in competition with the respondent, as above found, do not use said sales plan or method, or any sales or method involving a game of chance or the sale of a chance to win something by chance, or any other sales plan or method that is contrary to public policy. Many dealers and ultimate purchasers of ice-cream cones are attracted by respondent's said method and sales plan and by the element of chance involved therein, and have been, and are, induced to buy and sell respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent who do not use the same or equivalent sales plans or methods. The use of said plan or method by respondent, because of said game of chance, has a tendency and capacity unfairly to divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondent from its said competitors who do not use the same or equivalent sales plans or methods.

CONCLUSION

The aforesaid acts and practices of respondent as hereinabove 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 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 on the complaint of the Commission and the answer of the 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 hearings as to said facts, 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, the Premier Cone Baking Co., a corporation, 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 ice-cream cones or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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1. Selling or distributing ice-cream cones so molded, packed, or assembled that sales to the general public of ice cream or other merchandise, when packed in said ice-cream cones, are to be made or, due to the manner in which said ice-cream cones are molded, packed, or assembled at the time they are sold by respondent, may be made, by means of a game of chance, gift enterprise, or lottery scheme.

2. Supplying to or placing in the hands of others ice-cream cones, some of which are molded with a star or other means of identification, together with a sales plan whereby such cones are to be used, or may be used, in distributing extra cones or containers of ice cream or other merchandise by lot or chance.

3. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the respondent, the Premier Cone Baking Co., a corporation, 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 to cease and desist.

Syllabus

IN THE MATTER OF
SCREEN BROADCAST CORPORATION 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 4736. Complaint, Mar. 19, 1942—Decision, June 25, 1943*

Where five corporations which (1) were engaged in the production and interstate sale, lease, rental, and distribution of commercial motion-picture films to or on the order of manufacturers and national advertisers of various products, and in the furnishing of display service to advertisers in motion-picture theaters through the use of such films, controlling more than 90 percent of the volume of business done in the motion picture screen advertising industry; (2) had under contract to display advertising films—under either national programs or cooperative programs, in latter of which cost is borne jointly by manufacturer and its local dealers—about 8,000 motion-picture theaters (of the approximately 18,000 in the United States) in small cities and towns; (3) were from time to time in free, active, and substantial competition with other film distributors and advertisers who produced their own films; and prior to the acts and practices below set forth, were in such competition with one another;

Acting in cooperation with one another or with and through corporate "General Screen Advertising" or "GSA" booking agency, controlled by one of their members, and its chairman, and also with and through their association, organized to adopt rules and regulations governing the handling of cooperative advertising films and programs, and its secretary—

- (a) Entered into understandings and agreements between and among themselves and with other film distributors as to screening rates and commissions and other terms and conditions in connection with the interstate sale, lease, rental, and distribution of films containing advertisements solicited from national advertisers; and pursuant to such understandings, etc., and in furtherance thereof (1) entered into individual contracts with moving-picture exhibitors for the exclusive privilege of exhibiting in their theaters commercial or advertising motion-picture films, usually for 5-year periods; (2) organized as their only channel for solicitation of national advertising contracts from manufacturers, aforesaid corporate "GSA," with the exception that two of their number also used as a booking agency for certain territory corporate "Screen Broadcast Corp." or "SBC," as below set forth; and (3) either directly or through their said booking agencies, fixed the display rates to be charged manufacturers, the rates, commissions, and other compensation to be allowed the agencies, and the terms and conditions under which national advertising films were to be shown in theaters; and

Where said "GSA" booking agency and said distributors—

- (b) Prepared, promulgated, executed, and carried out—except in the territory north of Virginia and east of Ohio, where aforesaid "SBC" had arrangements below described—uniform codistributor agreements whereunder (1) distributors were to furnish "GSA" a list of all theaters under contract, for classification by it according to size, circulation, desirability, and minimum rate