

Complaint.

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FEDERAL TRADE COMMISSION

v.

LOOSE-WILES BISCUIT COMPANY.

COMPLAINT, FINDINGS, AND ORDER IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914, AND OF SECTION 2 OF AN ACT OF CONGRESS APPROVED OCTOBER 15, 1914.

Docket 837—January 23, 1924.

SYLLABUS.

Where a corporation engaged in the manufacture and sale of biscuits, crackers, and other bakery products, long extensively advertised by it and in great demand throughout the United States, and which constituted the second largest producer of such products in the country and controlled approximately fifteen per cent of the trade therein; permitted chain store organizations to aggregate the separate purchases of their various retail grocery establishments or units, frequently operated in competition with comparable independent grocery establishments or units, comparably served by it and at the same cost for equal quantities, and thereby secure the advantage of the larger discounts which it extended for the larger purchaser, and declined to permit other retailers to aggregate the separate purchases of their respective independent grocery establishments or units, either through the instrumentality of corporate organizations created for such purpose, or in other ways; in order to secure similar advantages and enable them to meet the competition of the aforesaid chain store units; with the result that there was thereby conferred upon one class of retail grocers an undue advantage in competing with another class in the handling of its products, with the tendency to substantially lessen competition and create a monopoly in the retail distribution thereof:

Held, That such practices, substantially as described, constituted an unfair method of competition in violation of Section 5 of the Act of Congress approved September 26, 1914, and an unlawful discrimination in price, in violation of the provisions of Section 2 of the Act of Congress approved October 15, 1914.

Mr. I. E. Lambert for the Commission.

Patterson, Eagle, Greenough & Day, of New York City (*J. Frederick Eagle* and *Carroll G. Walter*, of New York, of counsel), for respondent.

COMPLAINT.¹

I.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission

¹As amended.

charges that the Loose-Wiles Biscuit Company, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce, in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

PARAGRAPH 1. That the respondent, Loose-Wiles Biscuit Company, is now, and was at all times hereinafter mentioned, a corporation organized existing and doing business under and by virtue of the laws of the State of New York, having bakeries scattered throughout the various cities of the United States and with its center office located in Kansas City, Mo.; that the respondent owns the entire capital stock, except the qualifying shares, and directs, operates and controls the policies of the following corporations:

Loose-Wiles Biscuit Company of Missouri,
Loose-Wiles Biscuit Company of Illinois,
Loose-Wiles Biscuit Company of Maine,
Loose-Wiles Biscuit Company of Oklahoma,
Loose-Wiles Biscuit Company of Tennessee,
The Austin Dog Bread & Animal Food Company of Mass.,
Elbira Realty Company of Missouri;

that respondent is now and at all times hereinafter mentioned has been engaged in the business of manufacturing and selling biscuits, crackers and other bakery products and causing the same to be transported from the States in which the same are manufactured to the purchasers thereof in the various other States of the United States, the territories thereof, the District of Columbia and foreign countries, in direct competition with other persons, firms, copartnerships and corporations similarly engaged; that respondent is the second largest single producer of such bakery products in the United States and controls over 15% of such trade in this country; that the National Biscuit Company of New York is the largest single producer of biscuits, crackers and other bakery products in the United States and has over 40% of such trade in this country; that the said National Biscuit Company has adopted a policy in selling its products to retailers similar to the policy of the Loose-Wiles Biscuit Company hereafter complained of in this complaint; that the respondent has for many years last past extensively advertised its products, especially its package goods, such as "Tak-hom-a Biscuits," "Perfettos," and "Yum Yums," and some three hundred other varieties and thus the respondent has created a great demand for its products throughout the United States.

PAR. 2. That the respondent, in the course of its business described in paragraph 1 hereof, for more than one year last past allowed, and still allows, discounts on the aggregate monthly purchases of its

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product said discounts varying according to the amount of said aggregate monthly purchases. That the respondent allowed, and now allows, said discounts to the owners of so-called chain stores—that is, to owners who operate more than one retail store—on the aggregate monthly purchases of all said stores. That the respondent serves each said separate retail chain store as a distinct and separate purchaser. The respondent solicits, takes orders from and makes deliveries to, each chain store unit.

PAR. 3. That in many instances the owner of a single store is in direct competition with the unit store of a chain system in selling respondent's products, and the aggregate monthly purchases of respondent's products by said unit store are no greater than the aggregate monthly purchases of respondent's products by the owner of the single store; yet the respondent grants a larger discount to the unit store of the chain system than it does to the owner of the single store.

PAR. 4. That the cost of selling each unit of a chain system is the same as the cost of selling the owner of a single store whose purchases are equal to those of the chain store unit similarly located.

PAR. 5. That as the result of the application of said system of discounts as aforesaid, a discrimination in price is made between owners of retail stores purchasing similar quantities of respondent's products.

PAR. 6. That to meet this disadvantage in competing with chain stores in the selling of respondent's products as hereinbefore described in paragraphs 2, 3, 4, and 5, the owners of one retail store have pooled their orders and have given to respondent such pooled orders as are hereinafter more particularly set forth; that the owners operating but one retail store each do not do a sufficient business, individually, to justify them in purchasing as large quantities of respondent's products as are purchased by the owners operating said chain stores, and they therefore do not secure as high or as great discounts as are secured by said chain store owners; that to overcome their said disadvantage, a number of owners, each operating but one retail store, pool or combine their orders, and the pooled or combined orders have been and are given to and filled by respondent; that respondent has refused, during the period hereinbefore set forth, and still refuses, to grant discounts based upon the amount of such combined or pooled orders, but will grant only discounts based upon the respective amounts of the individual orders contained in said pooled or combined orders, which discounts are substantially lower than if the same were based upon the aggregate amount of such pooled or combined orders.

PAR. 7. That the effect of respondent's system of discounts as hereinbefore described in paragraphs 2, 3, 4, 5, and 6 is to give the owners of such chain of retail stores an undue advantage in competing with the owners operating but one retail store in the handling of respondent's said products, which practices have the capacity to and do tend to substantially lessen competition and create a monopoly in the retail distribution of respondent's products.

PAR. 8. The above alleged acts and conduct of said respondent are all to the prejudice of the public and of said respondent's competitors and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," approved September 26, 1914.

II.

PARAGRAPH 1. And the Federal Trade Commission having reason to believe, from the preliminary investigations made by it, that the Loose-Wiles Biscuit Company, hereinafter referred to as respondent, has been and is violating the provisions of Section 2 of An Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," issues this amended complaint, stating its charges in that respect on information and belief as follows:

That paragraphs 1, 2, 3, 4, 5, 6, and 7 of Count I hereof are hereby adopted and made a part of this count as fully as if set out herein verbatim.

PAR. 2. That the said discrimination in price by respondent between its said customers as aforesaid, has not been and is not based upon a difference in the grade, quality, or quantity of its product so sold, as aforesaid, and has not been and is not now made on account of any allowance whatever for any difference in the cost of selling or transportation of its said products, or in order to meet competition.

PAR. 3. That by reason of the facts hereinabove recited, respondent is unlawfully discriminating in price between different purchasers of its products, contrary to the prohibition thereof, contained in Section 2 of an Act of Congress entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914.

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REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

Pursuant to the provisions of an act of Congress approved September 26, 1914, and an Act of Congress approved October 15, 1914, the Federal Trade Commission issued and served a complaint upon the respondent, the Loose-Wiles Biscuit Company, charging it with using unfair methods of competition in violation of the provisions of said Act approved September 26, 1914, and in violation of the provisions of Section 2 of said Act approved October 15, 1914. The respondent having entered its appearance and filed its answer herein, hearings were held before John W. Addison, an Examiner of the Federal Trade Commission theretofore duly appointed, at which hearings evidence was introduced in support of the allegations of the complaint and on behalf of the respondent. Thereupon this proceeding came on for final argument, and the Commission being fully advised in the premises, and upon consideration thereof, makes this its findings as to the facts and conclusions:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. The respondent, Loose-Wiles Biscuit Company, is now and was at all times hereinafter mentioned, a corporation organized, existing and doing business under the laws of the State of New York, and through stock ownership in other companies controlling nine other plants, located as follows: One, each, at St. Louis, Missouri; Omaha, Nebraska; Kansas City, Missouri; Dallas, Texas; Chicago, Illinois; Minneapolis, Minnesota, and Chelsea, Massachusetts; and two in Boston, Massachusetts; and having its central office located in Kansas City, Missouri, where most of its officers reside. Respondent owns the entire capital stock except qualifying shares, and directs, operates and controls the policies of the following corporations: Loose-Wiles Biscuit Company of Illinois, Loose-Wiles Biscuit Company of Missouri, Loose-Wiles Biscuit Company of Maine, Loose-Wiles Biscuit Company of Oklahoma, Loose-Wiles Biscuit Company of Tennessee, and Austin Dog Bread and Animal Food Company of Massachusetts.

PAR. 2. Respondent is now, and at all times hereinafter mentioned has been, directly and through said controlled companies, engaged in the business of manufacturing and selling biscuits, crackers and other bakery products, and causing the same to be transported from the States in which the same are manufactured to the purchasers thereof in the various other states of the United States, the territories thereof, the District of Columbia and foreign countries, in direct competition with other persons, firms, copartnerships and corporations similarly engaged.

PAR. 3. The respondent is the second largest single producer of such bakery products in the United States. It maintains branches in over 100 cities and controls approximately 15 per cent of such trade in this country. The National Biscuit Company of New York, which is the largest single producer of biscuits, crackers and other bakery products in the United States, has adopted a policy in selling its products to retailers similar to the policy of the Loose-Wiles Biscuit Company complained of in said complaint herein. The respondent has, for many years last past, extensively advertised its products, especially its package goods—"Tak-hom-a Biscuits," "Perfettos," and "Yum-Yums," and a large number of other varieties, and has created a great demand for its products in the United States.

PAR. 4. The respondent, in the course of its business described in paragraphs 1 and 2 hereof, for more than one year last past allowed, and still allows, discounts on the aggregate monthly purchases of its products, said discounts varying according to the amount of said aggregate monthly purchases; for example, aggregate monthly purchases of specified amounts as indicated below, in addition to a cash discount of one per cent, entitled purchasers in New York and Missouri, respectively, to discounts as follows:

Value of purchase	New York	Missouri
	<i>Per cent</i>	<i>Per cent</i>
\$15	5	5
35	5	10
50	10	10
100	10 and 2½	10
150	10 and 5	15
200	15	15

PAR. 5. The respondent allows to purchasers operating more than one retail grocery store, or what are commonly known as "chain stores" (and will be hereinafter so designated) a discount in price on the monthly gross purchases of all the separate units or retail grocery stores of such chain store systems. The number of separate units or retail stores in the various chain store systems vary from two to more than seven thousand. The respondent serves each separate unit or retail store of a chain system as a distinct and separate purchaser—its salesmen solicit and take orders from the managers of each of the separate units or retail stores; it makes deliveries to each separate unit or retail store; in many instances the manager of the separate unit or retail store pays for respondent's goods when they are delivered, but in other instances payment is made at the headquarters of the chain system; in some instances the general

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manager of the chain store system at headquarters to a certain extent determines the brands or varieties of respondent's products that the separate units or retail stores of such system will carry—that is, the general manager will list the number of brands and varieties that each separate unit or retail store will be allowed to handle—but the managers of the separate units or retail stores then choose any or all of such products on such list that they think they can sell in their respective communities, and the quantities to be purchased by each separate unit or retail store in all instances are determined by the manager of said unit or retail store and given to respondent's salesman when he calls; in some instances, however, the manager of the separate unit or retail store determines the brands or varieties that his store will handle and has complete charge of the ordering of biscuits and crackers from the respondent. Different units or retail stores of a chain system in many instances handle different brands or varieties of respondent's products.

PAR. 6. There are some very small and likewise some very large units or retail grocery stores of chain systems. The purchases from respondent of some of the small units or retail stores of the chain system amount to less than \$15 a month, while the purchases of some of the large units or retail stores amount to several hundred dollars. There are some very small and likewise some very large independent retail grocery stores. The purchases from respondent of some of the small independent retail grocers amount to less than \$15 a month, while the purchases from some of the large independent retail grocers amount to several hundred dollars.

PAR. 7. The same salesman, in some instances, who takes orders from purchasers operating separate units or retail grocery stores of a chain system also takes orders from purchasers operating independent retail stores in such salesman's territory, and the same deliveryman who delivers respondent's products to the separate units or retail grocery stores of the chain system also makes deliveries of respondent's products to the independent retail store, in the course of his rounds in his territory. In some instances payments for respondent's goods are made by the purchasers operating separate units or retail grocery stores of a chain system in the same way that the payments are made by the purchasers operating independent retail groceries.

PAR. 8. In many instances a purchaser operating a single retail store is in direct competition with a purchaser operating a separate unit or retail grocery store of a chain system in selling respondent's products, and the aggregate monthly purchases of respondent's products by said purchaser operating a separate unit or retail grocery

store of the chain system are no greater than the aggregate monthly purchases of respondent's products by the purchaser operating a single retail store; yet the respondent grants a larger discount to the purchaser operating a separate unit or retail grocery store of the chain system than it does to the purchaser operating a single retail store.

PAR. 9. The respondent sells its products to purchasers operating separate units or retail grocery stores of grocery chain systems where such separate units or retail stores resell a portion of such purchases to other retailers.

PAR. 10. The respondent refuses to sell purchasers operating independent retail grocery stores where such independent retail grocery stores resell a portion of such purchases to other retailers.

PAR. 11. The cost of selling a purchaser operating a separate unit or retail grocery store of a chain system is the same as the cost of selling a purchaser operating an independent retail store whose purchases are equal to those of the separate unit or retail grocery store of the chain system and similarly located.

PAR. 12. As the result of the application of said system of discounts as aforesaid, a discrimination in price is made between purchasers operating retail grocery stores purchasing similar quantities of respondent's products.

PAR. 13. In order to compete with retail units of chain store systems in selling Loose-Wiles Biscuit Company products, groups of independent retailers in many localities in different parts of the United States have attempted to combine their purchases and obtain discounts equal to those granted to the chain stores:

(a) In some instances one of the independent retailers would buy for two or three of his neighbors, placing the order, receiving all deliveries at his store, and paying for the goods, the other grocers in the combination calling at his store and getting the goods thus ordered and received by him.

(b) In some instances groups of independent retailers have requested the Loose-Wiles Biscuit Company to make to them deliveries similar to those it makes to separate units or retail grocery stores of chain systems; to take orders from them as it takes orders from separate units or retail grocery stores of chain systems; and have offered to pay respondent cash on delivery, or in the same way as the chain stores pay; and have further offered to meet any requirements the respondent makes of the chain systems.

(c) In other instances corporations have been formed in which the stock is owned exclusively by retail grocers. These

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corporations have requested the Loose-Wiles Biscuit Company to sell their stockholders or members on the same terms and in the same manner as said respondent sells to separate units or retail grocery stores of chain systems. These corporations have offered cash on delivery for the goods, or to pay for them as the chain stores pay, and to meet every requirement that the Loose-Wiles Biscuit Company makes of the chain systems.

The Loose-Wiles Biscuit Company has in every instance refused to grant discounts on gross purchases of independent retailers associated or combined together as set out in subparagraphs (a), (b) and (c) of this paragraph, but have continued to sell each independent grocer comprised in the above-mentioned attempted associations or combinations and to grant discounts only on the purchases of each separate member of the association or combination.

PAR. 14. The respondent sells its products to purchasers operating grocery chain system where such systems divide their purchases among the separate units or retail grocery stores of the system.

PAR. 15. The respondent refuses to sell associations or combinations of independent retail grocers operating retail grocery stores similar to the separate units or retail grocery stores of the chain store systems, where said associations or combinations divide their purchases among the members of the association or combination.

PAR. 16. It costs the respondent no more to sell a specified number of purchasers operating independent retail stores than it costs to sell the same number of purchasers operating separate units or retail grocery stores of chain systems buying the same quantities and similarly located.

PAR. 17. Respondent's products, being nationally known, make exceptionally good "leaders," and the chain stores are very frequently using them as such. (When a retailer sells a well-known product at a very low price, to attract attention and lure customers into his store, he is said to be selling such product as a "leader.")

PAR. 18. In many instances the purchaser operating an independent retail grocery store, purchasing equal amounts with a competing purchaser operating a separate unit or retail grocery store of a chain system, can not buy respondent's products at as low a price as the separate unit or retail grocery store of the chain system is selling such products, because of difference in discounts.

PAR. 19. In many instances independent retailers purchasing less than \$200 per month of Loose-Wiles Biscuit Company products are unable to successfully compete with purchasers operating separate units or retail grocery stores of chain systems in the sale of respondent's products, because of difference in the discounts.

PAR. 20. In many localities in the different parts of the United States independent retail grocers who do not carry Loose-Wiles Biscuit Company's products or who do not sell respondent's products at a price equal to that at which the separate units or retail stores of chain systems are selling, such grocers not only lose the sale of respondent's products but also thereby lose the opportunity of supplying customers with other commodities.

PAR. 21. That the effect of the application of respondent's system of discounts, as hereinbefore set out, gives to one class of retail grocers an undue advantage in competing with another class of retail grocers in the handling of respondent's products, which has the capacity to and does tend to substantially lessen competition and to create a monopoly in the retail distribution of respondent's products.

CONCLUSION.

That the practices of said respondent, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in interstate commerce and constitute a violation of the Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," and violate the provisions of Section 2 of an Act of Congress approved October 15, 1914, entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes."

ORDER TO CEASE AND DESIST.

The proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent and the testimony and evidence received by the Examiner of the Commission, and the Commission having made its findings as to the facts and its conclusion that the respondent, the Loose-Wiles Biscuit Company has violated the provisions of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes;" and has violated the provisions of Section 2 of an Act of Congress approved October 15, 1914, entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes:

It is now ordered, That respondent, Loose-Wiles Biscuit Company, its officers, directors, agents, representatives, servants, and employees, cease and desist, in interstate commerce, directly or indirectly.

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1. From discriminating in price between purchasers operating separate units or retail grocery stores of chain systems and purchasers operating independent retail grocery stores of similar kind and character purchasing similar quantities of respondent's products, where such discrimination is not made on account of difference in the grade or quality of the commodity sold, nor for a due allowance for the difference in the cost of selling or transporting, nor in good faith to meet competition in the same or different communities.

2. From giving to purchasers operating two or more separate units or retail grocery stores of chain systems a discount on the gross purchases of all the separate units or retail stores of such chain system, where the same or a similar discount of gross purchases is not allowed or given to associations or combinations of independent grocers operating retail grocery stores similar to the separate units or stores of such chain system.

It is further ordered, That respondent, within sixty (60) days after the service upon it of this order, shall file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinbefore set forth.

HOCHMAN & LEVINE.

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