

Complaint

IN THE MATTER OF
PEANUT SPECIALTY COMPANY

COMPLAINT AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 3 OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933

Docket 2273. Complaint, Dec. 24, 1934—Order, Feb. 5, 1935

Consent order requiring respondent, its officers, etc., in connection with the manufacture, sale, and distribution in interstate commerce of candy and candy products to jobbers, wholesalers, and retailers direct, to cease and desist from the sale and distribution of candy or packages or assortments thereof arranged and planned for resale to the general public through schemes or devices of chance, and from supplying therewith or separately, display cards for retailer's use in advising of the nature of the particular plan, including the sale of candies of uniform size, shape and quality, but with different colored center, packed with larger pieces or packages of candy to be given as prizes to chance purchasers of particular colored centers; and

Ordered further, That respondent, its officers, etc., in connection with the manufacture, sale and distribution in the state of Illinois of its aforesaid products, cease and desist from the sale thereof through the means above set forth.

Mr. Henry C. Lank for the Commission.

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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, having reason to believe that Peanut Specialty Company, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said Act of Congress, and in violation of the Act of Congress approved June 16, 1933, known as the National Industrial Recovery Act, and it appearing to said 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:

Count 1

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Illinois, with its principal office and place of business in the city of Chicago, State of Illinois. Respondent, for

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more than one year last past, has been engaged in the manufacture of candy and in the sale and distribution thereof to wholesale dealers and jobbers located at points in the various States of the United States, and causes said products when so sold to be transported from its principal place of business in the city of Chicago, Ill., to purchasers thereof in other States of the United States and in the District of Columbia, at their respective places of business, and there is now and has been for more than a year last past a course of trade and commerce by the said respondent in such candy between and among the States of the United States and in the District of Columbia. In the course and conduct of the said business, respondent is in competition with other corporations, individuals and partnerships engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States and within the District of Columbia.

PAR. 2. In the course and conduct of its business as described in paragraph 1 herein, respondent sells and has sold to wholesale dealers and jobbers certain packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

Certain of said assortments of candy are composed of a number of pieces of chocolate covered candies of uniform size, shape and quality, together with a number of larger pieces of candy or packages of candy which larger pieces of candy or packages of candy are to be given as prizes to purchasers of said chocolate covered candies of uniform size, shape, and quality in the following manner:

The majority of said chocolate covered candies in said assortment have centers of the same color, but a small number of said chocolate covered candies have centers of a different color. The color of the center of these chocolate covered candies is effectively concealed from the prospective purchaser until a selection or purchase has been made and the piece of candy broken open. The said candies of uniform size, shape and quality in said assortment, retail at the price of 1 cent each but the purchasers who procure one of the said candies having a center of a different color than the majority of said candies are entitled to receive and are to be given free of charge one of the said larger pieces of candy or packages of candy heretofore referred to. The aforesaid purchasers of said candies who procure a candy having a center colored differently from the majority of said pieces of candy are thus to procure one of the said larger pieces of candy or packages of candy wholly by lot or chance.

Respondent furnishes to said wholesale dealers and jobbers with said assortment of candies, display cards to be used by retail dealers

in offering said candies for sale, which display cards bear a legend or statement informing the prospective purchaser that the said assortments of candies are being sold in accordance with the sales plan above described.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments, resell said assortments of candy to retail dealers and said retail dealers expose said assortments for sale in connection with the aforesaid display cards and sell said candies 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 in accordance with the sales plan hereinabove set forth, as a means of inducing purchasers thereof to purchase respondent's said product in preference to candies offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public as above alleged involves a game of chance or the sale of a chance to procure such larger pieces of candy or packages of candy in the manner alleged. Such game of chance and the sale along with the sale of such candy of such chance to procure such larger pieces of candy or packages of candy in the manner alleged are contrary to the established public policy of the several States of the United States and the District of Columbia and of the Government of the United States, and in many of the States of the United States are contrary to local criminal statutes.

By reason of the said facts, many persons, firms and corporations who make and sell candy in competition with respondent as above alleged are unwilling to offer for sale or sell candies so packed and assembled as above alleged, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, or the sale with such candy of a chance to procure larger pieces of candy by chance; and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candies are attracted by respondent's said method and manner of packing said candy and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent in preference to candies offered for sale and sold by said competitors of the respondent who do not use the same or an equivalent method. Many dealers in candies are induced to purchase said candies so offered for sale and sold by respondent in preference to all others because said ultimate purchasers thereof give preference to respondent's said candies on account of said game of chance so involved in the sale thereof.

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PAR. 6. The use of said method by respondent has the tendency and capacity unfairly, and because of said game of chance alone, to divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and do not use the same or an equivalent method; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by respondent has the tendency and capacity unfairly to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or an equivalent method that is contrary to public policy and to criminal statutes as above alleged. Many of said competitors of respondent 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, because such method is contrary to public policy or to the criminal statutes of certain of the States of the United States, or because they are of the opinion that such a method is detrimental to public morals and to the morals of the purchasers of said candy, or because of any or all of such reasons.

PAR. 7. The aforementioned method, acts and practices of the respondent are all to the prejudice of the public and of respondent's competitors as hereinabove alleged. Said method, acts and practices 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.

Count 2

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Illinois, with its principal office and place of business in the city of Chicago, State of Illinois. Respondent for more than one year last past has been engaged in the manufacture of candy and in the sale and distribution thereof to wholesale dealers and jobbers located at points in the State of Illinois and at points in various other States of the United States, and causes said products when so sold to be transported from its principal place of business in the city of Chicago, Ill., to the purchasers thereof in the State of Illinois and to other purchasers thereof in other States of the United States and in the District of Columbia at their respective places of

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business, and there is now and has been for more than one year last past a course of trade and commerce by the said respondent in such candy in the State of Illinois and between and among the States of the United States and in the District of Columbia. In the course and conduct of said business respondent is in competition with other corporations, individuals and partnerships engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States and within the District of Columbia.

PAR. 2. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 2 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 2 of count 1 of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 2 of said count 1 were repeated verbatim.

PAR. 3. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 3 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 3 of count 1 of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 3 of said count 1 were repeated verbatim.

PAR. 4. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 4 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 4 of count 1 of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 4 of said count 1 were repeated verbatim.

PAR. 5. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 5 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 5 of count 1 of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as

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though the several averments of said paragraph 5 of said count 1 were repeated verbatim.

PAR. 6. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 6 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 6 of count 1 of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 6 of said count 1 were repeated verbatim.

PAR. 7. Under and pursuant to the provisions of section 2 of said National Industrial Recovery Act, the President of the United States on the 16th day of June 1933 by his executive order in writing appointed Hugh S. Johnson to be the administrator for Industrial Recovery under Title I of said act.

Under and pursuant to the provisions of said National Industrial Recovery Act, National Confectioners' Association of the United States, Inc., a corporation, as a representative of the Candy Manufacturing Industry, submitted to the President of the United States on application for the approval of a code of fair competition for the Candy Manufacturing Industry.

Said application was duly referred to said Hugh S. Johnson, as such administrator, by and before whom such further action was taken and proceedings were had that on the 9th day of June 1934 said Johnson, as such administrator, submitted a certain code of fair competition for the Candy Manufacturing Industry to the President of the United States, together with his written report containing an analysis of said code of fair competition, and with his recommendations and findings with respect thereto, wherein said administrator found that the said code of fair competition complies in all respects with the pertinent provisions of Title I of the National Industrial Recovery Act, and that the requirements of classes (1) and (2) of subsection (a) of Section 3 of said Act had been met. The concluding paragraphs of said report are in the following words, to wit:

I find that—

(a) Said code is well designed to promote the policies and purposes of Title I of the National Industrial Recovery Act, including removal of obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof and will provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among the trade groups, by inducing and maintaining united action of labor and management under adequate governmental sanctions and supervision, by eliminating unfair competitive practices, by promoting the fullest possible utilization of the pres-

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ent productive capacity of industries, by avoiding undue restriction of production (except as may be temporarily required), by increasing the consumption of industrial and agricultural products through increasing purchasing power, by reducing and relieving unemployment, by improving standards of labor, and by otherwise rehabilitating industry.

(b) The code as approved complies in all respects with the pertinent provisions of said title of said act, including without limitation subsection (a) of section 3, subsection (a) of section 7, and subsection (b) of section 10 thereof; and that the applicant association is a trade association truly representative of the aforesaid industry; and that said association imposes no inequitable restrictions on admission to membership therein.

(c) The code is not designed to and will not permit monopolies or monopolistic practices.

(d) The code is not designed to and will not eliminate or oppress small enterprises and will not operate to discriminate against them.

(e) Those engaged in other steps of the economic process have not been deprived of the right to be heard prior to approval of said code.

It is recommended, therefore, that this code be approved.

Respectfully,

HUGH S. JOHNSON,
Administrator.

June 9, 1934.

Thereafter, and on the 11th day of June 1934 the President of the United States made and issued his certain written executive order wherein and whereby he adopted and approved the report, recommendations and findings of said administrator, and ordered that the said code of fair competition be, and the same thereby was, approved, and by virtue of said National Industrial Recovery Act the provisions of said code became, and still are, the standard of fair competition for the Candy Manufacturing Industry, and became and still are binding upon every member thereof, except that said code of fair competition when so approved was approved with a proviso that Rule 19, Article VIII thereof, was stayed for a period of 10 days. Successive subsequent administrative orders were severally duly made and entered by which the provisions of said Rule 19, Article VIII, were stayed for fixed periods designated in several orders, the latest date to which said Rule 19 was stayed being July 30, 1934. On July 30, 1934, said Rule 19, Article VIII, became in full force and effect. On and since said July 30, 1934, the said code of fair competition, including said Rule 19, Article VIII, has been and is in full force and effect and became, and still is, binding upon every member of said industry.

Rule 19, Article VIII, of said Code provides as follows:

No member of the industry shall sell or distribute the type of merchandise commonly referred to as "break and take", "picks", or "draws", or merchandise of a like character, serving the same purposes.

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Among persons engaged in said trade and among the purchasing public the language of said Rule 19 is understood to refer to and include candies offered for sale and sold by the method used by respondent as above alleged. The language of said Rule 19 does refer to and include candies so offered for sale and sold. Candies offered for sale and sold by the method so used by respondent are of the type of merchandise commonly referred to as "break and take", "picks", or "draws", and are merchandise of a like character, serving the same purpose, within the intent and meaning of said Rule 19, Article VIII.

Notwithstanding said provisions of said Rule 19, Article VIII, of said code of fair competition, respondent has continued to, and does, use said method of competition hereinabove alleged and described, and has been and is offering for sale and selling to wholesale dealers, jobbers, and retail dealers certain packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, as hereinabove alleged and set forth.

PAR. 8. The above alleged method, acts and practices of the respondent are and have been in violation of the standard of fair competition for the Candy Manufacturing Industry of the United States. Such violation of such standard in the aforesaid transactions in interstate commerce and in other transactions which affect interstate commerce in the manner set forth in paragraph 6 of count 1 hereof, are in violation of section 3 of the National Industrial Recovery Act and they are unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act as amended.

ORDER TO CEASE AND DESIST

This proceeding having been considered by the Federal Trade Commission upon the complaint of the Commission and the answer of the respondent filed herein, wherein respondent states that it does not desire to contest the proceeding and consents that the Commission make, enter and serve upon it an order to cease and desist from the violations of law charged in the complaint:

It is now ordered, That the respondent, Peanut Specialty Company, its officers, agents, representatives, and employees, in the manufacture, sale, and distribution in interstate commerce of candy and candy products, do cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed

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and assembled that sales of such candy to the general public are by means of a lottery, gaming device, or gift enterprise.

(2) Supplying to or placing in the hands of wholesale dealers and jobbers or retail dealers packages or assortments of candy which may be or which are used, without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said package or assortment to the public.

(3) Packing or assembling in the same package or assortment of candy for sale to the public at retail pieces of candy of uniform size, shape and quality, having centers of different colors, together with larger pieces or packages of candy, which larger pieces or packages of candy are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

(4) Furnishing to wholesale dealers, jobbers, and retail dealers display cards, either with packages or assortments of candy or separately, bearing a legend or legends or statements informing the purchaser that the candy is being sold to the public by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

(5) Furnishing to wholesale dealers, jobbers, and retail dealers display cards or other printed matter for use in connection with the sale of its candy or candy products, which said advertising literature informs the purchasers and purchasing public that upon the obtaining by the ultimate purchaser of a piece of candy having a center of a particular color, a larger piece or package of candy will be given free to said purchaser.

It is further ordered, That the respondent Peanut Specialty Company, its officers, agents, representatives, and employees, in the manufacture, sale, and distribution in the State of Illinois of candy and candy products, do cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are by means of a lottery, gaming device, or gift enterprise.

(2) Supplying to or placing in the hands of wholesale dealers and jobbers or retail dealers packages or assortments of candy which may be or which are used, without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said package or assortment to the public.

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(3) Packing or assembling in the same package or assortment of candy for sale to the public at retail pieces of candy of uniform size, shape and quality, having centers of different colors, together with larger pieces or packages of candy, which larger pieces or packages of candy are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

(4) Furnishing to wholesale dealers, jobbers, and retail dealers display cards, either with packages or assortments of candy or separately, bearing a legend or legends or statements informing the purchaser that the candy is being sold to the public by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

(5) Furnishing to wholesale dealers, jobbers and retail dealers display cards or other printed matter for use in connection with the sale of its candy or candy products, which said advertising literature informs the purchasers and purchasing public that upon the obtaining by the ultimate purchaser of a piece of candy having a center of a particular color, a larger piece or package of candy will be given free to said purchaser.

It is further ordered, That the respondent, Peanut Specialty Company, within 30 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.

Syllabus

IN THE MATTER OF

NORWOOD SOLLY AND CHARLES B. SOLLY, COPARTNERS, TRADING UNDER THE NAME OF NORWOOD PHARMACEUTICAL LABORATORIES

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

Docket 2281. Complaint, Jan. 14, 1935—Order, Feb. 14, 1935

Consent order requiring respondents, their agents, etc., in connection with the sale or offer of cosmetics in interstate commerce, to cease and desist from representing and advertising through magazines, newspapers, pamphlets, labels, testimonials, or by radio or otherwise, that—

- (a) Their sales people are dermaticians, and they employ pharmaceutical chemists and chemists, and have consulting chemists;
- (b) Cosmetics should be selected for the particular type of skin and their representatives take a skin analysis for chemists and doctors prescribe from analysis records for each particular customer, and their prescriptions are specially made up to fit the particular needs of the customer;
- (c) Their massage cream can truly be called a cream rejuvenator, their creams contain no grease or casein, and are the results of scientific study of dermatologists and pharmaceutical chemists, selected for the individual customer, and their face powders are medicated and will help to alleviate and, in some cases, cure skin diseases and irritations, and that through the use thereof sufferers from eczema, acne, and blackheads will find relief and pimples can be made to vanish;
- (d) They send out information to customers from time to time about their skin, and the hair, and their formulas are helpful in treating and, in some cases, curing an ailment, and they are experts in building, formulating, and selecting corrective beauty services, and give each patron individual, satisfactory service; and

Ordered further, That respondents cease and desist from use on letterheads, or in labels, or any other advertising media of (1) the staff of Hermes, insignia of the Army Medical Corps, (2) the words "Formula Number", referring to their creams, or (3) the words "Reg. U. S. Pat. Off." or other words of like import, until their trade name has been registered in the Patent Office, and they have a legal right to use said words; and

Ordered further, That respondents cease and desist from—

- (a) Use of the word "Pharmaceutical" in their corporate or trade name, or any other word of like import, or use thereof upon or in their labels, booklets, stationery, letters, or otherwise; or
- (b) Use of symbol "R" in the word "Norwood" of their trade name and on letterheads, and in pamphlets, labels and other advertising media; and

Ordered further, That respondents, their agents, etc., cease and desist from substituting and passing off to the public, competitors' products as their own, and advertising and representing that they manufacture all of the products sold and distributed by them.

Mr. Astor Hogg for the Commission.