

Syllabus

IN THE MATTER OF

BUTTERICK PUBLISHING CO. ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 2171. Complaint, Apr. 26, 1934—Decision, June 20, 1935*

Where five corporations engaged in publication and sale of various periodicals among the States and Territories, and three corporations engaged in the sale and distribution thereof, with an aggregate business amounting to substantially more than 12,000,000 copies of each issue, and in competition with one another and with other publishers and sellers of periodicals, and also with distributors of the much lower priced, second-hand or back-number magazines, including two dealers in whole back-number magazines, distributed by them in eastern Massachusetts through some eight hundred retailers, 90 percent of whom dealt also in current periodicals; acting through a committee created by them to deal with the matter—

- (a) Notified some thirteen wholesalers distributing to the above involved territory, 90 percent. of whose retailer outlets therein were included among those through whom the two aforesaid dealers distributed their whole back-number magazines, that they, the retailers, would no longer be permitted to handle both back-number magazines and current issues, and must choose between the two, and that if they continued dealing in the former, they would be denied supplies of the latter;

With the result that about half of the retail dealers affected in said territory by the aforesaid notice and demand, duly transmitted to and made upon, them by said wholesalers, discontinued dealing in the back-number periodicals of the said two distributors thereof, and they had difficulty in securing other retail outlets; and

- (b) Sought to interfere with the sources of supply of back-number distributors by bringing pressure to bear upon the Salvation Army and other sources of supply of back-number magazines, to prevent their sale to those concerns distributing the same to retail dealers;

With the result that competition between them and their wholesalers on the one hand, and said distributors of back-number magazines on the other, was substantially lessened, and the public, to a substantial extent, was deprived of the benefits that would normally flow therefrom;

Held, That such acts and practices, under the circumstances set forth, were to the injury of competitors and to the prejudice of the public, and constituted unfair methods of competition in violation of Section 5.

Mr. Robt. N. McMillen for the Commission.

Mr. Manheim Rosenzweig, of New York City, for Butterick Publishing Co. and International Circulation Co., Inc., who also appeared along with *Mr. Chester W. Johnson*, of Minneapolis, Minn., and *Mr. John F. McGovern*, of Washington, D. C., for Midwest Distributors, Inc.

Mr. Joseph Schultz, of New York City, for McFadden Publications, Inc., and Street & Smith Publications, Inc.

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Mr. Robert W. Maloney, of New York City, for Frank A. Munsey Co.

Burroughs & Brown, of New York City, for Pictorial Review Co. Whitman, Ransom, Coulson & Goetz, of New York City, for S-M News Co.; Inc.

COMPLAINT

Pursuant to the provisions of an Act of Congress 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 Butterick Publishing Co., McFadden Publications, Inc., Frank A. Munsey Co., Street & Smith Publications, Inc., Pictorial Review Co., International Circulation Co., Inc., S-M News Co., Inc., and Midwest Distributors, Inc., hereinafter referred to as respondents, have been and are using unfair methods of competition in commerce, as "commerce" is defined in 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:

Respondents, Butterick Publishing Co., McFadden Publications, Inc., Frank A. Munsey Co., and Street & Smith Publications, Inc., are all corporations organized, existing, and doing business under and by virtue of the laws of the State of New York, each with its principal office and place of business in the City and State of New York.

Respondent, Pictorial Review Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business in the City of New York in the State of New York. All of the said respondents are now and for more than three years last past have been engaged in printing and publishing periodical magazines and other periodical publications and in selling the same between and among the various States and Territories of the United States and the District of Columbia. They have caused, and still cause, such periodical magazines and other publications when sold by them to be shipped to the purchasers thereof located in the State of New York and in other States of the United States, the Territories thereof, and the District of Columbia, and there is now and has been for more than three years last past a constant current of trade and commerce in such periodical magazines and other periodical publications between and among the various States of the United States and the District of Columbia. In the course and conduct of their business hereinbefore described, the said respondents are now and

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have been for more than three years last past in competition in interstate commerce with other publishers of and dealers in periodical magazines and other periodical publications. *Par. 2.* Respondents, International Circulation Co., Inc., and S. M. News Co. are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, each with its principal office and place of business in the City of New York in said State. Respondent, Midwest Distributors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of South Dakota, with its principal office and place of business in the City of New York in the State of New York. The said respondents named in this paragraph are now and for more than three years last past have been engaged in the distribution and sale of periodical magazines and other periodical publications between and among the various States and Territories of the United States and the District of Columbia. They have caused and still cause, said periodical magazines and other publications sold by them to be shipped to the purchasers thereof located in the State of New York and in States other than the State of New York, and there is now and has been for more than three years last past a constant current of trade and commerce in such periodical magazines and other periodical publications between and among the various States and Territories of the United States and the District of Columbia. In the course and conduct of their business hereinbefore described the said respondents are now and have been for more than three years last past in competition in interstate commerce with other sellers and distributors of and dealers in periodical magazines and other periodical publications. *Par. 3.* The periodical magazines and other periodical publications printed, published and sold by the respondents named in paragraph 1 hereof and the periodical magazines and other periodical publications sold by the respondents named in paragraph 2 hereof, have a wide circulation throughout the United States and there is a constant demand by the purchasing public for such periodical magazines and other periodical publications, wherefore retailers of periodical magazines and other periodical publications find it advisable and necessary to deal therein. *Par. 4.* There are now and have been for more than three years last past among the competitors in interstate commerce of the respondents named in paragraphs 1 and 2 hereof sellers and dealers in second-hand and used periodical magazines and other periodical publications. Such dealers in used and second-hand periodical magazines and other periodical publications purchase their supplies

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thereof in various States of the United States other than the States in which they have their respective places of business, and cause such second-hand and used periodical magazines and other periodical publications to be shipped to themselves in interstate commerce to their respective places of business. After acquiring such second-hand and used periodical magazines and other periodical publications, said dealers therein sell the same between and among the various States and Territories of the United States and the District of Columbia. They have caused, and still cause, said second-hand and used periodical magazines and other periodical publications sold by them to be shipped to the purchasers thereof located in the States in which such dealers have their respective places of business and in other States of the United States and Territories thereof and the District of Columbia. There is now and has been for more than three years last past a constant current of trade and commerce in such second-hand and used periodical magazines and other periodical publications between and among the various States and Territories of the United States and the District of Columbia, and such dealers in second-hand and used periodical magazines and other periodical publications use the same kinds and class of dealers through which their used and second-hand periodical magazines and other periodical publications ultimately reach the ultimate buyer as do the respondents named in paragraphs 1 and 2 hereof. These are chiefly proprietors of book stores, magazine stores and news stands in railroad stations, hotels and other places.

PAR. 5. In November 1931 or thereabouts, the respondents named in paragraphs 1 and 2 hereof, for the purpose of eliminating competition between themselves in the sale in interstate commerce of periodical magazines and other periodical publications and dealers in used and second-hand periodical magazines and other periodical publications, entered into and have since carried out and are still carrying out an agreement, combination, understanding, and conspiracy among themselves to destroy the business done in the United States in the purchase and sale in interstate commerce of used and second-hand periodical magazines and other periodical publications. Pursuant to and for the purposes of carrying out the said agreement, combination, understanding and conspiracy, the said respondents named in paragraphs 1 and 2 hereof have done, among other things, the following:

(a) By agreement among themselves have eliminated competition between the sale of periodical magazines and other periodical publications sold by them, and used and second-hand periodical

magazines and other periodical publications sold by dealers therein.

(b) Agreed to refuse, in pursuance of such agreement, have refused and still refuse to continue to sell periodical magazines and other periodical publications dealt in by them to dealers, whether at wholesale or retail, in used and second-hand periodical magazines and other periodical publications.

(c) Agreed to discontinue, and in pursuance of such agreement have discontinued to sell periodical magazines and other periodical publications dealt in by them to dealers, whether wholesale or retail, in second-hand and used periodical magazines and other periodical publications unless such dealers would agree to discontinue the sale of used and second-hand periodical magazines and other periodical publications.

(d) Sought and secured agreements from dealers in periodical magazines and other periodical publications dealt in by them by which agreements such dealers, whether wholesale or retail, agreed not to sell used and second-hand periodical magazines and other periodical publications.

(e) Refused and still refuse to continue to sell periodical magazines and other periodical publications dealt in by them to dealers, whether wholesale or retail, of used and second-hand periodical magazines and other periodical publications because such dealers refuse to discontinue the sale of used and second-hand periodical magazines and other periodical publications.

PAR. 6. The aforesaid alleged acts and practices of, all of the respondents are all to the prejudice of the public and to the prejudice of competitors of the respondents; have a dangerous tendency to; and have actually hindered and prevented competition in the sale between and among the various States of the United States, the Territories thereof and the District of Columbia of periodical magazines and other periodical publications; have tended to create in the said respondents a monopoly in the sale in interstate commerce of periodical magazines and other periodical publications; have unreasonably restrained interstate commerce in periodical magazines and other periodical publications, and particularly in used and second-hand periodical magazines and other periodical publications; have restricted competition in interstate commerce and the common liberty to engage therein; and constitute unfair methods of competition in interstate 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.

REPORT, FINDINGS, AS TO THE FACTS, AND ORDER

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 issued and served its complaint on respondents, Butterick Publishing Company, a corporation; McFadden Publications, Inc., a corporation; Frank A. Munsey Company, a corporation; Street & Smith Publications, Inc., a corporation; Pictorial Review Company, a corporation; International Circulation Company, Inc., a corporation; S-M News Company, Inc., a corporation; and Midwest Distributors, Inc., a corporation, charging them with the use of unfair methods of competition in interstate commerce in violation of the provisions of said act.

Respondents entered their appearances and filed answers, and hearings were had before a duly qualified examiner of the Federal Trade Commission, at which evidence was introduced in support of the complaint. Thereafter, the respondents filed motion to dismiss the complaint upon the ground that the evidence introduced in support thereof failed to establish any cause of action against the respondents, which motion was by the Commission, on due consideration, overruled, saving to respondents the privilege of renewing said motion at time of final argument on the merits. Thereafter, at a hearing convened for the introduction of evidence by the respondents, they announced that they waived the introduction of any evidence and stood upon their motion to dismiss. Thereafter briefs were filed in support of the complaint and by the respondents in opposition thereto and the matter was orally argued before the Commission. And now the Commission, having duly considered the whole record and being fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS, AS TO THE FACTS:

PARAGRAPH 1. The Butterick Company, known also as the Butterick Publishing Company, McFadden Publications, Inc., Frank A. Munsey Company and Street & Smith Publications, Inc., are corporations organized under the laws of the State of New York with their principal places of business at the City of New York in said State. The Pictorial Review Company is a corporation organized under the laws of the State of Delaware with its principal place of business at the City of New York in the State of New York. The International Circulation Company, Inc., and S-M

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News Company are corporations organized under the laws of the State of New York, each with its principal place of business in New York in said State. Midwest Distributors, Inc., is a corporation organized under the laws of the State of South Dakota with its principal place of business at the City of New York in the State of New York. The corporations above named were in existence, and their principal places of business were located as above stated, at all times hereinafter mentioned.

PAR. 2. Respondents The Butterick Company, McFadden Publications, Inc., Frank A. Munsey Company, Street & Smith Publications, Inc., and Pictorial Review Company are, and at all times hereinafter mentioned, have been, engaged in the printing and publishing of periodical magazines and other periodical publications and in selling the same into and among the various States and Territories of the United States and the District of Columbia. During all such time they have caused such magazines and other publications when sold by them to be shipped to the purchasers thereof located in the State of New York and in other States of the United States, the Territories thereof, and the District of Columbia, and there is now and has been during all such time a constant current of trade and commerce in such periodical magazines and other publications between and among the various States and Territories of the United States and the District of Columbia.

The respondents International Circulation Company, Inc., S. M. News Company, and Midwest Distributors, Inc., are now, and during all times hereinafter mentioned, have been, engaged in the sale and distribution of periodical magazines and other periodical publications between and among the various States and Territories of the United States and the District of Columbia, and have caused said magazines and other publications so sold by them to be shipped to the purchasers thereof located in the State of New York and in other States and Territories and have at all times hereinafter mentioned, carried on a constant trade and commerce in such publications between and among the various States and Territories of the United States and the District of Columbia. Hereinafter, when the word "publishers" is used it shall be deemed to include also these last-named three respondents. All of said respondents are now, and at all times hereinafter mentioned, have been, in substantial competition in interstate commerce among themselves and with other publishers and sellers of magazines and other periodical publications, and with the distributors of second-hand or back-number magazines as hereinafter set forth. The aggregate business of these respondents amounts to substantially more than twelve million copies of each issue.

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PAR. 3. In the distribution of the magazines so published and sold by the respondent, sales are principally to so-called "distributors" or wholesalers located throughout the United States, although to a minor extent sales are made direct to retailers, consisting principally of drug stores, news stands, etc., located in those districts not served by wholesalers. The legal relationship between respondents, with the exception of McFadden Publications, Inc., and Midwest Distributors, Inc., and said wholesalers and retailers is that of vendor and vendee. In the two excepted cases the relationship is that of consignor and consignee.

At all times hereafter mentioned and for an undetermined period prior thereto it has been the custom of the industry and trade that all magazines remaining unsold in the hands of the wholesaler and retailer would be returned to the publishers from whom received and the wholesaler or retailer reimbursed or credited in the amount paid therefor, so that the publishers received payment only for those magazines actually sold by their wholesalers and retailers during the current period, that is, from the time they were placed on sale until the succeeding issue of the same magazines were placed on sale. Also, it has been and is the custom that the wholesaler would reimburse or give credit to the retailer for all magazines remaining unsold in his hands at the end of the current period, so that the wholesaler receive payment only for those magazines which are sold by the retailer during the current period. Also, it is and has been the custom that instead of shipping back the entire unsold magazine, the cover only is returned, as a token that the same remains unsold, and wholesalers and retailers have been and are privileged to sell the remaining body of the magazine as waste paper, for their own account. This body of the magazine, from which the cover has been removed and for which the wholesaler or retailer has been reimbursed, is known in the industry and trade as a "coverless" magazine, or "coverless return" or "return".

PAR. 4. At all times hereinafter mentioned there were and now are throughout the United States, persons, firms, and corporations hereinafter to be referred to as back-number distributors, engaged in the business of collecting noncurrent cast-away magazines, particularly story magazines, and selling them to retail dealers, consisting principally of news stands, drug stores and other retailers handling current magazines. These noncurrent magazines, hereinafter to be referred to as "back-numbers", regularly retail at from one-third to one-fourth the sale price of the same magazine while current. The sources of supply of these back-number distributors were and are principally waste paper dealers located throughout the

United States and, to a minor extent, such organizations as the Salvation Army, junk dealers, etc. The back-number magazines have been and are in active, substantial competition with the current numbers.

PAR. 5. Among the back-number distributors above referred to were Back Number Wilkins, Inc., a corporation, and Eastern Back Number Magazine Company located, respectively, at Danvers and at Lynn and East Saugus, Mass. These two distributors at the times hereinafter mentioned dealt only in entire back-number magazines, as distinguished from coverless magazines or returns, and were the principal distributors of back-number magazines in eastern Massachusetts, and in the early part of the year 1932 had an aggregate of approximately 800 retail dealers in that area, 90 percent of whom were dealers in current magazines. The principal sources of supply of these two back-number distributors were waste paper concerns located in Massachusetts, New Hampshire, New York, Michigan, Pennsylvania, Ohio, Illinois, and Missouri. When second-hand magazines were purchased by them from these sources of supply, they were regularly shipped from said States to them at their respective places of business in Massachusetts.

PAR. 6. The retail dealers of the back-number distributors above named handled only entire, covered back-numbers and did not sell or offer for sale coverless magazines or returns.

PAR. 7. In eastern Massachusetts the magazines of respondents were distributed by some thirteen wholesalers located in Boston and other towns and cities in that area. Respondents regularly sold and delivered current magazines from their respective places of business, located as aforesaid, to these wholesalers, who in turn supplied the retail dealers in that area, including 90 percent of the retailers handling the magazines of the back-number distributors hereinabove named.

PAR. 8. On or about November 5, 1931, representatives of the respondents, at a meeting in the City of New York, formed the Special Committee on Magazine Distribution, consisting of a representative from each of the respondent companies, to take action for and on account of respondents. The formation of said Special Committee, and the action thereafter taken by it, was with the full knowledge and consent of the responsible executive officers of the respondent corporations. Thereafter and beginning on the first of April 1932, and continuing until about August 15 of that year, the Special Committee dispatched letters to all of the wholesalers in eastern Massachusetts handling the magazines of the respondents demanding that they inform their retail dealers that they, the retail dealers, would

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no longer be permitted to handle back-number magazines; that if they handled back-number magazines they would be denied further supplies of current issues. Upon receipt of these letters, the said wholesalers notified their retail dealers, both in writing and orally, that they would be required to choose between handling current issues and back-number magazines; that if they continued to handle back-number magazines they would no longer be supplied with current issues.

PAR. 9. Because of the above-mentioned demands of respondents upon their wholesalers and of the notices of the wholesalers to their retailers, approximately half the retail dealers handling both the current issues of respondents and the back-number magazines of the two distributors named discontinued handling back-number magazines, and said distributors had difficulty in securing other dealers for the same reason.

PAR. 10. During the same period of time the above-mentioned letters to wholesalers in eastern Massachusetts were being dispatched, the Special Committee on Magazine Distribution was also seeking to interfere with the sources of supply of the back-number distributors, by bringing pressure to bear upon the Salvation Army and other sources of supply to prevent the sale of back-number magazines to those concerns distributing the same to retail dealers.

PAR. 11. The result of the joint action of these respondents, as hereinabove found, has been and is to substantially interfere with and lessen competition between respondents and their wholesalers, on the one hand, and the said distributors of back-number magazines, on the other hand, thus depriving the public to a substantial extent of the benefits that would normally flow from such competition.

CONCLUSION

The acts and practices of the respondents under the circumstances hereinabove found and set forth, have been and are to the injury of their competitors and prejudicial to the public interest and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Act of Congress hereinabove entitled.

ORDER TO CEASE AND DESIST

This proceeding, being before the Federal Trade Commission upon the complaint of the Commission, the answers of the respondents, the evidence taken, the briefs and argument of counsel for the Commission and for the respondents.

And the Commission having made its findings as to the facts and its conclusion drawn therefrom that the respondents have violated the provisions of an Act of Congress approved September 26, 1914,

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entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes" 1

It is now ordered, That the respondents, The Butterick Company, also known as the Butterick Publishing Company, a corporation, McFadden Publications, Inc., a corporation, Frank A. Munsey Company, a corporation, Street & Smith Publications, Inc., a corporation, Pictorial Review Company, a corporation, International Circulation Company, Inc., a corporation, S. M. News Company, a corporation, and Midwest Distributors, Inc., a corporation, their agents, employees, and representatives, in connection with the sale and distribution of magazines and other periodical publications in interstate commerce, forthwith cease and desist from the following acts and practices:

(a) By agreement, combination, or concert of action among themselves, or between or among any two or more of them, or with others, preventing or seeking to prevent any person, firm or corporation lawfully owning the same, from selling to distributors thereof or dealers therein, second-hand or back-number magazines or other periodical publications; or

(b) By agreement, combination, or concert of action among themselves, or between or among any two or more of them, or with others, preventing, or seeking to prevent, or causing or seeking to cause wholesalers of magazines to prevent, newsdealers or other retailers of magazines from buying and selling or dealing in second-hand or back-number magazines or other periodical publications; or in any manner interfering with the business of distributors of or dealers in such second-hand or back-number magazines, or other periodical publications.

Provided, however, That nothing in this order contained shall prevent respondents from making such agreement or arrangements with, or taking such action against, wholesalers and retailers of their magazines or other periodical publications, as may be reasonably necessary to prevent unsold publications, for which respondents have reimbursed or credited such wholesalers or retailers, from being again placed on sale as reading matter.

It is further ordered, That within 30 days from the date of the service of this order upon respondents, they shall file with the Commission a report in writing setting forth in detail the manner and form in which they shall have complied with this order.

IN THE MATTER OF
**CURT A. SCHWARTZ, INDIVIDUALLY AND TRADING AS
AKRON CANDY COMPANY**

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914, AND OF AN ACT
OF CONGRESS APPROVED JUNE 16, 1933

Docket 2251. Complaint, Nov. 24, 1934—Decision, June 21, 1935

Where an individual engaged in the manufacture and sale of candy, including "break-and-take" assortments composed of individually wrapped penny suckers or lollipops, within a few of which there was concealed the statement "super dum-dum free", together with a number of larger pieces, thus referred to, for sale by the retailer to the consumer under a plan by which the chance purchaser of one of the aforesaid individually wrapped penny suckers, containing said legend, received one of the larger pieces free, and the purchaser of the last penny sucker in the assortment also received, without charge, one of said larger pieces—

Sold said assortments, together with explanatory display cards for the advice of the ultimate consumer and retailer, to wholesalers and jobbers, so packed and assembled that they could be displayed for sale and distribution to the purchasing public, as hereinbefore set forth, without alteration or rearrangement, and could not be resold to the public except as a lottery or gaming device, without unwrapping, unpacking, disassembling, or rearranging the same, with the knowledge and intent that said candy would and should thus be resold by the retailer; in competition with concerns who regard such a method of sale and distribution as morally bad and one which encourages gambling, and especially among children, and as injurious to the industry in merchandising a chance or lottery rather than candy, and providing retailers with the means of violating the laws of the several States, and who refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance;

With the result of putting at a disadvantage, by reason of their said refusal to adopt such a practice, said competitors, who can compete on even terms only through following the same to meet the demand and preference for such candy from certain dealers and small retailers, chiefly, and that of the children, from the frequently nearby schools, who purchase said candy by reason of the gambling feature connected therewith, in preference to the so-called "straight goods", and who constitute by far the largest class of purchasers and consumers thereof, and who supply the principal demand therefor, some competitors began the sale and distribution of candy for resale to the public by lot or chance, to meet the constant demand and preference for candy thus sold, trade was diverted to said individual from competitors declining to follow such a practice, to their prejudice and injury and that of the public, freedom of fair and legitimate competition in the industry concerned was restrained and harmed, sales of those dealing in the "straight goods" products exclusively were markedly decreased whenever and wherever the competition of the break-and-take assortments, with their necessarily smaller pieces or inferior quality, was encountered, by reason, principally, of the gambling or lottery feature connected with

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the latter, gambling among children was taught and encouraged, and the public policy of many of the States, some of which have laws making the operation of lotteries and gambling devices penal offenses, was violated:

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

Mr. Henry C. Lank for the Commission.

Mr. Walter C. Hughes, of Chicago, Ill., for respondent.

COMPLAINT

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 Curt A. Schwartz, individually and trading as the Akron Candy Company, 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 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 an individual and trades as the Akron Candy Company, with his principal office and place of business in the City of Akron, State of Ohio. Respondent for several years last past has been engaged in the manufacture of candy and in the 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 his principal place of business in the City of Akron, Ohio, to purchasers thereof in the State of Ohio, and to other 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 two years last past a constant course of trade and commerce by the said respondent in such candy in the State of Ohio and 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 individuals, partnerships, and corporations 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.

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PAR. 2. In the course and conduct of his 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.

One of the said assortments of candy is composed of pieces of candy of uniform size, shape, and quality, together with a number of larger pieces of candy, which larger pieces of candy are to be given as prizes to purchasers of said pieces of candy of uniform size, shape, and quality in the following manner:

The said pieces of candy of uniform size, shape, and quality in said assortment are contained within wrappers and a small number of the said wrappers have printed thereon the words "super dum dum free," but the remaining pieces of said candy do not have any such printing on the wrapper. The printed language above referred to is effectively concealed from the prospective purchaser until a selection or purchase has been made and the wrapper removed from the pieces of candy of uniform size, shape, and quality in said assortment, retail at the price of 1 cent each or five for 5 cents, but the purchaser who procures a piece of said candy having the words "super dum dum free" printed thereon is entitled to receive and is to be given free of charge one of the said larger pieces of candy hereinafter referred to. The purchaser of the last piece of candy in said assortment is entitled to receive and is to be given free of charge one of the said larger pieces of candy. The aforesaid purchaser of said candies who procures a candy with a wrapper bearing the words "super dum dum free" is thus to procure one of the said larger pieces of candy wholly by lot or chance.

Respondent in these instances furnished the said wholesale dealers and jobbers a display card with said assortment to be used by retail dealers in offering said candies for sale. The display card bears a legend or legends informing the purchaser that said candy is being sold in accordance with the sales plan above mentioned. The said display card furnished by respondent also bears a notice to the retail dealer as to the manner in which the assortment of the "super dum dum" should be displayed and how won and there has been a prize.

PAR. 3. The wholesale dealers and jobbers resell said assortments of candy to retail dealers and said retail dealers expose said assortments of candy for sale 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 his products in accordance with the sales plan hereinabove set forth, as a means of inducing purchases thereof.

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to purchase respondent's said product in preference to candies offered for sale and sold by his competitors, to the purchasing public as above alleged, involves a game of chance of the sale of a chance to procure such larger pieces of candy in the manner alleged. Such a game of chance, and the sale along with the sale of such candy of such chance to procure such larger pieces 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. It is evidenced as aforesaid by the facts, in 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.

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.

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 his 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

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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. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 1 of count 1 of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 1 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 1 of said count 1 were repeated verbatim.

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 sev-

eral 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 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 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 an 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

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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 analysis of said code of fair competition, and with his recommendations and findings with respect thereto, wherein said administrators 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 (c) of Section 3 of said Act had been met. The concluding paragraphs of said report are in the following words, to wit:

Section 3. Subsection (a) of Section 7 and Subsection (b) of Section 10 of the National Industrial Recovery Act, in addition to the other provisions of said Act, including without limitation Subsection (a) of Section 3, Subsection (c) of Section 7, and Subsection (b) of Section 10, shall read as follows: "(a) No association shall be deemed to be a trade association truly representative of the aforesaid industry; and that said association imposes no undue or unreasonable restrictions on admission to membership therein.

(c) The Code is not designed to and will not permit monopolization or monopolistic practices within the meaning of the provisions of the Sherman Act, 15 U.S.C. 1 and 2, and will not discriminate against small enterprises and will not operate to discriminate against them.

It is recommended, therefore, that this bill be approved, and that the National Industrial Recovery Act be amended so that the provisions of 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

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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 said 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 purpose. 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 wholesaler sale 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. The above alleged method, acts, and practices of the respondent in violation of the standard of fair competition for the Candy Manufacturing Industry of the United States both in transactions in interstate commerce and in transactions affecting interstate commerce, constitutes unfair methods of competition in commerce within the meaning of Section 5 of an Act of Congress, as amended, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

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 issued and served a complaint in two counts upon the respondent, Curt A. Schwartz, individually and trading as Akron Candy Company, charging in count 1 of the aforesaid complaint that the said respondent had been and was using unfair methods of competition in commerce as "commerce" is defined in said act of Congress and charging in count 2 of the aforesaid complaint that the said respondent had been and was using unfair methods of competition in commerce in violation of the Act of Congress approved June 16, 1933, known as the National Industrial Recovery Act, and thereafter respondent duly filed answer thereto. Testimony and evidence were received, duly recorded and filed in the office of the Commission and subsequently the proceeding came regularly on for a final hearing before the Commission on said complaint, answer, testimony, and evidence, briefs of counsel for the Commission and counsel for the respondent. Oral argument was waived and the Commission having duly considered the matter and being 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 as to count 1 of the aforesaid complaint and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Curt A. Schwartz, is an individual doing business under the trade name Akron Candy Company and has his principal office and place of business in the City of Akron, State of Ohio. Respondent is now and for several years last past has been engaged in the manufacture of candy in Akron, Ohio, and in the sale and distribution of said candy to wholesale dealers and jobbers in the State of Ohio and in other States of the United States. He causes said candy when sold to be shipped and transported from his principal place of business in the State of Ohio to purchasers thereof in Ohio and in the States of the United States other than the State of Ohio. In so carrying on said business, respondent is and has been engaged in interstate commerce and is and has been in active competition with other individuals and with corporations and partnerships engaged in the manufacture of candy and in the sale and distribution of same in interstate commerce.

PAR. 2. Among the candies which respondent manufactured, sold, and distributed at the time of the issuance of the complaint in this

case was an assortment composed of a number of small pieces of hard candy on a stick, commonly referred to as suckers or lollipops, together with a number of larger pieces of hard candy. The small pieces of candy were described by respondent as "dum dums" and the larger pieces of hard candy were described by respondent as "super dum dums." Each of the small pieces of candy were contained within wrappers and printed on a few of the wrappers were the words "super dum dum free." The wrappers were so arranged as to conceal the words "super dum dum free" from the purchasers and prospective purchasers until a selection had been made and the wrapper removed. The small pieces of candy in said assortment retailed at the price of 1 cent each but the purchaser who procured a piece of said candy having the words "super dum dum free" printed thereon was entitled to receive and was to be given free of charge one of the said larger pieces of candy referred to above. The purchaser of the last small piece of candy in said assortment was entitled to receive and was to be given free of charge one of the said larger pieces of candy. The aforesaid purchaser of said candy who procured a piece of candy having the words "super dum dum free" printed on the wrapper thereof was thus to procure one of the said larger pieces of candy wholly by lot or chance.

Respondent furnished said wholesale dealers and jobbers a display card with the assortment of candy referred to above to be used by retail dealers in offering said candies for sale, which display card bore a legend or statement informing the prospective purchaser that said assortment of candy was being sold in accordance with the sales plan above described. The said display card also bore a notice to the retail dealers as to the manner in which the assortment should be displayed. The respondent discontinued the printing of the words "super dum dum free" on the wrappers of the small pieces of candy and discontinued furnishing the display card at or about the time the complaint in this case was issued by the Commission but subsequent to the time that the Commission began its investigation of the aforementioned acts and practices of the respondent.

PAR. 3. The lottery, prize, or draw packages described in paragraph 2 above, are generally referred to in the candy trade or industry as "break and take" or "draw" packages. The packages or assortments of candy without the lottery, prize or draw features in connection with their resale to the public are generally referred to in the candy trade or industry as "straight goods." These terms will be used hereafter in these findings to describe these respective types of candy.

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101 PAR. 4. Numerous retail dealers purchased the assortment described in paragraph 2 above from wholesale dealers or jobbers who in turn had purchased said assortment from respondent and such retail dealers displayed said assortment for sale to the public as packed by the respondent and the candy contained in said assortment was sold and distributed to the consuming public by lot or chance.

102 PAR. 5. (All sales made by respondent were absolute sales and respondent retained no control over the goods after they were delivered to the wholesale dealer or jobber. The assortments were assembled and packed in such manner that they could be displayed by the retail dealer for sale and distribution to the purchasing public as above described, without alteration or rearrangement. An examination of the assortment of candy described in paragraph 2 herein as packed, assembled and sold by respondent shows that said assortment could not be resold to the public by the retail dealers, except as a lottery or gaming device, unless said retail dealers unwrapped, unpacked, disassembled or rearranged the said assortment of candy. In the sale and distribution to jobbers and wholesale dealers for resale to retail dealers of assortments of candy assembled and packed as described in paragraph 2 herein, respondent had knowledge that said candy would be resold to the purchasing public by retail dealers by lot or chance and he packed and assembled such candy in the way and manner described so that it might and should be resold to the public by lot or chance by said retail dealers.)

103 PAR. 6. The sale and distribution of candy by the retail dealers by the method described in these findings is the sale and distribution of candy by lot or chance and constitutes a lottery or gaming device. Competitors of respondent appeared as witnesses in this proceeding and testified, and the Commission finds as a fact that many competitors regard such method of sale and distribution as morally bad and, encouraging gambling, especially among children; as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several States. Because of these reasons some competitors of respondent refused to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. Certain retailers who find that they can dispose of more candy by the "break and take" or "draw" methods; buy respondent's products and the products of others employing the same methods of sale, and thereby, trade is diverted to respondent and others using similar methods, from said competitors. Said competitors can compete on even terms only by giving the same or similar

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devices to retailers. This they are unwilling to do, and their sales of "straight goods" candy show a continued decrease. There is a constant demand for candy which is sold by lot or chance, and in order to meet the competition of manufacturers who sell and distribute candy which is sold by such methods, some competitors of respondent have begun the sale and distribution of candy for resale to the public by lot or chance. The use of such method by respondent in the sale and distribution of his candy was prejudicial and injurious to the public and his competitors, and has resulted in the diversion of trade to respondents from his said competitors, and was a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 7. The principal demand in the trade for the "break and take" or "draw" candy comes from the small retailers. The stores of these small retailers are in many instances located near schools and attract the trade of the school children. The consumers or purchasers of the lottery or prize package candy are principally children, and because of the lottery or gambling feature connected with the "break and take" or "draw" packages and the possibility of becoming a winner, it has been observed that the children purchase them in preference to the "straight goods" candy when the two types of packages are displayed side by side.

Witnesses from several branches of the candy industry testified in this proceeding to the effect that children prefer to purchase the lottery or prize package candy because of the gambling feature connected with its sale. The sale and distribution of "break and take" or "draw" packages or assortments of candy or of candy which has connected with its sale to the public the means or opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children, who comprise by far the largest class of purchasers and consumers of this type of candy.

PAR. 8. The pieces of candy in the "break and take" or "draw" packages of all manufacturers of that type of candy are either smaller in size than the corresponding pieces of straight goods candy or the quality of the candy in the break and take or draw packages is poorer than that in the straight goods assortments. It is necessary to make this difference between either the size of the individual pieces of candy or the quality of the candy in order to compensate for the value of the prizes or premiums which are distributed with the "break and take" or "draw" goods.

PAR. 9. There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize assortments of candy and who sell their "straight goods" candy in interstate

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commerce in competition with the "break and take" or "draw" candy and manufacturers of the "straight goods" type of candy have noted a marked decrease in the sales of their products whenever and wherever the lottery or prize candy has appeared in their markets. This decrease in the sales of "straight goods" candy is principally due to the gambling or lottery feature indicated with the "break and take" or "draw" candy.

PAR. 10. In addition to the assortment described in paragraph 2 herein the respondent manufactured and continues to manufacture candy which he sells to wholesalers and jobbers without any lottery or chance feature.

PAR. 11. The sale and distribution of candy by lot or chance is against the public policy of many of the States of the United States and some of said States have laws making the operation of lotteries and gambling devices penal offenses.

CONCLUSION

The aforesaid acts and practices of respondent, Curt A. Schwartz, individually and trading as Akron Candy Company, under the conditions and circumstances set forth in the foregoing findings of fact are all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in commerce and constitute violations of Section 5 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."

ORDER TO CEASE AND DESIST, ETC.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission (in two counts, count 1 thereof charging a violation of Section 5 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 count 2 thereof charging a violation of the National Industrial Recovery Act), the answer of the respondent, the testimony taken, and the briefs filed, and the Commission having made its findings as to the facts and conclusion that as to count 1, the respondent 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"—

It is hereby ordered, That the respondent, Curt A. Schwartz, individually and trading as Akron Candy Company, his 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, candy so packed and assembled that sales of such candy to the general public are to be made or may be made by means of a lottery, gaming device, or gift enterprise.

(2) Supplying to or placing in the hands of wholesale dealers and jobbers, packages or assortments of candy which are used or may be 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 assortment to the public.

(3) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, small pieces of candy together with larger pieces of candy which said larger pieces of candy are to be given as prizes to the purchaser procuring a small piece of candy contained within a wrapper bearing the words "super dum dum free" or words of similar import and effect.

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

(5) Furnishing to wholesale dealers and jobbers display cards or other printed matter for use in connection with the sale of respondent's 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 contained within a wrapper bearing certain printed words that a larger piece of candy will be given free to said purchaser.

It is further ordered, That respondent, Curt A. Schwartz, individually and trading as Akron Candy Company, within 30 days after the service upon him of this order, shall file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist hereinabove set forth.

And it is hereby further ordered, That by reason of the decision of the Supreme Court of the United States in *A. L. A. Schechter Poultry Corporation v. United States of America*, decided May 27, 1935,¹ count 2 of the complaint in this proceeding be and the same hereby is dismissed.

¹ 295 U. S. 495.

IN THE MATTER OF
BONITA COMPANY

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

Docket 2263. Complaint, Dec. 15, 1934—Decision, June 21, 1935

Where a corporation engaged in the manufacture and sale of candy including, among other break-and-take merchandise, (a) assortments of penny candies of uniform size, shape, and quality, together with a number of larger pieces or small boxes of candy, to be given as prizes to chance purchasers of a few of the aforesaid smaller pieces, the color of the enclosed, concealed centers of which differed from that of the majority, and to the purchaser of the last of said penny pieces therein contained, together with explanatory display cards for retailer's use, (b) assortments and display cards involving a similar plan in which chance selection of one of a few of the individually wrapped pieces composing the assortment, the enclosed, concealed color of which differed from that of the majority, entitled purchaser to one of the prizes, (c) assortments composed of large and small pieces, or of uniform pieces and box of candy, and push cards or punch boards, with explanatory legends, in which acquisition of large or small piece, or one, two, or more pieces, or box of candy, as case might be, was dependent upon a 5-cent chance punch and number thereby secured, and (d) assortments consisting of two boxes containing, respectively, (1) pieces of uniform size, shape and quality, the color of the enclosed, concealed centers of a few of which differed from that of the majority, and (2) larger pieces or bars of candy, the number of which corresponded approximately with that of the different colored centers in the other, so packed that they might be displayed as a single assortment in which the larger pieces were to be distributed as prizes to chance purchasers of the smaller candies with the different colored centers—

Sold such assortments, together with explanatory display cards or push cards or punch boards, as the case might be, to wholesalers and jobbers, so packed and assembled that they could be displayed for sale and distribution to the purchasing public, as hereinbefore set forth, without alteration or rearrangement, and could not be resold to the public (except in the case of said last-named two-box assortments) except as a lottery or gaming device, without unwrapping, unpacking, disassembling, or rearranging the same, with knowledge and intent that said candy would and should thus be resold by the retailer; in competition with concerns who regard such a method of sale and distribution as morally bad and one which encourages gambling, and especially among children, and as injurious to the industry in merchandising a chance or lottery rather than candy, and providing retailers with the means of violating the laws of the several States, and who refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance;

With the result of putting at a disadvantage, by reason of their said refusal to adopt such a practice, said competitors, who can compete on even terms only through following the same to meet the demand and preference for such candy from certain dealers and small retailers, chiefly, and that of