

Syllabus

IN THE MATTER OF

F. A. MARTOCCIO COMPANY, IN ITS OWN NAME AND
RIGHT AND TRADING AS HOLLYWOOD CANDY
COMPANY

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

Docket 2283. Complaint, Jan. 23, 1935—Decision, May 26, 1936

Where a corporation engaged in the manufacture and sale of candy, including "straight" merchandise and "draw" or "deal" assortments composed of small bars, middle sized bars, and larger bars, and punch boards or push cards so arranged that number punched by chance from 100-disc board or card determined which size bar purchaser was to receive by lot or chance in return for five cents paid, and in accordance with legend set forth on the explanatory display card supplied with assortment—

Sold said assortments, along with said boards and display cards, to wholesale dealers or jobbers, so assembled and packed that they could be displayed by retailer vendees without alteration or rearrangement, and be by them offered and sold to consuming and purchasing public by means of said push cards, and with knowledge and intent that they would and should thus be resold to such public by said retailers, including small dealers whose stores, frequently located near schools, attract trade of school children, principal consumers or purchasers of lottery or prize-package candy, and purchasers thereof in preference to "straight goods" product, by reason of lottery or gambling feature connected with former and possibility of becoming a winner, and who constitute source of a substantial demand therefor;

With result that competitors, including those who, along with many retail and wholesale dealers and jobbers, regard such method of sale and distribution as morally bad and as encouraging gambling, especially among children, and as injurious to the industry in merchandising a chance or lottery instead of candy and as providing retail merchants with means of violating the laws of the several States, and who refuse, in common with various dealers, to sell candy so packed and assembled that it can be resold to public by lot or chance, were put to a disadvantage in competing, and retailers who found that they could dispose of more candy by the draw or deal method, bought its products and those of others employing such methods and trade was diverted to it and such others, from said competitors, whose sales of "straight goods" candy showed continued decrease and who can compete on even terms only by giving same or similar devices to retailers, which they are unwilling to do, and some competitors began sale and distribution of candy packed and assembled for resale to public by lot or chance in order to meet competition of candy sold and distributed by such methods and in constant demand; to the prejudice and injury of the public and competitors and in restraint upon and to the detriment of freedom of fair and legitimate competition in said industry, and in violation of the public policy of the United States Government:

Complaint

22 F. T. C.

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.

Before *Mr. Robert S. Hall*, trial examiner.

Mr. Henry C. Lank for the Commission.

Guesmer, Carson & MacGregor, of Minneapolis, Minn., 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 F. A. Martoccio Company, a corporation, in its own name and right and also trading as Hollywood 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 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 Minnesota, with its principal office and place of business in the city of Minneapolis, State of Minnesota. 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 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 Minneapolis, Minn., 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 one 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 this business as described in paragraph 1 herein, respondent sells and has sold to wholesale dealers and jobbers, certain packages of assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

Several of the said assortments are composed of a number of bars of candy of uniform size, shape and quality together with a number of larger pieces of candy, together with a device commonly known as a punch board. The larger pieces of candy contained in said assortment are to be given as prizes to purchasers of punches from said board in the following manner:

(a) Punches from said board are five cents each and when a punch is made a number is disclosed. The board bears a statement or statements informing the prospective customer as to which numbers receive the additional pieces of candy and the size thereof. All purchasers of punches from said board receive a bar of candy but certain punches, depending upon the number printed thereon, entitle the purchaser to one of the additional pieces of candy. The numbers on said board are effectively concealed from the purchasers or prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The additional pieces of candy contained in said assortments are thus distributed to purchasers of punches from said boards wholly by lot or chance.

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 punch boards and sell said candy 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 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 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.

Complaint

22 F. T. C.

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 competitors of the respondent who do not use the same or equivalent methods. 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.

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 competitors who do not use the same or equivalent methods; to exclude from said candy trade all competitors who are unwilling to and do not use the same or equivalent methods; 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 equivalent methods, 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 equivalent methods that are 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 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 Minnesota, with its principal office and place of business in the city of Minneapolis, State of Minnesota. 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 Minnesota 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 Minneapolis, Minn., to the purchasers thereof in the State of Minnesota 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 course of trade and commerce by the said respondent in such candy in the State of Minnesota 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 one of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 2 of count one 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 one 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 one of this complaint to the same extent as though the allegations thereof were set out at length herein and

Complaint

22 F. T. C.

said paragraph 3 of count one 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 one 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 one of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 4 of count one 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 one 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 one of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 5 of count one 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 one 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 one of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 6 of count one 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 one 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 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, 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 present 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,

Complaint

22 F. T. C.

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 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 the 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, 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, 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 one 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.

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, on January 23, 1935, issued and served a complaint in two counts upon the respondent, F. A. Martoccio Company, a corporation in its own name and right and trading as Hollywood Candy Company, charging in count one of the aforesaid complaint that the 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 two 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.

After the issuance of said complaint and the filing of respondent's answer thereto, testimony and evidence in support of the allegations of count one of the complaint were introduced by Henry C. Lank attorney for the Commission, before Robert S. Hall, an examiner of the Commission, theretofore duly designated by it, and in defense of the allegations of count one of the complaint by Arnold L. Guesmer, attorney for the respondent, and said testimony and evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on count one of said complaint, the answer thereto, testimony and evidence, briefs in support of said count one of the complaint and in defense thereto, and the oral arguments of counsel aforesaid, and the Commission, having duly considered the same 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 one of the aforesaid complaint and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, F. A. Martoccio Company, is a corporation organized under the laws of the State of Minnesota, with its principal office and place of business in the city of Minneapolis,

Findings

22 F. T. C.

State of Minnesota. Respondent is now, and for several years last past has been, engaged in the manufacture of candy in Minneapolis and in the sale and distribution of said candy under trade name, Hollywood Candy Company, to wholesale dealers and jobbers located in the State of Minnesota and other States of the United States. It causes the said candy when sold to be shipped or transported from its principal place of business in the State of Minnesota to purchasers thereof in Minnesota and in the States of the United States other than the State of Minnesota. 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 corporations and with partnerships and individuals 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.

PAR. 2. Among the candy manufactured and sold by respondent, are several assortments composed of a number of bars of candy of uniform size, shape and quality, together with a number of larger bars of candy of the same quality and a device commonly called a "punch board" or "push card." The respondent manufactured and distributed all such assortments, with which a "push card" or "punch board" was included, involving the same lot or chance feature in the distribution to the ultimate consumer and varied in detail.

Illustrative of the sales method involved was an assortment which the respondent designated "Big Chief Deal." This assortment contained seventy bars of candy of one size, twenty larger bars of candy and ten still larger bars of candy, all of the said bars being of the same quality candy. The "punch board" or "push card" included with this assortment bore legends at the top thereof stating the manner in which the several bars in said assortment were to be distributed to the ultimate purchasers. These legends were as follows:

5¢ per sale	"BIG CHIEF DEAL"
	* * * NO BLANKS * * *
	Numbers 5-10-15-20-25-30-35-40-45-50-55-60-65-70-75-80-85-90-95-100
	Each Receive One ¼ POUND NOUGAT LOAF
	Numbers 3-13-23-33-43-53-63-73-83 Each Receive One ½ POUND NOUGAT LOAF
	All Other Numbers With the Exception of Last Push Each Receive Choice of Either PUZZLE OR BIG TIME BAR
	Last Purchase Receives One ½ POUND NOUGAT LOAF"

The "punch board" or "push card" also had, immediately below the legends quoted, 100 partially perforated discs and under each disc was a number, which number was effectively concealed from the purchasers and prospective purchasers until a punch or selection had been made and the particular disc separated from the board. The candy contained in said assortment was distributed to the consuming public in accordance with the legends at the top of said "punch board" or "push card." Sales were 5 cents each and the fact as to whether a purchaser received one of the small bars, one of the middle sized bars, or one of the largest bars for the price of 5 cents was thus determined wholly by lot or chance, by the use of said "punch board" or "push card."

With this Big Chief assortment, the respondent furnished a display card or advertisement of the deal. The display card was of white cardboard 10 inches by 18 inches, having printed thereon in bold red letters the following:

"5¢

BIG CHIEF DEAL

NO BLANKS—YOU CAN'T LOSE

20 ¼ LB. NOUGAT LOAVES

20 ½ LB. NOUGAT LOAVES

Let's Go . . . 'WHOOPEE' "

This card was adopted during the summer of 1934 and was in use at the time of the hearing. Previous to the summer of 1934, a similar card was used which had the word "FREE" in front of the numbers 20 and 10.

PAR. 3. The candy assortments involving the lot or chance feature, as described above, are generally referred to in the candy trade or industry as "draw" or "deal" assortments. Assortments of candy without the lot or chance feature, 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 distinguish these separate types of assortments.

The respondent began the manufacture and distribution of candy in 1929 and at that time its entire output was assembled and packed as "straight" goods. In 1933, the respondent began the manufacture and distribution of the various "draw" or "deal" assortments and has continuously, since said time, manufactured one or more such assortments. It has, from time to time, discontinued, either permanently or seasonally, certain of these assortments, but has continued the manufacture and distribution of other of said assortments.

Findings

22 F. T. C.

PAR. 4. Numerous retail dealers purchase the assortments described in paragraph 2 above from wholesale dealers or jobbers, who, in turn, have purchased said packages or assortments from the respondent. Such retail dealers display said packages for sale to the public, as packed by the respondent, and the candy, contained in said packages or assortments, is sold and distributed to the consuming public by means of the "push cards" furnished by respondent, and in accordance with the legends printed thereon.

PAR. 5. The respondent sells its merchandise to wholesale dealers and jobbers throughout the United States, with the exception of the extreme western coast States, and respondent's merchandise, both "straight" and "draw" or "deal" assortments, is resold in practically all stores where candy is sold. This includes grocery stores, drug stores, restaurants, hotels, cigar stands, and school stores.

All sales made by the respondent are absolute sales and the respondent retains no control over the goods after they are delivered to the wholesale dealer, jobber or retail dealer. The packages are assembled and packed in such manner that they can be displayed by the retail dealer, without alteration or rearrangement, and offered for sale to the consuming or purchasing public by means of said push card.

In the sale and distribution to jobbers and wholesale dealers, for resale to retail dealers of packages and assortments of candy assembled and packed, as described in paragraph 2 herein, respondent has knowledge that said candy will be resold to the purchasing public, by retail dealers, by lot or chance, and it packs and assembles such candy in the way and manner described, and furnishes the said "push card" so that the said candy may, and shall, be resold to the public by lot or chance, by said retail dealers.

PAR. 6. A substantial demand in the trade for "draw" or "deal" candy comes from the small retailers. The stores of these small retailers are, in many instances, located near schools and attract the trade of school children. The consumers, or purchasers of lottery or prize package candy, are principally children, and because of the lottery or gambling feature connected with the "draw" or "deal" assortments, 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 packages of candy are displayed side by side.

Witnesses, from several branches of the candy industry, testified in this proceeding to the effect that children preferred to purchase the lottery or prize package candy because of the gambling feature connected with its sale. The sale and distribution of "draw" or "deal"

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 a substantial number of the purchasers and consumers of this type of candy.

PAR. 7. There are, in the United States, many manufacturers of candy who do not manufacture and sell lottery or prize packages or assortments of candy and who sell their "straight goods" candy in interstate commerce, in competition with the "draw" or "deal" candy, and manufacturers of "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 sale of "straight goods" candy is principally due to the gambling or lottery features indicated with the "draw" or "deal" candy.

PAR. 8. The sale and distribution of candy, by retailers, by the methods described in paragraph 2 hereof, is the sale and distribution of candy by lot or chance, and constitutes a lottery or gaming device. Retail candy dealers, wholesale dealers and jobbers, and manufacturers in competition with respondent, appeared as witnesses in this proceeding and testified, and the Commission finds as a fact that many retail dealers, wholesale dealers and jobbers and competitors of respondent regard such method of sale and distribution as morally bad and as 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 a means of violating the laws of several States. Because of these reasons, various dealers and competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. Such competitors of respondent are thereby put to a disadvantage in competition. Certain retail dealers who find that they can dispose of more candy by the "draw" or "deal" method buy respondent's products, and the products of others employing the same method of sale, and thereby trade is diverted, to respondent and others using similar methods, from such competitors. Such competitors can compete on even terms only by giving the same or similar 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

Order

22 F. T. C.

candy packed and assembled for resale to the public by lot or chance. The use of such methods, by the respondent, in the sale and distribution of its candy, is prejudicial and injurious to the public and its competitors, and has resulted in the diversion of trade to respondent, from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 9. Respondent has approximately 4,000 wholesale dealers or jobbers on its mailing list and sells its candy generally throughout the United States. Respondent's gross sales for all of its candy products, both "straight" merchandise and "draw" or "deal" assortments for 1929 were 502,248, 1930—525,993, 1931—915,856, 1932—632,605, 1933—674,471 and 1934—731,602.

The sale and distribution of candy by lot or chance is against the public policy of the Government of the United States.

CONCLUSION

The aforesaid acts and practices of respondent, F. A. Martoccio Company, a corporation in its own name and right and trading as Hollywood 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 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."

ORDER TO CEASE AND DESIST AS TO COUNT ONE OF THE COMPLAINT AND
ORDER OF DISMISSAL AS TO COUNT TWO OF THE COMPLAINT

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and evidence taken before Robert S. Hall, an examiner of the Commission theretofore duly designated by it, in support of the charges of said count one of said complaint and the opposition thereto, briefs filed herein and oral argument of Henry C. Lank, counsel for the Commission and Arnold L. Guesmer, counsel for the respondent, and the Commission having made its findings as to the facts and its conclusion that said 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."

Order

It is hereby ordered, As to count one of the aforesaid complaint, that the respondent, F. A. Martoccio Company, a corporation, in its own name and right and trading as Hollywood Candy Company, its officers, directors, agents, representatives, and employees, in the manufacture, sale and distribution in interstate commerce of candy and candy products, cease and desist from:

(1) Selling and distributing to wholesale dealers and jobbers, for resale to retail dealers, candy so packed and assembled that sales of said 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 said 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) Supplying to, or placing in the hands of, wholesale dealers and jobbers assortments of candy together with a device, commonly called a "punch board" or "push card", for use, or which may be used, in distributing or selling said candy to the public at retail;

(4) Furnishing to wholesale dealers and jobbers a device, commonly called a "punch board" or "push card", either with packages or assortments of candy or candy products, or separately, bearing a legend, or legends, or statements, informing the purchasing public that the candy, or candy products, are 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.

It is further ordered, That the respondent, F. A. Martoccio Company, a corporation, in its own name and right and trading as Hollywood Candy 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 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, [295 U. S. 495] count two of the complaint in this proceeding be and the same is hereby dismissed.

IN THE MATTER OF
CANTON SILK MILLS, INC.

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

Docket 2618. Complaint, Nov. 8, 1935—Decision, May 26, 1936

Where a corporation engaged in the purchase of raw griego or unfinished silk and rayon cloths and fabrics from weavers and manufacturers and in causing said cloths and fabrics to be dyed, printed, or processed into finished dry goods and materials by others and in selling such finished goods and materials to various retailers, members of the cutting-up trade, and others—

Represented and implied, through display and use of its trade name containing the words "Silk Mills", and the language "Mills: Riverside, Rhode Island, Phenix, Rhode Island", on advertising cards, letterheads, bills, invoices, and other printed matter, that it owned, operated, and maintained or controlled one or more mills for the manufacture of silks or silk goods;

Facts being it was not engaged in the manufacture, printing, processing or dyeing of silk or silk material or rayon or rayon materials and did not own, operate, maintain or control any such mill or plant in which such fabrics were made, dyed, printed, or processed, or own, control, operate, or maintain any mill or plant for manufacturing, dyeing, printing, or processing such fabrics at the aforesaid places or at any other place whatsoever;

With effect of deceiving and misleading customers and prospective customers of such finished silk and rayon goods and materials into the belief that the products thus offered and sold by it were made by it in mills which it owned and operated or maintained and controlled, and of inducing such customers to purchase such products from it because of such erroneous belief, and in response to the preference of certain customers for dealing directly with the manufacturer as eliminating the profit of the middleman, or as giving customer more uniformity in quality and design, and of diverting trade thereby to it from competitors, among whom there are those who truthfully represent and denominate themselves as engaged in the manufacture of such products and those engaged in the purchase and resale thereof, and who do not respectively misrepresent themselves as owners and operators of mills and factories in which their products are made, dyed, or printed and processed:

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

Before *Mr. Charles F. Diggs*, trial examiner.

Mr. John Darsey for the Commission.

Mr. Morris A. Schoenfeld, of New York City, for respondent.