

Syllabus

IN THE MATTER OF
BRECHT CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2662. Complaint, Dec. 18, 1935—Decision, Aug. 15, 1936¹*

Where a corporation engaged in manufacture and sale of candy, including "break and take," and "draw" or "deal" assortments, in which, as the case might be, (1) chance selection of one of a number of individually wrapped penny pieces of uniform size and shape, enclosed yellow colored center of which differed from that of majority, entitled purchaser to receive, without charge, one of the larger pieces or bars of candy, included therewith, and in which purchaser of last penny piece, likewise received, without charge, the small package of candy similarly included; (2) particular legend secured by chance from push card included with assortment, entitled 5-cent purchaser, in accordance with card's explanatory statement and legend secured, to one, two, three, four, or five candy bars, and in which final purchaser received four of said bars in accordance with such advisory statement; and (3) chance selection of number, as disclosed by punch on 600-hole board included with assortment, entitled purchaser to bar or to box of candy, as case might be; and including also other similar assortments with other types of candy and punch boards with larger or smaller number of holes, as case might be, stocked and made up by it on request of customers—

Sold said various assortments, with cards or boards, as aforesaid to wholesalers, jobbers, and retailers, knowingly assembled and packed for resale without alteration, addition, or rearrangement to consuming, purchasing public by retailers which, as sellers of its said product, included, generally, in case of the concealed, colored center assortments, candy stores near schools and small grocery stores, and in case of punch board assortments, more often, though not exclusively, cigar stores, pool rooms, and places frequented by men, and stores of which retailers, in case of the small establishments, are frequently near schools and attract the trade of children, principal consumer-purchasers of the lottery or prize candy, and who, given choice, purchase same in preference to the "straight" goods because of lottery or gambling feature connected therewith and chance of becoming a winner;

With result that some competitors, dealing in "straight" goods candy only, and who, like many, regard sale and distribution of other as morally bad, and as encouraging gambling, and especially among children, and as injurious to the industry in merchandising, instead of candy, a chance or lottery, and as providing retail merchants with means of violating the laws of the States, and who refuse to sell candy so packed and assembled that it can be resold to public by lot or chance, and who can compete on even terms only by giving same or similar devices to retailers, were put to a disadvantage, some competitors began sale and distribution of candy to public

¹ Order, however, published as of Nov. 13, 1936.

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by lot or chance to meet demand for candy thus sold and competition of manufacturers who thus sell and distribute their products, sale of "straight" goods candy by aforesaid unwilling competitors showed a continued decrease, as did sale of such candy whenever and wherever the lottery or prize candy appeared in its markets, by reason of gambling or lottery feature connected with former, public and competitors were prejudiced and injured, and trade was diverted from latter to it, and there was a restraint upon and a detriment to the freedom of fair and legitimate competition in the industry involved, and a violation of public policy:

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

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank and *Mr. P. C. Kolinski* for the Commission.

Mr. Wilbur F. Denious and *Mr. Hudson Moore*, of Denver, Colo., and *Mr. Walter J. 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 Brecht Candy Company, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and 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:

PARAGRAPH 1. Respondent is a corporation, organized under the laws of Colorado with its principal place of business in the city of Denver, State of Colorado. Respondent is now, and for several years last past, has been engaged in the manufacture of candy and in the sale and distribution thereof to wholesale and retail dealers located at points in the various States of the United States, and causes said products, when so sold, to be transported from its place of business in the city of Denver, State of Colorado, to purchasers thereof in other States of the United States at their respective places of business, and there is now, and has been for several years last past, a course of trade and commerce by said respondent in such candy, between and among the States of the United States. In the course and conduct of the said business, respondent is in competition with other corporations and with individuals and partnerships engaged

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in the sale and distribution of candy and candy products in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale and retail dealers, various packages or assortments of candy, so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. Certain of said packages are hereinafter described for the purpose of showing the methods used by respondent, but this list is not all inclusive of the various packages, nor does it include all the details of the several sales plans which respondent has been or is using in the distribution of candy by lot or chance:

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

(b) Another assortment manufactured and distributed by the respondent is composed of a number of candy bars together with a device commonly called a push card. The candy contained in said assortment is distributed to purchasers in the following manner:

The push card has a number of partially perforated discs, and when a push is made and the disc separated from the card, a legend is disclosed. Sales are 5¢ each and the card bears statements informing customers and prospective customers as to the number of bars which are to be given with the particular legends. For example:

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BASEBALL

EVERY PLAY RECEIVES ONE OR MORE CANDY BARS

Home Run Receives.....	8 candy bars
Three Base Hit Receives.....	7 candy bars
Two Base Hit Receives.....	6 candy bars
One Base Hit Receives.....	5 candy bars
Stolen Base Receives.....	3 candy bars
Base on Balls Receives.....	3 candy bars
Hit by Pitcher Receives.....	2 candy bars
Sacrifice Hit Receives.....	1 candy bar
Out Receives.....	1 candy bar
Last Play Receives.....	5 candy bars

The legends on the discs or pushes are effectively concealed from the purchaser and prospective purchaser until a selection has been made and the disc separated from the card. The number of candy bars which a customer receives for the price of 5¢ is thus determined wholly by lot or chance.

(c) Another assortment manufactured and distributed by respondent is composed of a number of bars of candy and a number of boxes or packages of candy together with a device commonly called a punch board. The bars and packages or boxes of candy in said assortment are distributed in the following manner:

The punch board has a number of holes and in each hole is a slip of paper bearing a number. There are as many numbers as there are holes in the board, but the slips are not arranged in numerical sequence. Punches from said board are 5¢ each and when a punch is made, a number is disclosed. The board bears statements or legends informing the customer and prospective customer which numbers receive the packages or boxes of candy. All other numbers receive a bar of candy. The numbers on said board are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the particular punch separated from the board. The fact as to whether a purchaser receives one of the bars of candy or one of the packages or boxes of candy for the price of 5¢ is thus determined wholly by lot or chance.

PAR. 3. The wholesale dealers to whom respondent sells its assortments, resell said assortments to retail dealers, and said retail dealers, and the retail dealers to whom respondent sells direct, expose said assortments for sale, and sell said candy to the purchasing public in accordance with the aforesaid sales plans. 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 plans hereinabove set forth, as a means of inducing purchasers thereof to pur-

chase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure (a) larger pieces of candy; (b) additional bars of candy; or (c) packages or boxes of candy.

The use by respondent of said method of the sale of candies, and the sale of candies by and through the use thereof, and by the aid of said method is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy; and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has the dangerous tendency unduly to hinder competition or create monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the branch of the candy trade involved in this proceeding competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme.

Wherefore, many persons, firms, and corporations who make and sell candy in competition with the respondent, as above alleged, are unwilling to offer for sale or sell candy 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, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy 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 candy offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful; 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 the respondent has the tendency and capacity to eliminate from said candy trade all

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actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or an equivalent method.

PAR. 6. 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 or any other method that is contrary to public policy.

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

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 December 18, 1935, issued and served a complaint upon the respondent, Brecht Candy Company, a corporation, charging that the respondent had been and was using unfair methods of competition in commerce as "commerce" is defined in said act of Congress.

After the issuance of said complaint, the respondent having failed to file answer thereto, testimony and evidence in support of the allegations of the complaint were introduced by Henry C. Lank and P. C. Kolinski, attorneys for the Commission, before Miles J. Furnas, an examiner of the Commission theretofore designated by it. The respondent was represented by Messrs. Wilbur F. Denious and Hudson Moore, of Denver, Colo., and by Walter J. Hughes, of Chicago, Ill., but offered no testimony or evidence in defense of the charges of the complaint. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint, the testimony and evidence and brief in support of the complaint, respondent having failed to file any brief, and not having indicated a desire to orally argue the matter, 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 and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Brecht Candy Company, is a corporation organized under the laws of the State of Colorado, with

its principal office and place of business in the city of Denver, Colo. Respondent is now and for several years last past has been engaged in the manufacture of candy in Denver, Colo., and in the sale and distribution of said candy to retail and wholesale dealers located in the State of Colorado and in the States of Montana, New Mexico, Arizona, and Wyoming. It causes said candy when sold to be shipped or transported from its principal place of business in Denver, Colo., to purchasers thereof in the above-named States. In so carrying on said business respondent 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 is an assortment designated as "150 Tuckaway" composed of a number of small pieces of wrapped candy of uniform size and shape, together with a number of larger pieces or bars of candy, and a small package of candy. The larger bars of candy, and the small package of candy are given as prizes to the ultimate purchasers or consumers of said small wrapped candies in the following manner:

The majority of the said small wrapped candies in said assortment have white centers, but a small number have yellow centers. The color of the center of the said small wrapped pieces of candy is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. The said small wrapped candies retail at the price of 1¢ each, but the purchaser or consumer who procures one of the said candies having a yellow center is entitled to receive, and is to be given free of charge, one of the larger pieces or bars of candy. The purchaser or consumer who obtains the last piece of small wrapped candies in said assortment is entitled to receive, and is to be given free of charge, the small package of candy. The larger pieces or bars of candy and the small package of candy contained in said assortment are thus distributed to purchasers of the small wrapped candies wholly by lot or chance.

Respondent has from time to time distributed various assortments involving the same principle or sales plan, but varying in detail.

PAR. 3. Another assortment manufactured and sold by respondent and designated "Play Ball" consists of a number of bars of candy, together with a device commonly called a "push card." The push card included with this assortment bears legends at the top thereof stating the manner in which the candy is to be distributed to the purchasers or consumers. These legends are as follows:

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PLAY BALL

5¢ A SALE

5¢ A SALE

ALL WINNERS

NO BLANKS

HOME RUN Receives.....	5 Candy Bars
3 Base Hit Receives.....	4 Candy Bars
2 Base Hit Receives.....	3 Candy Bars
1 Base Hit Receives.....	2 Candy Bars
Base on Balls Receives.....	1 Candy Bar
Foul Ball Receives.....	1 Candy Bar
Strike Out Receives.....	1 Candy Bar

Last Sale Receives 4 Candy Bars

The push card also has immediately below the legends quoted 110 partially perforated discs, and under each disc is a number effectively concealed from purchasers, and prospective purchasers, until a "push" or selection has been made and the particular disc separated from the card. The legends on said discs correspond to the legends shown at the top of the card, and the candy bars contained in said assortment are distributed to purchasers in accordance with the said legends. Sales are 5¢ each and the fact as to whether a purchaser receives one or more than one bar of candy for the price of 5¢ is thus determined wholly by lot or chance.

Here also, as in paragraph 2 above, the respondent has from time to time manufactured and sold various assortments involving the same principle or sales plan, but varying in detail.

PAR. 4. Prior to the hearing in this case the respondent manufactured and distributed several assortments of candy with which was included a device commonly called a "punch board."

One such assortment consisted of a number of bars of candy, a number of boxes of candy, and a punch board having 600 holes therein. In each of the holes on said punch board a slip of paper bearing a number was secreted. The number on the said slip of paper was effectively concealed from purchasers or prospective purchasers until a punch or selection had been made and the slip of paper removed from the board. There were legends or statements at the top of the board informing customers and prospective customers as to which numbers received a bar of candy and which numbers received a box of candy. The fact as to whether a purchaser received a bar of candy or one of the boxes of candy for the price of a single punch or selection was thus determined wholly by lot or chance.

Other assortments contained other types of candy, together with punch boards, some of which had a smaller number of holes, and some of which had a larger number of holes. An officer of the respondent corporation testified that these assortments with which a

punch board was included were not now regularly stocked by the respondent, but that such punch boards were carried in its stock and assortments were made up on request of its customers.

PAR. 5. The candy assortments involving the lot or chance feature, as described in paragraphs 2, 3, and 4 above, are generally referred to in the candy trade or industry as "break and take", "draw", or "deal" assortments. Assortments of candy without the lot or chance 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 designate these types of assortments.

PAR. 6. Numerous retail dealers purchase, and have purchased, the assortments described in paragraphs 2, 3, and 4, above, direct from respondent or from wholesale dealers and jobbers who in turn have purchased said packages or assortments from the respondent. Such retail dealers display such assortments for sale to the public as packed and assembled by the respondent, and the candy contained in said assortments is sold and distributed to the consuming public as suggested by the respondent or by means of the push card or punch board furnished by respondent, and in accordance with the legends printed on the said push cards or punch boards.

PAR. 7. The respondent sells its merchandise to retail dealers and to wholesale dealers and jobbers in the States of Colorado, Montana, New Mexico, Arizona, and Wyoming, and respondent's merchandise is resold to the public in practically all stores where candy is sold. An officer of the respondent corporation testified that assortments as described in paragraphs 2 and 3 were sold generally in candy stores in the vicinity of schools and small grocery stores selling candy. And with reference to the assortments with which a punch board is included (referred to in paragraph 4), they are more often resold, though not exclusively, in cigar stores and pool rooms and places where men congregate and deal.

All sales made by respondent are absolute sales and respondent retains no control over the goods after they are delivered to the retail dealers, or to the wholesale dealers and jobbers. The assortments are packed in such manner that they can be displayed and offered for sale, without alteration, addition, or rearrangement, to the consuming public by means of a lottery, gaming device, or gift enterprise.

In the sale and distribution to retail dealers and to wholesale dealers and jobbers for resale to retail dealers of assortments of candy assembled and packed as described in paragraphs 2, 3, and 4 herein, respondent has knowledge that the 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 so that it may, without alteration, addition, or rearrangement, be resold to the public by lot or chance by said retail dealers.

PAR. 8. Many competitors of respondent regard such methods 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 the means of violating the laws of the several States. Because of these reasons, some competitors of respondent refuse 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. Said 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" candy show a continued decrease.

There is a 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 resold 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 methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public, and respondent's 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. The principal demand in the trade for the "break and take," or "deal", 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 school children. The consumers or purchasers of the lottery or prize candy assortments are principally children and because of the lottery or gambling feature connected with the "break and take", or "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" candy when the two types of assortments are displayed side by side.

The children prefer to purchase the lottery or prize assortments of candy because of the gambling feature connected with its sale. The sale and distribution of "break and take", or "draw", or "deal" 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. 10. 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" candy in interstate commerce in competition with the "break and take", or "draw", or "deal" candy, and manufacturers of the "straight" type of candy have noted a marked decrease in the sales of their product whenever and wherever the lottery or prize candy has appeared in their markets. This decrease in the sales of "straight" candy is principally due to the gambling or lottery feature indicated with the "break and take", or "draw", or "deal" candy.

PAR. 11. The exact annual volume of respondent's business was not shown but an officer of the respondent corporation testified, and the Commission finds, that the annual volume of respondent's business is substantial.

PAR. 12. The Commission further finds that the sale and distribution in interstate commerce of assortments or packages of candy so packed and assembled as to enable retail dealers, without alteration, addition, or rearrangement, to resell the same to the consuming public by lot or chance is contrary to public policy.

CONCLUSION

The aforesaid acts and practices of the respondent, Brecht Candy Company, a corporation, 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 are 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."

MODIFIED ORDER TO CEASE AND DESIST ¹

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the testimony and evidence taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, in support of the charges of the complaint, no answer having been filed to the complaint, and no testimony having been offered in opposition thereto, and upon the brief herein filed by counsel for the Commission, 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

¹ Published, as modified, as of November 13, 1936.

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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 ordered, That the respondent, its officers, agents, representatives, and employees, in the offering for sale, sale, and distribution by it in interstate commerce of candy and candy products, do cease and desist from:

(1) Selling and distributing to retail dealers, and 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 or retail dealers, 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 contained in said assortments to the public;

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

(4) Supplying to, or placing in the hands of, retail and wholesale dealers and jobbers assortments of candy, together with a device commonly called a "push card" or a device commonly called a "punch board", for use, or which may be used, in distributing said candy to the public at retail.

And it is further ordered, That the respondent, Brecht 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.

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IN THE MATTER OF

BOSTON SPORTSWEAR COMPANY ET AL.

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

Docket 2755. Complaint, Apr. 3, 1936—Decision, Aug. 19, 1936

Where five corporations and three individuals engaged in manufacture of flannel skirts and sale thereof to purchasers in States other than their own State of manufacture—

- (a) Entered into an understanding, agreement, combination, or conspiracy among and between themselves to restrict, suppress, and eliminate competition in the sale and distribution of said products to purchasers thereof located throughout the States by agreeing to quote and sell said skirts at a uniform price of \$16.50 per dozen; and
- (b) Severally notified, thereafter, their respective customers by identical written notice to effect that the price of said articles had been fixed as aforesaid and that same had been agreed to by said corporations and individuals, and sold same, pursuant thereto, at said price;

With effect of unduly tending to substantially lessen, restrict and suppress competition in interstate sale of flannel skirts throughout the United States and particularly in the New England States, in which they constituted practically all of the manufacturers thereof: