

## Syllabus

## IN THE MATTER OF

NATIONAL CANDY COMPANY, INC., IN ITS OWN NAME  
AND RIGHT, AND TRADING AS PAN CONFECTION  
FACTORYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION  
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 1802. Complaint, Apr. 22, 1937<sup>1</sup>—Decision, Jan. 22, 1938*

Where a corporation engaged in manufacture and sale of candies, including assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and which were composed of (1) number of 2-for-a-penny pieces of chocolate covered candies of uniform size and shape, together with certain other articles of merchandise to be given as prizes to purchasers procuring, by chance, one of a relatively few of said uniform pieces, colored center of which differed from that of majority, and to purchaser of last of such uniform pieces in assortment, and together with, also, explanatory display card for retailers' use, and of (2) number of chocolate-covered candy malted milk balls, together with push card, for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser received, for penny paid, and in accordance with number pushed by chance, one or more of said malted milk balls, up to 20, and pursuant to which, further, purchaser of last push in first 3 of board's 4 sections received 5 of such balls and purchaser of last push received 15—

Sold to wholesalers, jobbers, and retailers, for display and resale to purchasing public in accordance with aforesaid sales plans, said assortments, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its products, in accordance with aforesaid sales plan, contrary to public policy long recognized by the common law and criminal statutes and to an established public policy of the United States Government, and in competition with many who, unwilling to offer or sell candy so packed and assembled as above described, or otherwise arranged and packed for sale to purchasing public, as to involve a game of chance or any other method of sale contrary to public policy, refrain therefrom; With result that many dealers in and ultimate purchasers of candy were attracted by its said method and manner of packing same and by element of chance involved in sale thereof as above set forth, and thereby induced to purchase said candy, thus packed and sold by it, in preference to that offered and sold by said competitors who do not use same or equivalent methods, and with tendency and capacity, because of said game of chance, to divert to it trade and custom from its said competitors as aforesaid, exclude from said trade all competitors who are unwilling to and do not use such or equivalent method as unlawful, lessen competition therein and

<sup>1</sup> Amended and supplemental complaint. Original findings and order in this matter on April 3, 1934 (18 F. T. C. 282), were vacated and set aside by order of April 21, 1937. See 24 F. T. C. 1395.

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tend to create monopoly thereof in it and such other distributors as use same or equivalent method, deprive purchasing public of benefit of free competition in trade in question, and eliminate from said trade all actual, and exclude therefrom all potential, competitors who do not adopt and use such or equivalent methods:

*Held*, That such acts and practices were 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* for the Commission.

*Lowenhaupt, Waite & Stolar*, of St. Louis, Mo., for respondent.

## AMENDED AND SUPPLEMENTAL COMPLAINT

*Whereas*, The Federal Trade Commission did heretofore, to wit, on April 30, 1930, issue its complaint herein, charging and alleging that respondent herein was and had been guilty of unfair methods of competition in interstate commerce within the intent and meaning 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

*Whereas*, This Commission having reason to believe that respondent herein has been and is using unfair methods of competition in commerce as "commerce" is defined in said act, other than and in addition to those in relation to which the Commission issued its complaint as aforesaid, and it appearing to said Commission that a further proceeding by it in respect thereof would be in the public interest;

*Now, therefore*, Acting in the public interest pursuant to the provisions of the Act of September 26, 1914, aforesaid, the Federal Trade Commission charges that the National Candy Company, Inc., has been and now is using unfair methods of competition in commerce, as "commerce" is defined in said act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of New Jersey, with its principal office and place of business located at 208 North Broadway, in the city of St. Louis, State of Missouri, and with a place of business located at 341 West Erie Street, in the city of Chicago, State of Illinois. Respondent conducts its business from its principal office and place of business in St. Louis, Mo., as the National Candy Company, Inc., and it does business at its Chicago office and place of business as the Pan Confection Factory, National Candy Company, Inc.

Respondent is now, and for several years last past has been, engaged in the manufacture of candies and in the sale and distribution

thereof to wholesale dealers and jobbers and to retail dealers located at points in the various States of the United States. It causes said products when sold to be transported from its principal place of business in the city of St. Louis, State of Missouri, and from its place of business in the city of Chicago, State of Illinois, to the purchasers thereof in the State of Missouri and in the State of Illinois and in other States of the United States at their respective places of business. 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 said business, respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy 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 dealers and jobbers and to retail dealers assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

(a) One of said assortments is composed of a number of pieces of chocolate-covered candies of uniform size and shape, together with certain other articles of merchandise, which other articles of merchandise are to be given as prizes to purchasers of said chocolate-covered candies in the following manner:

The majority of said chocolate-covered candies of uniform size and shape have centers of the same color, but a small number thereof have centers of a different color. The said pieces of candy of uniform size and shape retail at the price of 2 for 1 cent, but the purchaser who procures one of said candies having a center of a color different from the majority of said candies is entitled to receive, and is to be given free of charge, one of the said other articles of merchandise hereinbefore referred to. The purchaser of the last piece of chocolate-covered candies of uniform size and shape is entitled to receive, and is to be given free of charge, one of the other articles of merchandise. The color of the center of said pieces of chocolate-covered 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 candies who procure a piece of candy having a center colored differently from the majority and the purchaser of the last piece of candy in said assortment are thus to procure one of the other articles of merchandise wholly by chance.

Respondent furnishes to said wholesale dealers and jobbers and to retail dealers with each of said assortments a display card to be used

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by the retail dealer in offering said candies for sale to the public, which display card bears a legend or statement informing the prospective purchaser that the candy contained in said assortment is being distributed in accordance with the above-described sales plan.

(b) Another assortment manufactured and distributed by respondent is composed of a number of chocolate-covered candy malted-milk balls, together with a device commonly called a "push card." The candy contained in said assortment is distributed to the consuming public by means of the said push card in the following manner:

The push card has a number of partially perforated disks, and the said disks are arranged on said card in four sections. Concealed within each of said disks is a legend. Sales are 1 cent each, and the card has statements or legends at the top thereof stating that certain specified legends entitled the purchaser to 1 of said chocolate-covered malted-milk balls; that certain other specified legends entitled the purchaser to 2 of said candy balls; others to 3 candy balls; others to 5 candy balls; others to 6 candy balls; others to 8 candy balls; others to 10 candy balls; and others to 20 candy balls. The card also bears statements or legends stating that the last play in each of the first 3 sections completed receives 5 balls. The last play on the card receives 15 balls. The statements or legends in said partially perforated disks are effectively concealed from purchasers and prospective purchasers until a selection has been made and the disk separated from the card. The fact as to whether a purchaser receives 1, 2, 3, 5, 6, 8, 10, 15, or 20 of said chocolate-covered malted-milk balls is thus determined wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments of candy resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale and sell the same 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. Such sales plans have the capacity and tendency of inducing purchasers thereof to purchase respondent's said candy in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure (a) another article of merchandise; or (b) additional chocolate-covered malted-milk balls.

The use by respondent of said methods in the sale of candy, and the sale of candy by and through the use thereof and by the aid of

said methods, 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 methods has the 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 candy trade competitors who do not adopt and use the same methods or equivalent or similar methods involving the same or an equivalent or similar element of chance or lottery scheme.

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 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 methods 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 methods 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 equivalent methods; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are unlawful; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and in 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 methods by respondent has the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors who do not adopt and use said methods or equivalent methods.

PAR. 6. The aforementioned methods, acts, and practices of 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, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

## 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 April 30, 1930, issued and served its complaint in this proceeding upon the respondent, National Candy Company, Inc., a corporation, in its own name and right and trading as Pan Confection Factory, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. Thereafter, on April 22, 1937, the Commission issued and served its amended and supplemental complaint on the respondent, charging it with the use of unfair methods of competition in commerce other than and in addition to those in relation to which the Commission issued its complaint on April 30, 1930, as aforesaid. After the issuance of said complaint and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's request for permission to withdraw said answer and to substitute therefor an amended answer admitting all the material allegations of the amended and supplemental complaint to be true and waiving the taking of further evidence and all other intervening procedure, which amended answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said amended and supplemental complaint and amended answer; and the Commission having duly considered the matter and being now 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. Respondent is a corporation organized under the laws of the State of New Jersey, with its principal office and place of business located at 208 North Broadway, in the city of St. Louis, State of Missouri, and with a place of business located at 341 West Erie Street, in the city of Chicago, State of Illinois. Respondent conducts its business from its principal office and place of business in St. Louis, Mo., as the National Candy Company, Inc., and it does business at its Chicago office and place of business as the Pan Confection Factory, National Candy Company, Inc.

Respondent is now, and for several years last past has been, engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers and jobbers and to retail dealers located at points in the various States of the United States. It causes said

products when sold to be transported from its principal place of business in the city of St. Louis, State of Missouri, and from its place of business in the city of Chicago, State of Illinois, to the purchasers thereof in the State of Missouri and in the State of Illinois and in other States of the United States at their respective places of business. 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 said business, respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy 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 dealers and jobbers and to retail dealers assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

(a) One of said assortments is composed of a number of pieces of chocolate-covered candies of uniform size and shape, together with certain other articles of merchandise, which other articles of merchandise are to be given as prizes to purchasers of said chocolate-covered candies in the following manner:

The majority of said chocolate-covered candies of uniform size and shape have centers of the same color, but a small number thereof have centers of a different color. The said pieces of candy of uniform size and shape retail at the price of 2 for 1 cent, but the purchaser who procures one of said candies having a center of a color different from the majority of said candies is entitled to receive, and is to be given free of charge, one of the said other articles of merchandise hereinbefore referred to. The purchaser of the last piece of chocolate-covered candies of uniform size and shape is entitled to receive, and is to be given free of charge, one of the other articles of merchandise. The color of the center of said pieces of chocolate-covered 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 candies who procure a piece of candy having a center colored differently from the majority in said assortment are thus to procure one of the other articles of merchandise wholly by chance.

Respondent furnishes to said wholesale dealers and jobbers and to retail dealers with each of said assortments a display card to be used by the retail dealer in offering said candies for sale to the public, which display card bears a legend or statement informing

the prospective purchaser that the candy contained in said assortment is being distributed in accordance with the above described sales plan.

(b) Another assortment manufactured and distributed by respondent is composed of a number of chocolate-covered candy malted-milk balls, together with a device commonly called a "push card." The candy contained in said assortment is distributed to the consuming public by means of the said push card in the following manner:

The push card has a number of partially perforated disks, and the said disks are arranged on said card in four sections. Concealed within each of said disks is a legend. Sales are 1 cent each, and the card has statements or legends at the top thereof stating that certain specified legends entitle the purchaser to 1 of said chocolate-covered malted-milk balls; that certain other specified legends entitle the purchaser to 2 of said candy balls; others to 3 candy balls; others to 5 candy balls; others to 6 candy balls; others to 8 candy balls; others to 10 candy balls; and others to 20 candy balls. The card also bears statements or legends stating that the last play in each of the first three sections completed receives 5 balls. The last play on the card receives 15 balls. The statements or legends in said partially perforated disks are effectively concealed from purchasers and prospective purchasers until a selection has been made and the disk separated from the card. The fact as to whether a purchaser receives 1, 2, 3, 5, 6, 8, 10, 15, or 20 of said chocolate-covered malted-milk balls is thus determined wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers 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 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.

PAR. 4. The sale of said candy to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure a number of pieces of candy, or other articles of merchandise.

The use by respondent of said method in 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 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.

Many persons, firms, and corporations who make and sell candy in competition with the respondent are unwilling to offer for sale or sell candy so packed and assembled as above described, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, or any other method of sale that is contrary to public policy, 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 capacity and tendency 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.

#### CONCLUSION

The aforesaid acts and practices of the respondent, National Candy Company, Inc., a corporation, in its own name and right and trading as Pan Confection Factory, are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, within the intent and meaning 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."

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## ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended and supplemental complaint of the Commission and the amended answer of respondent, National Candy Company, Inc., a corporation, trading in its own name and right and trading as Pan Confection Factory, admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, 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."

*It is ordered*, That the respondent, National Candy Company, Inc., a corporation, trading in its own name and right and trading as Pan Confection Factory, its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of candy in interstate commerce or in the District of Columbia, do forthwith cease and desist:

1. Selling and distributing 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 dealers assortments of candy which are used or which may be used without alteration or rearrangement of the contents of such 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 different colors together with larger pieces of candy or other articles of merchandise which said larger pieces of candy or other articles of merchandise are to be given as prizes to the purchaser procuring a piece of candy having a center of a particular color.

4. Supplying to or placing in the hands of dealers assortments of candy together with a device commonly called a push card, or a device commonly called a punchboard, for use or which may be used in distributing or selling the said candy to the public at retail;

5. Furnishing to dealers a device commonly called a push card, or a device commonly called a punchboard, either with packages or assortments of candy or separately, which push card or punchboard is to be used or may be used in distributing or selling said candy to the public.

*It is further ordered,* That the respondent, National Candy Company, Inc., a corporation, in its own name, and right and trading as Pan Confection Factory, shall within 30 days after service upon it of this order, 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.

IN THE MATTER OF  
ABRAHAM & STRAUS, INC.

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

*Docket 3159. Complaint, June 23, 1937—Decision, Jan. 22, 1938*

Where a corporation engaged in operation of department store and in sale and distribution therefrom of women's wearing apparel, pillows, and other allied products, to members of the purchasing public in various States and in the District of Columbia, in substantial competition with others engaged in similar sale and distribution of such products; in advertising its said merchandise in newspapers having interstate circulation—

- (a) Made use of such words as "silk," "heavy silk," "pure silk prints," "imported silks," "muffler silks," and "silk jerseys," in representing, designating, and referring to certain pillows and items of women's wearing apparel; and
- (b) Made use of words "crepe" or "taffeta" in designating, describing or referring to pillows, dress goods, and other items as aforesaid, without other modifying word as descriptive of fiber of which made;

Notwithstanding fact said various products, thus advertised and offered, were not composed of silk, product of cocoon of silkworm, as long definitely understood in mind of retail dealers and consuming public from word "silk," products of which have long held and still hold great public esteem and confidence for their preeminent qualities, and as understood from words "taffeta" or "crepe" without descriptive qualification, as meaning one of terms applied to fabrics resulting from different types of weaving silk fiber and fabric made from cocoon of silkworm, and, as commonly known and understood by public generally, silk;

With capacity and tendency to mislead and deceive portion of purchasing public into erroneous belief that such articles were made of silk, and to cause them to purchase said articles by reason thereof, and to unfairly divert trade to it from competitors aforesaid; to the substantial injury of competition in commerce:

*Held*, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. W. W. Sheppard*, trial examiner.

*Mr. Astor Hogg* for the Commission.

*Proskauer, Rose & Paskus*, of New York City, 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 Abraham and Straus, Inc., a corporation, hereinafter referred to as respondent, has been and now is using unfair methods of competi-