

Complaint

IN THE MATTER OF

TOSTO FOODS, INC., AND WILLIAM C. MITHOEFER

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

Docket 3290. Complaint, Jan. 3, 1933—Decision, Mar. 5, 1938

Where a corporation and an individual, vice president, secretary, and treasurer thereof, engaged in sale and distribution of salted peanuts to wholesalers, jobbers, and retailers, in competition with others similarly engaged in sale and distribution of salted nuts, confections, and candy—

Sold its so-called "Strange As It Seems" nuts, packed in individual, small, sealed, 5-cent cartons, within a few of which there were concealed, in accordance with notice on individual cartons thereof advising ultimate purchaser "You may find 5 cents, 25 cents, 50 cents, or \$1," some such sum, as determined through selection and breaking of carton, and thereby supplied to and placed in hands of others means of conducting lotteries in sale of their said product as displayed and sold by retail purchasers thereof, in accordance with such plan or game of chance and in violation of public policy of the common law and criminal statutes and contrary to that of the United States Government;

With result that many dealers in and ultimate purchasers of such products were attracted by element of chance involved in sale thereof, and thereby induced to buy same, thus packed and sold, in preference to nuts or candy of competitors who are not willing to and do not offer and sell their products so packed, assembled or otherwise arranged as to involve game of chance and refrain therefrom, and with tendency and capacity thereby to divert to themselves trade and custom from competitors who do not use same or equivalent method, and to exclude from said trade all aforesaid unwilling competitors and lessen competition therein and create a monopoly of said trade in themselves and in such other distributors as use same or an equivalent method, and to deprive purchasing public of benefit of free competition in said trade and eliminate or exclude therefrom, as case may be, all actual or potential competitors who do not adopt and use such methods;

Held, That such method, act, and practices were all to the prejudice of the public and competitors and constituted unfair methods of competition.

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

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 the Tosto Foods, Inc., a corporation, and William C. Mithoefer, an individual, hereinafter referred to as respondents, have been and are using unfair

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methods of competition in commerce, as "commerce" is defined in said 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:

PARAGRAPH 1. Respondent, Tosto Foods, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business at 307 East Twelfth Street, Cincinnati, Ohio. Respondent William C. Mithoefer is its vice president, secretary, and treasurer and has his business office at the same address as that of the corporate respondent. Respondents act together and in cooperation with each other in doing the acts and things hereinafter alleged. Respondents are now, and for more than 1 year last past have been, engaged in the sale and distribution of salted peanuts to wholesale dealers, jobbers, and retail dealers. Said respondents cause and have caused their said products, when sold, to be transported from their principal place of business in the city of Cincinnati, Ohio, to purchasers thereof in the State of Ohio and in other States of the United States at their respective places of business. There is now, and has been for more than 1 year last past, a course of trade and commerce by said respondents in such salted peanuts between and among the various States of the United States. In the course and conduct of said business, respondents are in competition with other corporations and individuals and with partnerships engaged in the sale and distribution of salted nuts, salted peanuts, peanut confections, and candy in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesale and retail dealers salted peanuts so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. Said salted peanuts are packed in individual, small, sealed cartons which retail to the ultimate consumer at 5 cents per carton. Said salted peanuts are designated by respondents as "Strange as It Seems." Sealed within a small number of individual cartons are 5 cents, 25 cents, 50 cents, or \$1, but the ultimate purchasers cannot ascertain which cartons contain one of the above-named sums until a selection has been made and the individual carton broken open. The aforesaid purchasers of said individual cartons of salted peanuts who procure one of the said sums of money thus procure the same wholly by lot or chance. The individual cartons of said salted peanuts have lithographed or printed thereon the following language: "You may find 5 cents, 25 cents, 50 cents, or \$1."

PAR. 3. The wholesale dealers and jobbers to whom respondents sell the said salted peanuts resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondents sell direct expose said salted peanuts for sale and sell same to the purchasing public in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their products in accordance with the sales plan hereinabove set forth. Said sales plan has a capacity and tendency to induce purchasers thereof to purchase respondents' said products in preference to salted nuts, salted peanuts, peanut confections or candy offered for sale and sold by their competitors.

PAR. 4. The sale of said salted peanuts to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure a sum of money. The use by respondents of said method in the sale of salted peanuts, and the sale of salted peanuts 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 respondents of said method has a tendency unduly to hinder competition or create a monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the salted nut and peanut confection or candy trade 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 salted nuts, salted peanuts, and peanut confections or candy in competition with the respondents, as above alleged, are unwilling to offer for sale or sell their said products 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 salted nuts, salted peanuts, and peanut confections and candy are attracted by respondents' said method and manner of packing said salted peanuts, and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said salted peanuts so packed and sold by respondents in preference to salted peanuts or candy offered for sale and sold by said competitors of respondents who do not use the same or an equivalent method. The use of said method by respondents has the tendency and capacity because of said game of chance, to divert to respondents trade and custom

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from their competitors who do not use the same or an equivalent method; to exclude from said 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 trade, and to tend to create a monopoly of said trade in respondents and in such other distributors as use the same or an equivalent method; and to deprive the purchasing public of the benefit of free competition in said trade. The use of said method by respondents has the tendency and capacity to eliminate from said trade all actual competitors, and to exclude therefrom all potential competitors who do not adopt and use said method or an equivalent method.

PAR. 6. The aforementioned method, acts, and practices of respondents are all to the prejudice of the public and respondents' 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, 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 January 3, 1938, issued and served its complaint in this proceeding upon the respondents, Tosto Foods, Inc., and William C. Mithoefer, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answer, the Commission, by order entered herein, granted respondents' request for permission to withdraw said answer and substitute therefor a substitute answer admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, which substitute 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 complaint and the substitute 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, Tosto Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 307 East Twelfth Street, Cincinnati, Ohio. Respondent William C. Mithoefer is its vice president, secretary, and treasurer and has his business office at the same address as that of the corporate respondent. Respondents act together and in cooperation with each other in doing the acts and things hereinafter found. Respondents are now, and for more than 1 year last past have been, engaged in the sale and distribution of salted peanuts to wholesale dealers, jobbers, and retail dealers. Said respondents cause and have caused their said products, when sold, to be transported from their principal place of business in the city of Cincinnati, Ohio, to purchasers thereof in the State of Ohio and in various States of the United States at their respective places of business. There is now, and has been for more than 1 year last past, a course of trade and commerce by said respondents in such salted peanuts between and among the various States of the United States. In the course and conduct of said business, respondents are in competition with other corporations and individuals and with partnerships engaged in the sale and distribution of salted nuts, salted peanuts, peanut confections, and candy in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesale and retail dealers salted peanuts so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. Said salted peanuts are packed in individual, small, sealed cartons which retail to the ultimate consumer at 5 cents per carton. Said salted peanuts are designated by respondents as "Strange As It Seems." Sealed within a small number of individual cartons are 5 cents, 25 cents, 50 cents, or \$1, but the ultimate purchasers cannot ascertain which cartons contain one of the above named sums until a selection has been made and the individual carton broken open. The aforesaid purchasers of said individual cartons of salted peanuts who procure one of the said sums of money thus procure the same wholly by lot or chance. The individual cartons of said salted peanuts have lithographed or printed thereon the following language: "You may find 5 cents, 25 cents, 50 cents, or \$1."

PAR. 3. The wholesale dealers and jobbers to whom respondents sell the said salted peanuts resell the same to retail dealers, and said retail

dealers and the retail dealers to whom respondents sell direct expose said salted peanuts for sale and sell same to the purchasing public in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their products in accordance with the sales plan hereinabove set forth. Said sales plan has a capacity and tendency to induce purchases thereof to purchase respondents' said products in preference to salted nuts, salted peanuts, peanut confections, or candy offered for sale and sold by their competitors.

PAR. 4. The sale of said salted peanuts to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure a sum of money. The use by respondents of said method in the sale of salted peanuts, and the sale of salted peanuts 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 respondents of said method has a tendency unduly to hinder competition or create a monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the salted nut and peanut confection or candy trade 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 salted nuts, salted peanuts, and peanut confections or candy in competition with the respondents, as above described, are unwilling to offer for sale or sell their said products 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, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of salted nuts, salted peanuts, and peanut confections and candy are attracted by respondents' said method and manner of packing said salted peanuts, and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said salted peanuts so packed and sold by respondents in preference to salted peanuts or candy offered for sale and sold by said competitors of respondents who do not use the same or an equivalent method. The use of said method by respondents has the tendency and capacity, because of said game of chance, to divert to respondents trade and custom from their competitors who do not use the same or an equivalent method; to exclude from said salted peanut and candy trade all competitors who are unwilling to and who do not use the same or an equivalent method

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because the same is unlawful; to lessen competition in said salted peanut and candy trade, and to tend to create a monopoly of said salted peanut and candy trade in respondents and in such other distributors of salted peanuts and candy as used the same or an equivalent method; and to deprive the purchasing public of the benefit of free competition in said salted peanut and candy trade. The use of said method by respondents has the tendency and capacity to eliminate from said salted peanut and 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 aforementioned method, acts and practices of respondents are all to the prejudice of the public and respondents' competitors, as hereinabove found. 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, 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

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the substitute answer of the respondents 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 respondents have 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 respondents, Tosto Foods, Inc., a corporation, its officers, and William C. Mithoefer, individually, and as an officer of Tosto Foods, Inc., and their respective representatives, agents, and employees, in connection with the offering for sale, sale and distribution of salted nuts or confections in interstate commerce, do forthwith cease and desist from:

1. Selling and distributing salted nuts or confections so packed and assembled that sales of such salted nuts or confections 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 salted nuts or confections which are used, or may be used, without

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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 salted nuts or confections contained in said assortments to the public;

3. Selling or distributing individual packages of salted nuts or confections containing coins or other United States money, which said individual packages of salted nuts or confections are packed and assembled in assortments with other individual packages of salted nuts or confections of similar size, shape, and appearance not containing coins or other United States money, for resale to the public by retail dealers.

It is further ordered, That the respondents shall, within 30 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist hereinabove set forth.

Syllabus

IN THE MATTER OF

CARL E. KOCH AND EUGENE F. HEFLEBOWER, TRADING AS CO-OPERATIVE BUYERS' SERVICE AND AMERICAN BEAUTY PRODUCTS COMPANY

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

Docket 2529. Complaint, Nov. 17, 1936¹—Decision, Mar. 7, 1938

Where two partners and a corporation, which they served as president and vice president, respectively, and stock of which they owned, with same principal place of business and representing a common enterprise, engaged in sale and distribution of beauty and barber shop supply products consisting of a large number of different items, such as permanent-waving machines, scissors, brushes, lotions and oils, and other related products, through catalogs, correspondence, bulletins, and monthly trade literature, and with branch offices in seven American cities—

- (a) Represented business conducted by them as that of a cooperative, through selecting and using trade name "Co-Operative Buyers' Service" for business conducted by the two partners, and represented to customers and prospective customers, through long stories and articles in their said trade literature and in other ways, that business done under aforesaid trade name was that of a cooperative and that prices at which said products were offered were cost prices, and that only profit which enured to their benefit for purchase of their said products, at prices listed, was service charge paid on order;

Facts being business was not in any sense a cooperative, prices included a profit to them over and above such charge, and there was no difference in the method and manner of conduct of business done under said trade name and that done by said corporation, conducted from same office, by same personnel, and with same overhead expense, and trade literature of both listed same products at same price quotations, and orders to either were filled from same stock, in same manner, and at identical prices, excepting addition of service charge in case of so-called "cooperative";

- (b) Falsely represented in their trade literature that they had branch offices in San Francisco and Paris; and
- (c) Adopted and pursued plan and practice of advertising and offering for sale in their trade literature nationally known patented and trade-marked products of manufacturers who refused to sell same to them, at prices substantially below said products' prevailing market prices, and filled many orders therefor with products of inferior quality and grade to those called for;

Notwithstanding fact they did not keep in stock and were unable to purchase in natural channels of trade sufficient quantities of such nationally known products to fill, supply, and service a normal and anticipated number of orders therefor at prices advertised, and in many instances did not have any of such products in stock and were unable to obtain any substantial

¹ Amended.