

Complaint

IN THE MATTER OF
JOY PACKAGE COMPANY, INC.

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

Docket 3203. Complaint, Aug. 16, 1937—Decision, June 8, 1938

Where a corporation engaged in sale and distribution of candy, including "break and take," "draw," or "deal" assortments composed of a number of individually wrapped penny pieces of uniform size and shape, together with a number of other articles of merchandise to be given as prizes to chance purchasers of a few of said pieces, the enclosed concealed color of which differed from that of the majority—

Sold said assortments to dealers for display and resale to the public, in accordance with aforesaid sales plan based on lot or chance, so assembled and packed that they might be thus displayed and resold, and with knowledge and intent that they should thus be resold to such purchasing public by retailers, by lot or chance, without alteration, addition, or rearrangement, in violation of public policy and in competition with many manufacturers who do not make and sell such "break and take," "draw," or "deal" assortments of candy, but sell their "straight" merchandise in competition in commerce with the others;

With result of supplying to and placing in the hands of retail merchants a means of violating the laws of the several States and with result that many competitors who regard such sale or distribution as morally bad, encouraging gambling among children, and injurious to the candy industry, and as resulting in violation of law, and therefore refuse, in the case of some, to resell candy so packed that it can be resold to public by lot or chance, were put to a competitive disadvantage and trade was unfairly diverted from them to it and others using similar methods, through purchase by retailers from it and such others, as more salable, of candy sold as above set forth:

Held. That such acts and practices were all to the prejudice and injury 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.

Schonfield & Schonfield, of Baltimore, Md., 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 Joy Package Co., Inc., 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

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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, Joy Package Co., Inc., is a corporation organized and doing business under the laws of the State of New York with its principal office and place of business located at 37 East Twelfth Street, New York City. It is now, and for several months last past has been, engaged in the sale and distribution of candy to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States. It causes the said products when sold to be transported from its principal place of business in New York City to purchasers thereof in other States of the United States at their respective places of business. There is now, and has been for several months 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 partnerships and individuals 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 has caused and causes the representation to be made to its customers and prospective customers by its salesmen and agents, to be set forth on its business stationery, bill-heads, invoices, and other printed literature, to the effect that it controls and operates factories and is the manufacturer of the merchandise in which it deals. A substantial portion of the purchasing public, including retail dealers in candy, have expressed and have a preference for purchasing merchandise direct from the manufacturer thereof, such persons believing that they secure closer prices, superior quality, and other advantages that are not obtained when they purchase from an independent selling agency or middleman. The truth and fact is that respondent neither owns, controls, nor operates any factory whatsoever and does not manufacture the candy or other merchandise sold by it, but on the contrary only purchases and repacks the candy and other merchandise which it sells.

PAR. 3. The use by respondent of said representation that it is the manufacturer of the merchandise which it sells has the capacity and tendency to and does mislead and deceive many of respondent's said customers and prospective customers into the erroneous belief that respondent is a business concern which controls and operates a factory in which the aforesaid merchandise sold by respondent is manufactured, and that persons dealing with respondent are buying said

merchandise direct from the manufacturer thereof, thereby eliminating the profits of middlemen and obtaining various advantages, including advantages in service, delivery, and adjustment of account, that are not obtained by persons purchasing goods from middlemen.

PAR. 4. There are among the competitors of respondent, referred to in paragraph 1 hereof, many who manufacture the candy and other merchandise which they sell and who rightfully represent that they are the manufacturers thereof. There are others of said competitors who purchase the candy and other merchandise in which they deal and resell the same at a profit to themselves and who in no wise represent that they manufacture said candy or other merchandise. The above alleged acts and practices of respondent, as set out in paragraphs 2 and 3 hereof, tend to and do divert business from and otherwise injure and prejudice said competitors.

PAR. 5. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale dealers, jobbers, and retail dealers 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. The said assortments are composed of a number of pieces of candy of uniform size and shape, together with a number of other articles of merchandise, which other articles of merchandise are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner: The majority of the said pieces of candy of uniform size and shape are of the same color, but a small number of said pieces of candy are of a different color. The said pieces of candy of uniform size and shape retail at the price of 1 cent each, but the purchaser who procures one of the said pieces of candy of a color different from the majority is entitled to receive and is to be given free of charge one of the said other articles of merchandise heretofore referred to. Said pieces of candy of uniform size and shape are contained in individual wrappers, and the color thereof is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. The aforesaid purchasers who procure a piece of candy colored differently from the majority thus procure one of the said other articles of merchandise wholly by lot or chance.

PAR. 6. The jobbers and 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 plan. Respondent thus supplies to and places in the hands of others the means of conducting

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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 products in preference to candy offered for sale and sold by its competitors.

PAR. 7. 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 other articles of merchandise. The use by respondent of said method in the sale of candy, and the sale of candy 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 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 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. 8. 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 an equivalent method. 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 in such other distributors of candy as use the same or an equivalent method; and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by respondent has the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential

competitors who do not adopt and use the said method or an equivalent method.

PAR. 9. The aforementioned method, acts, and practices of 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 16, 1937, issued, and thereafter served its complaint in this proceeding upon the respondent, Joy Package Co., Inc., a corporation, charging it 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 filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Henry C. Lank, attorney for the Commission, and in opposition thereto by Simon Schoenfield, attorney for the respondent, before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it. The said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter this proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence and briefs in support of the complaint and in opposition thereto (oral argument not having been requested), 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, Joy Package Co., Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 37 East Twelfth Street, New York City, N. Y. It is now and for some time last past has been engaged in the sale and distribution of candy to dealers located at points in various States of the United States. Respondent has caused said products, when sold, to be transported from its principal place of business in New York City to purchasers

thereof in various States of the United States at their respective points of location. There is now and has been for some time last past a course of trade and commerce by respondent in such candy between and among various States of the United States. In so carrying on said business, respondent is and has been engaged in active competition with other corporations and with partnerships and individuals engaged in the sale and distribution of candy in commerce between and among various States of the United States.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, respondent has sold in commerce between and among various States of the United States, various assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. The said assortments are composed of a number of pieces of candy of uniform size and shape, together with a number of other articles of merchandise, which other articles of merchandise are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner: The majority of said pieces of candy of uniform size and shape are of the same color, but a small number of said pieces of candy are a different color. Said pieces of candy of uniform size and shape retail at the price of one cent each, but the purchaser who procures one of the said pieces of candy of a color different from the majority of the pieces of candy, is entitled to receive and is to be given without additional cost one of the said other articles of merchandise heretofore referred to. Said pieces of candy of uniform size and shape are contained in individual wrappers, and the color thereof is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. The aforesaid purchasers who procure a piece of candy colored differently from the majority of the pieces of candy thus procure one of the said other articles of merchandise wholly by lot or chance.

PAR. 3. Candy assortments involving the lottery or chance features as described in paragraph 2 hereof are generally referred to in the candy trade or industry as "break-and-take," "draw," or "deal" assortments. Assortments of candy without any lottery or chance features in connection with their resale to the public are generally referred to in the candy trade or industry as "straight" merchandise. These terms are being used hereinafter in these findings to distinguish the various types of assortments.

PAR. 4. The dealers to whom respondent sells its assortments resell the same to the public or to other dealers, and said assortments are

displayed for sale to the public as packed by the respondent, and sold to the public in accordance with the above described sales plan.

PAR. 5. The assortments hereinabove described are assembled and packed in such a manner that they have been used and may be used by retail dealers for distribution to the purchasing public by lot or chance without alteration or rearrangement. In the sale and distribution of the assortments of candy hereinabove described, respondent had knowledge that said assortments were to be resold to the purchasing public by retail dealers by lot or chance, and respondent packed such candy in the way and manner described so that without alteration, addition thereto or rearrangement thereof, it might be resold to the public by lot or chance by said retail dealers. The packing and distributing of candy in the manner above found is contrary to public policy.

PAR. 6. There are in the United States many manufacturers of candy who do not manufacture and sell "break-and-take," "draw," or "deal" assortments of candy and who sell their "straight" merchandise in interstate commerce in competition with the "break-and-take," "draw," or "deal" candy, and the manufacturers of "straight" merchandise have noted a marked decrease in the sales of their products whenever or wherever the "break-and-take," "draw," or "deal" assortments have appeared in their markets. The decrease in the sale of "straight" merchandise is due to the gambling or lottery feature connected with the "break-and-take," "draw," or "deal" candy. Consumers prefer to purchase "break-and-take," "draw," or "deal" candy because of the gambling feature connected with its sale. The sale and distribution of "break-and-take," "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 a substantial number of the purchasers and consumers of this type of candy.

PAR. 7. The sale and distribution of candy by the methods described herein is the sale and distribution of candy by lot or chance and constitutes a lottery scheme, game of chance, or gift enterprize. Many competitors of respondent regard such sale or distribution as morally bad, as encouraging gambling among children, and injurious to the candy industry. The sale and distribution by respondent of such assortments of candy supplies to and places in the hands of retail merchants a means of violating the laws of several States. Because of these reasons, some of the competitors of respondent refuse to sell candy so packed that it can be resold to the public by lot or chance.

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These competitors are thereby put to a competitive disadvantage. The retailers, finding that they can dispose of more candy by "break-and-take," "draw," or "deal" methods, have bought from respondent and others employing the same methods of sale, and thereby trade is unfairly diverted from said competitors to respondent and others using similar methods.

The testimony disclosed that for some months prior to the hearing in this case, the respondent had discontinued the sale of its products in the manner above described.

CONCLUSION

The aforementioned acts and practices of respondent as herein alleged are all 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 the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of respondent, testimony and other evidence taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint, and in opposition thereto, briefs filed herein (oral argument not having been requested), and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is now ordered, That the respondent, Joy Package Co., Inc., a corporation, 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 from:

1. Selling and distributing to dealers, candies 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 rearrangements of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale and distribution of candy contained in said assortments to the public.

3. Packing or assembling in the same assortment of candy for sale to the public at retail, individually wrapped pieces of candy of uniform size and shape with different colored centers, together with other articles of merchandise, which said articles of merchandise are to be given as prizes to the purchasers procuring pieces of candy of a particular color.

It is further ordered, That the respondent shall, within 60 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 this order.

IN THE MATTER OF
H. KLUGER, INC.

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

Docket 3206. Complaint, Aug. 16, 1937—Decision, June 8, 1938

Where a corporation engaged in sale and distribution of piece goods to garment manufacturers and to other customers in the various States—

- (a) Made use of such words and phrases, in designating and describing certain of its products, as "Pur'Di," "100% Pure Dye," "Pure Silk Filled," "Genuine Pur'Di," and "100% Pure Dye Crepe," through labels bearing words "Pur'Di trade mark 100% Pure Dye, Pure Silk Filled," etc., supplied to customers for affixing to garments made from its said goods, and through such statements, in newspaper and periodical advertising, as "100% Pure Dye Crepe," "Pur'Di, a revolutionary New England lingerie crepe," and "Compare Pure Dye Lingerie with other silk garments at twice the cost";

Notwithstanding fact that said fabrics and garments made therefrom were not composed entirely of silk, product of the cocoon of the silk worm, as long definitely understood by a substantial portion of the garment manufacturers and the consuming public from the word "silk," and as long associated in the minds of a substantial part of the purchasing and consuming public with such phrases as "Pur'Di * * *," "100% Pure Dye * * *," "Pure Silk Filled * * *," "Genuine Pur'Di," "100% Pure Dye Crepe," and "Crepe," as meaning a fabric made from product of cocoon of silk worm, commonly known and understood by public generally as silk, and held in great esteem and confidence for its preeminent qualities in genuine silk products and the variety of weaves in which the fiber has long been woven;

With capacity and tendency to mislead and deceive a substantial portion of public into belief that such fabrics and garments made therefrom, composed in whole or part of rayon, were made entirely of silk, product of the cocoon of the silkworm; and

- (b) Made use of such expressions as "Silk Manufacturers and Distributors" in advertising matter circulated in the various States, and set forth on its letterheads legend or statement "Factories: Paterson, N. J.; Fall River, Mass.; Hillsgrove, R. I.;"

Notwithstanding fact it neither made products offered and sold by it nor owned, operated, nor controlled in any manner mills or factories thus referred to:

With capacity and tendency to mislead purchasers of its said products into erroneous belief that in buying from it they were dealing with manufacturer thereof, and thereby gaining an advantage by saving middleman's profit and obtaining various other advantages not to be had by those buying from middlemen, and to mislead a substantial portion of purchasing public into erroneous belief that such representations were true and to cause them to buy said products as a result thereof, and thereby divert trade unfairly to it from competitors, among whom there are those engaged in sale of piece goods and other allied products who do not misrepresent the kind of goods offered for sale, and do not represent that they are the manufacturers of products offered by them when they are not such: