

Syllabus

IN THE MATTER OF

STAR TOBACCO COMPANY, SPERLING TOBACCO COMPANY, KEY STORES, INC., 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 3412. Complaint, May 9, 1938—Decision, Mar. 8, 1939

Where three corporations and two individuals (1) engaged as jobbers, distributors, and wholesalers in selling tobacco and confectionery products to retailers in the Wilkes-Barre trading area, and in purchasing such products, which are made in many different States and some of which include certain widely known, nationally advertised articles in constant demand by consuming public and necessary largely or entirely to tobacco and confectionery retail business, from manufacturers located, for the most part, in States other than Pennsylvania, and (2) constituting a large and important part of jobbers, distributors, and wholesalers of such products in said large and important outlet and market therefor to manufacturers, producers, and distributors located therein, and to those located in other States, and particularly in the eastern half of the United States, and constituting (3) in said area, a group sufficiently influential in the trade as to be able to control and influence flow of trade and commerce within, to and from such area, and (4) naturally and normally in competition with each other in the conduct of their respective businesses, and in actual and potential competition with others engaged in purchase of such products from manufacturers in other States and in resale thereof in Pennsylvania and neighboring States; and four individuals who held responsible executive positions in such concerns or businesses and directed policies and practices thereof—

Entered into and carried out an agreement, combination, understanding, and conspiracy among themselves to prevent competing dealers in such products in said area from obtaining the same directly from the manufacturers thereof, and, incident thereto and as a part thereof, to fix and establish uniform prices at which aforesaid concerns should sell their products, and prevent others from selling at lower prices, and thus suppress, hinder, and lessen competition in substantial interstate commerce in sale and distribution of such products in said territory; and for the accomplishment of said purposes—

- (a) Exacted and procured pledges and other promises and agreements from their said concerns and from manufacturers and producers of such products serving said area, to the effect that such dealers, manufacturers, and producers would support, adhere to, and enforce program above set forth;
- (b) Used, in concert and agreement among themselves and with others, coercive and concerted action, boycott, threats thereof, and other united action against confectionery manufacturers, dealers, and others to induce and require them, and to attempt to induce and require them, to agree and conform to and support and enforce their program and refrain from selling such products to other dealers, jobbers, distributors, and wholesalers not parties thereto; and

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- (c) Engaged in other acts, cooperative and concerted action, and coercive methods and practices in promoting, establishing, and carrying out the program of their said agreement, combination, conspiracy, and undertaking, as above set forth;

With result that the capacity, tendency, and effect of such agreement, combination, confederation, etc., as above set forth, and said acts and practices in said trade area and other related or connected territory, were—

(1) To close and curtail sundry outlets within said State for direct and immediate sale by manufacturers located in other States of goods shipped by them into said State, and to monopolize in said concerns business of dealing in and distributing tobacco and confectionery products;

(2) To unreasonably lessen, eliminate, restrain, stifle, hamper, and suppress competition in said tobacco and confectionery industry in such State, and deprive purchasing and consuming public of advantages in price, service, and other considerations which they would receive and enjoy under conditions of normal and unobstructed or free and fair competition in said trade and industry, and otherwise operate as a restraint upon and detriment to the freedom of fair and legitimate competition therein; and

(3) To obstruct the natural flow of commerce in the channels of interstate trade and oppress, eliminate, and discriminate against small business enterprises which were or had been engaged in selling tobacco and confectionery products, and to prejudice and injure the public and manufacturers, producers, dealers, jobbers, distributors, and wholesalers and others who did not conform to their said program:

Held, That such acts and practices in entering into and carrying out said agreement, understanding, combination, and conspiracy, and in doing the acts and things done thereunder, and in furtherance thereof as above set-out, were to the prejudice of the public and competitors and constituted unfair methods of competition.

Mr. P. C. Kolinski for the Commission.

Mr. Andrew Hourigan, of Wilkes-Barre, Pa., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Star Tobacco Co., Sperling Tobacco Co., Key Stores, Inc., Frank Klein, an individual, trading under the firm name and style of Klein Candy Co., Meyer H. Abelson, an individual, trading under the firm name and style of Wilkes-Barre Cigar & Tobacco Co., Edward A. Stroud, Sr., William Smulyan, Haskell Ginsburgh, and Robert Jaffee, hereinafter referred to as respondents, have violated the provisions of the said act, and it appearing to the 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. Five of the respondents named in the caption hereof are corporations or individuals engaged as jobbers, distributors, and

wholesalers in selling tobacco and confectionery products to retail dealers in that portion of the State of Pennsylvania known as the Wilkes-Barre trading area. These respondents are all located in the city of Wilkes-Barre, in the State of Pennsylvania and are the following: Respondent Star Tobacco Co., is a corporation organized under the laws of the State of New Jersey, with its office and principal place of business located at 39 South Pennsylvania Avenue in said city; respondent Sperling Tobacco Co. is a corporation organized under the laws of the State of Pennsylvania, with its office and principal place of business located at 47 South Pennsylvania Avenue in said city; respondent Key Stores, Inc., is a corporation organized under the laws of the State of Delaware, with its office and principal place of business located at 80 East Northampton Street in said city; respondent Frank Klein, is an individual trading under the firm name and style of Klein Candy Co., with his principal place of business located at 254 East Market Street in said city; respondent Meyer H. Abelson, is an individual trading under the firm name and style of Wilkes-Barre Cigar & Tobacco Co., with his principal place of business located at 192 East Northampton Street in said city.

The remaining four respondents named in the caption hereof are individuals who are employed by and hold responsible offices with the trade respondents named herein, and in such capacities direct the policies of the above-named trade respondents, and engage in organization and trade association activities concerning the tobacco and confectionery industry; said individual respondents are: Edward A. Stroud, Sr., president and treasurer of respondent Star Tobacco Co., and located at 39 South Pennsylvania Avenue, in said city; William Smulyan, president of respondent Sperling Tobacco Co., and located at 47 South Pennsylvania Avenue in said city; Haskell Ginsburgh, vice president of respondent Key Stores, Inc., and located at 80 East Northampton Street in said city; and respondent Robert Jaffee, employee of respondent Meyer H. Abelson, and located at 192 East Northampton Street in said city.

PAR. 2. The said tobacco and confectionery products industry includes among its products certain widely known nationally advertised articles for which the consuming public maintains a consistent demand. These nationally advertised tobacco and confectionery products are manufactured in many different States of the United States and the conduct of the aforesaid business requires the dealing in all or most of such products.

The trade respondents hereinbefore named purchase the aforesaid tobacco and confectionery products, in which they deal, directly and

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immediately from manufacturers thereof located for the most part in States other than the State of Pennsylvania, and the manufacturers ship said products, when so purchased, from their respective places of business in such other States to said trade respondents in the State of Pennsylvania.

In the course and conduct of their aforesaid respective businesses, said trade respondents, but for the matters and things hereinafter set out, would be naturally and normally in competition with each other, and otherwise are in such competition with other individuals, partnerships, and corporations also engaged in the purchase of tobacco and confectionery products from aforesaid manufacturers located in States other than the State of Pennsylvania, and the resale thereof in the State of Pennsylvania and neighboring States.

The said trade respondents constitute a large and important part of the jobbers, distributors, and wholesalers in tobacco and confectionery products in the Wilkes-Barre trade area; and such trade respondents constitute a group so influential in the trade as to be able to control and influence the flow of trade and commerce in such products within, to and from said trade area. The volume of consumption of tobacco and confectionery products in said Wilkes-Barre trade area, and the volume of trade and commerce dealt in by said trade respondents in such products in, to and from said area constitute a substantial part of the trade and commerce of the United States in the tobacco and confectionery products industry. Said trade area is a large and important outlet and market for the sale of tobacco and confectionery products by manufacturers, producers, and distributors within said trade area and also by those in various other States, particularly those of the eastern half of the United States.

PAR. 3. In August 1937, or thereabouts, respondents named in paragraph 1 hereof, entered into, have since carried out, and are still carrying out an agreement, combination, understanding, and conspiracy among themselves, to prevent said competing dealers in tobacco and confectionary products, mentioned in paragraph 2 hereof, from obtaining tobacco and confectionery products directly from aforesaid manufacturers thereof; to fix and establish uniform prices at which said trade respondents should sell said products and to prevent others from selling at less prices and by and through the aforesaid means to suppress, hinder, and lessen competition in substantial interstate commerce in the sale and distribution of said products in the aforesaid territory served by respondents. To carry out the aforesaid purposes the respondents have done, among others, the following acts and things:

(a) Exacted and procured pledges and other promises and agreements from each such trade respondent and from manufacturers and producers of tobacco and confectionery products to the effect that such dealers, manufacturers, and producers would support, adhere to, and enforce the foregoing program of respondents set forth in paragraph 3 hereof.

(b) Used in concert and agreement among themselves and with others, coercive and concerted action, boycott, threats of boycott, and other united action against confectionery manufacturers, dealers, and others to induce and require them, and to attempt so to induce and require them, to agree and conform to and to support and enforce the said program of respondents, and to refrain from selling said products to other dealers, jobbers, distributors, and wholesalers who were not parties to such program of respondents.

(c) Used and engaged in other acts, cooperative, and concerted action, and coercive methods and practices in promoting, establishing, and carrying out the foregoing program and agreement, combination, conspiracy, confederation, and undertaking hereinabove set forth.

PAR. 4. The capacity, tendency, and effect of said agreement, combination, conspiracy, confederation, and undertaking, and the said acts and practices of respondents set forth in paragraph 3 hereof are and have been in aforesaid Wilkes-Barre trade area and other related or connected territory, to close and curtail sundry outlets within the State of Pennsylvania for the direct and immediate sale by manufacturers located in other States of goods shipped by such manufacturers into the State of Pennsylvania; to monopolize, in said trade respondents, the business of dealing in and distributing tobacco and confectionery products; to unreasonably lessen, eliminate, restrain, stifle, hamper, and suppress competition in said tobacco and confectionery industry in the State of Pennsylvania, and to deprive the purchasing and consuming public of advantages in price, service, and other considerations which they would receive and enjoy under conditions of normal and unobstructed, or free and fair, competition in said trade and industry; to otherwise operate as a restraint upon and a detriment to the freedom of fair and legitimate competition in such trade and industry; to obstruct the natural flow of commerce in the channels of interstate trade; to oppress, eliminate, and discriminate against small business enterprises which were or had been engaged in selling and distributing tobacco and confectionery products; and to prejudice and injure the public and manufacturers, producers, dealers, jobbers, distributors, and wholesalers and others who did not conform to respondents' program.

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PAR. 5. The acts and practices of the respondents as herein alleged are all to the prejudice of competitors of respondent as herein alleged public; have a dangerous tendency to and have actually hindered and prevented competition in the sale of tobacco and confectionery products in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained interstate commerce in tobacco and confectionery products, and constitute unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 9, 1938, issued, and on May 10, 1938, served, its complaint in this proceeding upon respondents Star Tobacco Co., Sperling Tobacco Co., Key Stores, Inc., Frank Klein, an individual trading under the firm name and style of Klein Candy Co., Meyer H. Abelson, an individual trading under the firm name and style of Wilkes-Barre Cigar & Tobacco Co., Edward A. Stroud, Sr., William Smulyan, Haskell Ginsburgh, and Robert Jaffee, 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 herein, granted respondents' motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts, 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 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, Star Tobacco Co., is a corporation organized under the laws of the State of New Jersey, with its office and principal place of business at 39 South Pennsylvania Avenue, Wilkes-Barre, Pa.

Respondent, Sperling Tobacco Co., is a corporation organized under the laws of the State of Pennsylvania, with its office and principal place of business at 47 South Pennsylvania Avenue, Wilkes-Barre, Pa.

Respondent, Key Stores, Inc., is a corporation organized under the laws of the State of Delaware, with its office and principal place of business at 80 East Northampton Street, Wilkes-Barre, Pa.

Respondent, Frank Klein, is an individual trading under the firm name and style of Klein Candy Co., with his principal place of business at 254 East Market Street, Wilkes-Barre, Pa.

Respondent, Meyer H. Abelson, is an individual trading under the firm name and style of Wilkes-Barre Cigar & Tobacco Co., with his principal place of business at 192 East Northampton Street, Wilkes-Barre, Pa.

The five above-named respondents are all engaged as jobbers, distributors, and wholesalers in selling tobacco and confectionery products to retail dealers in that portion of the State of Pennsylvania known as the Wilkes-Barre trading area. These five respondents will hereinafter be referred to as the trade respondents.

Respondent, Edward A. Stroud, Sr., president and treasurer of respondent Star Tobacco Co., is located at 39 South Pennsylvania Avenue, Wilkes-Barre, Pa.

Respondent, William Smulyan, president of respondent Sperling Tobacco Co., is located at 47 South Pennsylvania Avenue, Wilkes-Barre, Pa.

Respondent, Haskell Ginsburgh, vice president of respondent Key Stores, Inc., is located at 80 East Northampton Street, Wilkes-Barre, Pa.

Respondent, Robert Jaffee, employee of respondent Meyer H. Abelson, is located at 192 East Northampton Street, Wilkes-Barre, Pa.

The four respondents last above named are individuals employed by, and holding responsible executive positions with, the five trade respondents, and in such capacities these individuals direct the policies and practices of the trade respondents and represent such trade respondents in organization and trade association activities concerning the tobacco and confectionery industry.

PAR. 2. Tobacco and confectionery products are manufactured in many different States of the United States. Some of such products include certain widely known, nationally advertised articles for which the consuming public maintains a constant demand. The business of selling tobacco and confectionery products to retail dealers requires the dealing in all or most of such nationally advertised articles.

The above-named trade respondents purchase the tobacco and confectionery products in which they deal, directly from manufacturers located, for the most part, in States other than the State of Pennsylvania, and such products, when so purchased, are shipped from the

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place of manufacture in other States, to said trade respondents in the State of Pennsylvania.

The trade respondents herein, in the conduct of their respective businesses, but for the matters and things hereinafter set-out, would be naturally and normally in competition with each other, and are in actual and potential competition with other corporations, partnerships, and individuals who are also engaged in the purchase of tobacco and confectionery products from manufacturers located in States other than the State of Pennsylvania, and the resale of such products in the State of Pennsylvania and neighboring States.

The five trade respondents herein constitute a large and important part of the jobbers, distributors, and wholesalers of tobacco and confectionery products in the Wilkes-Barre trade area, and they constitute a group sufficiently influential in the trade as thereby to control and influence the flow of trade and commerce in such products within, to and from such trade area. The volume of consumption of tobacco and confectionery products in the Wilkes-Barre trade area, and the volume of trade and commerce of the trade respondents in such products in, to, and from such trade area constitutes a substantial part of the trade and commerce of the United States in such industry. The Wilkes-Barre trade is a large and important outlet and market for the sale of tobacco and confectionery products by manufacturers, producers, and distributors located within the trade area, and also by those located in other States, particularly those of the eastern half of the United States.

PAR. 3. The respondents herein, during the month of August 1937, or thereabouts, entered into, carried out, and are still carrying out an agreement, combination, understanding, and conspiracy among themselves to prevent competing dealers in tobacco and confectionery products in the Wilkes-Barre trade area from obtaining such products directly from the manufacturers thereof. A part of such agreement was the fixing and establishing of uniform prices at which trade respondents in the Wilkes-Barre trade area should sell such products, and the prevention of other dealers from selling at less prices, and through this means to suppress, hinder, and lessen competition in substantial interstate commerce in the sale and distribution of such products in this territory. For the accomplishment of these purposes respondents have done the following acts:

Respondents exacted and procured pledges and other promises and agreements from trade respondents in the Wilkes-Barre trade area, and from manufacturers and producers of tobacco and confectionery products serving such area, to the effect that such dealers, manufac-

turers, and producers would support, adhere to, and enforce the program set forth in the above agreement.

Respondents used in concert and agreement among themselves and with others, coercive and concerted action, boycott, threats of boycott, and other united action against confectionery manufacturers, dealers, and others to induce and require them, and to attempt to induce and require them to agree and conform to, and to support and enforce the program of respondents, and to refrain from selling such products to other dealers, jobbers, distributors, and wholesalers who were not parties to such program of respondents.

Respondents engaged in other acts, cooperative, and concerted action, and coercive methods and practices in promoting, establishing, and carrying out the program of the agreement, combination, conspiracy, confederation, and undertaking above set forth.

PAR. 4. The capacity, tendency, and effect of said agreement, combination, conspiracy, confederation, and undertaking, and the said acts and practices of respondents above set forth are and have been in aforesaid Wilkes-Barre trade area and other related or connected territory, to close and curtail sundry outlets within the State of Pennsylvania for the direct and immediate sale by manufacturers located in other States of goods shipped by such manufacturers into the State of Pennsylvania; to monopolize, in said trade respondents, the business of dealing in and distributing tobacco and confectionery products; to unreasonably lessen, eliminate, restrain, stifle, hamper, and suppress competition in said tobacco and confectionery industry in the State of Pennsylvania, and to deprive the purchasing and consuming public of advantages in price, service, and other considerations which they would receive and enjoy under conditions of normal and unobstructed, or free and fair, competition in said trade and industry; to otherwise operate as a restraint upon and a detriment to the freedom of fair and legitimate competition in such trade and industry; to obstruct the natural flow of commerce in the channels of interstate trade; to oppress, eliminate, and discriminate against small business enterprises which were or had been engaged in selling and distributing tobacco and confectionery products; and to prejudice and injure the public and manufacturers, producers, dealers, jobbers, distributors, and wholesalers and others who did not conform to respondent's program.

CONCLUSION

The acts and practices of the respondent in entering into and carrying out the agreement, understanding, combination, and conspiracy and in doing the acts and things done thereunder and in fur-

therance thereof as above set out are to the prejudice of the public and respondents' 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 respondents, in which answer respondents admit all the material allegations of fact set forth in said complaint, and state that they waive all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, Star Tobacco Co.; Sperling Tobacco Co.; Key Stores, Inc., Frank Klein, an individual trading under the firm name and style of Klein Candy Co.; Meyer H. Abelson, an individual, trading under the firm name and style of Wilkes-Barre Cigar & Tobacco Co.; Edward A. Stroud, Sr.; William Smulyan, Haskell Ginsburgh, and Robert Jaffee, their officers, representatives, agents, and employees, do forthwith cease and desist from entering into and carrying out any understanding, agreement, combination, and conspiracy among themselves or with others for the purpose or with the effect of restricting, restraining, or monopolizing, or eliminating competition in the purchase and sale in interstate commerce or in the District of Columbia of tobacco and confectionery products, and as a part of such understanding, agreement, combination, or conspiracy from doing any of the following acts and things:

1. Fixing or establishing uniform prices at which respondents should sell tobacco, and confectionery products.

2. Using boycott, threats of boycott, either with or without other coercive methods, to persuade, induce, or compel manufacturers and dealers to refrain from selling confectionery products to competing dealers.

3. Employing other cooperative or coercive acts and methods in promoting and carrying out the aforesaid programs and policies, or similar programs and policies.

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

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IN THE MATTER OF
CYRIL J. CONRADCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 3590. Complaint, Sept. 15, 1938—Decision, Mar. 8, 1939*

Where an individual engaged in sale and distribution of hosiery, watches, and other articles of merchandise; in soliciting the sale of and selling his said merchandise—

Distributed to public certain literature and instructions including push cards, order blanks, and circulars explaining plan of selling his said merchandise and of allotting it and other articles as premiums or prizes to operators of said push cards for use in distribution of his said products to the purchasing public, wholly by lot or chance, under a plan and in accordance with said card's explanatory legends by which amount paid was dependent upon number pushed by chance, as was customer's success or failure in securing article being thus disposed of or nothing other than chance, through selecting from list of feminine names displayed on card name, concealed number of which entitled selector to such article, or hosiery, as was maker of last sale; and

Supplied thereby and placed in hands of others means of conducting lotteries in sale of his said merchandise in accordance with aforesaid or similar sales plan involving game of chance or sale of a chance to procure article of merchandise at price much less than normal retail price thereof, contrary to an established public policy of the United States Government and in violation of the criminal laws, and in competition with many who are unwilling to adopt and use said or any method involving game of chance, or sale of chance to win by chance, or any other method contrary to public policy and in violation of criminal laws, and refrain therefrom;

With result that many persons were attracted by his said methods in sale and distribution of his merchandise, and element of chance involved therein, and were thereby induced to buy and sell his said products in preference to merchandise offered and sold by said competitors who do not use same or equivalent method and with effect of unfairly diverting trade to him from his said competitors; to the substantial injury of competition in commerce:

Held, that such acts and practices were all to the injury and prejudice of the public and competitors and constituted unfair methods of competition.

Mr. D. C. Daniel for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Cyril J. Conrad,