

Syllabus

IN THE MATTER OF

HERSHEY CHOCOLATE CORPORATION, PETER CAILLER KOHLER SWISS CHOCOLATES COMPANY, INC., CHOCOLATE SALES CORPORATION, LAMONT, CORLISS & COMPANY, SANITARY AUTOMATIC CANDY CORPORATION, BERLO VENDING COMPANY, AND CONFECTION CABINET COMPANY

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

Docket 3134. Complaint, May 20, 1937—Decision, Mar. 14, 1939

Where three vending machine operators which (1) were engaged in operation of such machines in various sections of the United States and in sale and distribution through said machines in theaters of confections, (2) thus sold certain special Hershey and Nestle solid chocolate bars made by the respective manufacturers for the vending-machine trade, and most popular solid chocolate bars made by far, enjoying much greater consumer demand than any such competitive products, and, prior to matters below set forth, sold generally to such operators' competitors, and (3) constituted the three largest operators of such machines in the industry, composed of 25 or more of such operators, and in competition with many other similarly engaged operators of such machines—

- (a) Entered into exclusive distributing contract with exclusive selling agent of said Nestle items, sale of which, or of others equal in size and weight and at as low a price, was thereafter no longer made to any member of the vending-machine trade other than three operators aforesaid; and
- (b) Protested sale of certain special Hershey competitive chocolate vending-machine items theretofore put on the market by said manufacturer to meet competition of such Nestle items, with result that such manufacturer immediately established policy of restricting sales of its said items, theretofore sold to trade in question generally, to three operators aforesaid, and so informed trade; and

Where manufacturer of said Nestle bars, and its said exclusive selling agent, engaged in manufacturing and sale of such bars in active competition with others similarly engaged—

- (c) Entered into exclusive distributor contract above set forth with such vending-machine operators and, in compliance therewith, notified immediately its vending-machine customers that it had discontinued manufacture of said special items and would no longer be able to supply other special bars as substitutes therefor, and thereafter neither made, offered, nor sold to any member of vending-machine trade other than said three operators any solid chocolate bar equal in size and weight to, and at as low a price as, said items aforesaid; and

Where manufacturer of said Hershey bars, engaged in active competition with others similarly engaged as aforesaid, and following protest, as aforesaid set forth, of such operators with reference to sale of its said special bars to vending-machine trade at large—

- (d) Established policy of restricting sale of such items to said operators, and thus informed trade, for fear that it would not otherwise obtain as large a percentage of the business of such operators as it had previously obtained unless it did so, and thereafter neither made nor offered to said vending-machine trade at large, whether through its selling agent or own selling organization, any solid chocolate bar comparable in size and weight to size and weight of aforesaid items, and at as low a price;

With results that—

(1) Vending-machine operators competing with the three aforesaid were unable to service their machines during such period with Hershey and Nestle solid chocolate bars, preferred by some theater managements for such machines located on their premises, and requested by such managements of competitors of three aforesaid, because of inability to obtain said bars at price which would insure sufficient profit to said competitors to permit them to grant the theater managements percentage of gross take necessary to obtain locations, and such competing vending-machine operators met with difficulty in negotiations for, and lost, theater locations because of inability, by reason of said exclusive distributor arrangements, to obtain such bars; and

(2) The effects of said exclusive distributor arrangements between said chocolate bar manufacturers and their selling and distributing agencies on the one hand, and such vending-machine operators on the other, entered into pursuant to agreements and understandings as above set out, were effectively to close sources of supply of such Hershey and Nestle solid chocolate bars made by their respective manufacturers to members of vending-machine trade other than said three vending-machine operators, and thereby deprived members of consuming public, who might desire to purchase such special chocolate bars from vending machines of competitors of said operators, of opportunity so to do:

Held, That such acts and practices had a dangerous tendency to monopolize sale of such chocolate bars in said vending-machine operators, and actually hindered and prevented competition in sale thereof in commerce, and unreasonably restrained such commerce in vending-machine industry and constituted unfair methods of competition therein.

Before *Mr. Arthur F. Thomas*, trial examiner.

Mr. John Darsey for the Commission.

Mr. Wellington S. Crouse, of Hershey, Pa., for Hershey Chocolate Corp. and Chocolate Sales Corp.

Mr. Grosvenor Calkins, of Boston, Mass., for Peter Cailler Kohler Swiss Chocolates Co., Inc. and Lamont, Corliss & Co.

Mr. William B. Jaffe and *Mr. Sol A. Rosenblatt*, of New York City, for Sanitary Automatic Candy Corp.

Mr. Max Aron and *Mr. George Phineas Aarons*, of Philadelphia, Pa., for Berlo Vending Co.

Mr. M. Robert Sturman, of Chicago, Ill., for Confection Cabinet Co.

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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 Hershey Chocolate Corporation, Peter Cailler Kohler Swiss Chocolates Co., Inc., Chocolate Sales Corporation, Lamont, Corliss & Co., Sanitary Automatic Candy Corporation, Berlo Vending Co., and Confection Cabinet Co., hereinafter referred to as the respondents, have been and are using unfair methods of competition in commerce, as "commerce" is defined in said Act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The respondent, Hershey Chocolate Corporation, hereinafter for convenience referred to as "Hershey," is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an office and place of business located in the city of Hershey, State of Pennsylvania. It is, and has been for more than 3 years last past, engaged in the manufacture and sale of candy products. For a period longer than a year immediately prior to October 1, 1935, it manufactured a special chocolate bar which it offered for sale and sold to candy vending-machine dealers and operators.

PAR. 2. The respondent, Peter Cailler Kohler Swiss Chocolates Co., Inc., hereinafter for convenience referred to as "Kohler," is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and place of business in the city of Fulton, State of New York. It is, and has been for more than 3 years last past, engaged in the manufacture and sale of candy products. For a period longer than a year immediately prior to October 1, 1935, it manufactured a special chocolate bar which it offered for sale and sold to candy vending-machine dealers and operators.

PAR. 3. Respondent, Chocolate Sales Corporation, hereinafter for convenience referred to as the "Chocolate Company," is a corporation organized and existing by virtue of the laws of the State of Delaware, with an office and place of business located in the city of Hershey, State of Pennsylvania. It is, and for a period of more than 3 years last past has been, engaged in selling and distributing candy products. It is, and for a period longer than a year immediately prior to October 1, 1935, was, the sole distributing agent of the candy products manufactured by respondent "Hershey." For a period of more than a year

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immediately prior to October 1, 1935, the respondent "Chocolate Company," pursuant to the sole-distributor arrangement with the respondent "Hershey," offered for sale and sold to the candy vending-machine trade the special chocolate bar manufactured by the respondent "Hershey."

PAR. 4. Respondent, Lamont, Corliss & Co., hereinafter for convenience referred to as "Lamont," is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 60 Hudson Street, in the city of New York, State of New York. It is, and for a period of more than 3 years last past has been, engaged in selling and distributing candy products. It is, and for a period longer than a year immediately prior to October 1, 1935, was, the sole distributing agent of the candy products manufactured by respondent "Köhler." For a period of more than a year immediately prior to October 1, 1935, the respondent "Lamont," pursuant to the sole-distributor arrangement with the respondent "Köhler," offered for sale and sold to the candy vending-machine trade the special chocolate bar manufactured by the respondent "Köhler."

PAR. 5. Respondent, Sanitary Automatic Candy Corporation, hereinafter for convenience referred to as "Sanitary," is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and place of business located at 235 West Twenty-third Street, in the city of New York, State of New York. It is, and for a period of more than 4 years last past has been, engaged in the business of operating candy-vending machines and in the sale and distribution of confectionery through the medium of vending machines.

In the course and conduct of its aforesaid business, the respondent "Sanitary" causes vending machines to be located or placed in theaters and public gathering places in the various States of the United States through and by virtue of arrangements or contractual relationships with the owners, proprietors, or managements of the theaters or such public gathering places. The respondent "Sanitary" causes the said vending machines, when located and placed as aforesaid, to be stocked or filled with confectionery. The products are obtained from the said machines upon the deposit of a designated coin by the customer. For a period longer than a year immediately prior to October 1, 1935, the respondent "Sanitary" stocked and serviced its vending machines with the special chocolate bars manufactured by the respondents "Hershey" and "Köhler" for the candy vending-machine trade which it purchased from or through the respondents "Chocolate Company" and "Lamont."

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PAR. 6. The respondent, Berlo Vending Co., hereinafter for convenience referred to as "Berlo," is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an office and place of business at 1518 North Broad Street, in the city of Philadelphia, State of Pennsylvania. It is, and for a period of more than 4 years last past has been, engaged in the business of operating candy-vending machines and in the sale and distribution of confectionery through the medium of vending machines.

In the course and conduct of its aforesaid business, the respondent "Berlo" causes vending machines to be located or placed in theaters and public gathering places in the various States of the United States through and by virtue of arrangements or contractual relationships with the owners, proprietors, or managements of the theaters or such public gathering places. The respondent "Berlo" causes the said vending machines, when located and placed as aforesaid, to be stocked or filled with confectionery. The products are obtained from the said machines upon the deposit of a designated coin by the customer. For a period longer than a year immediately prior to October 1, 1935, the respondent "Berlo" stocked and serviced its vending machines with the special chocolate bars manufactured by the respondents "Hershey" and "Kohler" for the candy vending-machine trade, which it purchased from or through the respondents "Chocolate Company" and "Lamont."

PAR. 7. The respondent, Confection Cabinet Co., hereinafter for convenience referred to as "Cabinet," is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with an office and place of business located at 315 Clinton Avenue, in the city of Newark, State of New Jersey. It is, and for a period of more than 4 years last past has been, engaged in the business of operating candy-vending machines and in the sale and distribution of confectionery through the medium of vending machines.

In the course and conduct of its aforesaid business, the respondent "Cabinet" causes vending machines to be located or placed in theaters and public gathering places in the various States of the United States through and by virtue of arrangements or contractual relationships with the owners, proprietors or managements of the theaters or such public gathering places. The respondent "Cabinet" causes the said vending machines, when located and placed as aforesaid, to be stocked or filled with confectionery. The products are obtained from the said machines upon the deposit of a designated coin by the customer. For a period longer than a year immediately prior to October 1, 1935, the respondent "Cabinet" stocked and serviced its vending machines with the special chocolate bars manufactured by the respondents

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"Hershey" and "Kohler" for the candy vending-machine trade, which it purchased from or through the respondents "Chocolate Company" and "Lamont."

PAR. 8. There are other individuals, firms, partnerships, and corporations engaged in the business of operating vending machines in the various States of the United States and the distribution and sale of confectionery through the medium of vending machines, and with such individuals, firms, partnerships, and corporations, the respondents "Sanitary," "Berlo," and "Cabinet," at all times mentioned herein have been, and are, in competition.

PAR. 9. On or about October 1, 1935, all of the parties respondent herein agreed, conspired, combined, and confederated together, and united in, and pursued, a common and concerted course of action and undertaking among themselves to close the source of supply of the special chocolate bar manufactured by the respondents "Hershey" and "Kohler" for the vending-machine trade to all members of the vending-machine trade other than the respondents "Sanitary," "Berlo," and "Cabinet," and to eliminate, harass, and unduly burden competitors of the respondents "Sanitary," "Berlo," and "Cabinet" in the candy vending-machine trade.

Pursuant to, and for the purpose of effecting and carrying out the aforesaid program, agreement, combination, confederation, conspiracy, and undertaking, respondents have done, among other things, the following:

(a) Established and designated the respondent "Sanitary," as the purchasing agent, or the representative, of the respondents "Sanitary," "Berlo," and "Cabinet."

(b) Caused a contract to be executed by and between the respondent "Sanitary," acting for and on behalf of the respondents "Berlo" and "Cabinet," and the respondent "Lamont," acting for and on behalf of the respondent "Kohler," the terms of which contract are, among other things, that no sales of the special chocolate bar, manufactured by the respondent "Kohler" for the vending-machine trade, are to be made to any member of the candy vending-machine trade other than the respondents "Sanitary," "Berlo," and "Cabinet," subsequent to the date of October 1, 1935.

(c) Caused a contract, agreement, or understanding to be executed or entered into by and between the respondent "Sanitary," acting for and on behalf of the respondents "Berlo" and "Cabinet," and the respondent "Chocolate Company," acting for and on behalf of the respondent "Hershey," the terms of which contract, agreement or understanding are, among other things, that no sales of the special

chocolate bar, manufactured by the respondent "Hershey" for the vending-machine trade, are to be made to any member of the candy vending machine trade other than the respondents "Sanitary," "Berlo," and "Cabinet," subsequent to the date of October 1, 1935.

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

PAR. 10. The capacity, tendency, and effect of said agreement, combination, conspiracy, confederation, and undertaking, and the said acts and practices of respondents, as set forth in paragraph 9 hereof, are, and have been:

(a) To monopolize in the respondents "Sanitary," "Berlo," and "Cabinet," the sale of the products of the respondents "Kohler" and "Hershey," for which products there is substantial public demand.

(b) To unreasonably lessen, eliminate, restrain, stifle, hamper, and suppress competition in the candy vending-machine industry, and to deprive the purchasing and consuming public of advantages in prices, 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 to otherwise operate as a restraint upon, and a detriment to, the freedom of fair and legitimate competition in such trade and industry.

(c) To substantially increase the cost of candy products with which competitors of respondents service or stock their vending machines, thereby eliminating the source of supply to the consuming public of products of equal quality and value.

(d) To place respondents in a position to persuade the proprietors and managements of theaters and public gathering places to permit the installation or location of their vending machines on such premises in lieu, or instead, of vending machines of competitors because of a public demand for respondents' products with the attendant result of obstructing, eliminating, oppressing, stifling, and restricting competition in the location and installation of candy-vending machines.

PAR. 11. The above alleged acts and things done by respondents as set forth in paragraphs 9 and 10 hereof, are monopolistic practices and are methods of competition which are unfair, and they constitute unfair methods of competition in commerce within the intent and meaning, and in violation, of Section 5 of said act 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 the Federal Trade Commission Act, the Federal Trade Commission, on May 20, 1937, issued and served its complaint in this proceeding upon the parties respondent named in the caption hereof, 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 answers thereto on behalf of said parties respondent, testimony and other evidence in support of the allegations of said complaint were introduced by John Darsey, attorney for the Commission, and in opposition to the allegations of the complaint by counsel for the several respondents, before Arthur F. Thomas, an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answers thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of counsel aforesaid; 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. The respondent, Hershey Chocolate Corporation (hereinafter referred to as Hershey), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. It is now and for many years prior hereto has been engaged in the business of manufacturing and selling chocolate and cocoa candy products. Its factories and principal place of business are located at Hershey, Pa.

In the course and conduct of its said business the respondent has sold and shipped, and does now sell and ship, chocolate and cocoa candy products in commerce between and among the various States of the United States from the State in which its factories and place of business are located to purchasers thereof located in States other than the State in which its said factories and places of business are located.

PAR. 2. The respondent, Peter Cailler Kohler Swiss Chocolates Co., Inc. (hereinafter referred to as Kohler), is a corporation organized, existing, and doing business under and by virtue of the laws of the

State of New York. It is now and for many years prior hereto has been engaged in the business of manufacturing and selling chocolate candy products. Its factories and principal place of business are located at Fulton, N. Y.

In the course and conduct of its said business the respondent has sold and shipped, and does now sell and ship, chocolate candy products in commerce between and among the various States of the United States from the State in which its factories and principal place of business are located to purchasers thereof located in States other than the State in which respondent's said factories and principal place of business are located.

PAR. 3. The respondent, Chocolate Sales Corporation, was a corporation organized under the laws of the State of Delaware. For many years prior to June 1937 it was the sole distributing agent of the candy products manufactured by the respondent Hershey. Respondent Chocolate Sales Corporation was legally dissolved in June 1937, and since that date respondent Hershey has maintained its own selling organization.

PAR. 4. The respondent, Lamont, Corliss & Co. (hereinafter referred to as Lamont), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York. The business of the respondent Lamont is that of a selling agent and for many years it has been the exclusive selling agent of the candy products manufactured by respondent Kohler. Respondent Lamont maintains its offices and principal place of business at 60 Hudson Street, in the city of New York, N. Y.

PAR. 5. The respondent, Sanitary Automatic Candy Corporation (hereinafter referred to as Sanitary), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York. It is now, and for many years prior hereto has been, engaged in the business of operating vending machines and in the sale and distribution of confectionery products through the medium of vending machines. It maintains an office and principal place of business at 235 West Twenty-third Street, in the city of New York, N. Y.

PAR. 6. The respondent, Berlo Vending Co. (hereinafter referred to as Berlo), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. It is now, and for many years prior hereto has been, engaged in the business of operating vending machines and in selling and distributing confectionery products through the medium of vending machines. It maintains an office and principal place of business at 1518 North Broad Street, in the city of Philadelphia, Pa.

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PAR. 7. The respondent, Confection Cabinet Co. (hereinafter referred to as Cabinet), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey. It is now, and for many years prior hereto has been, engaged in the business of operating vending machines and selling and distributing confectionery products through the medium of vending machines. It maintains an office and principal place of business at 315 Clinton Avenue, in the city of Newark, N. J.

PAR. 8. There are many other parties engaged in the manufacture and sale of solid chocolate bars, who pursuant to orders therefor, ship their said products into and through the various States of the United States to the respective places of business of purchasers located in the various States of the United States, and with such parties, the respondents Kohler, Lamont, Hershey, and Chocolate Sales Corporation (until it was dissolved in June 1937), at all times referred to herein have been, and are, in active competition.

PAR. 9. There are also many other parties engaged in the business of operating vending machines in the various States of the United States and in the sale of confectionery products through the medium of such vending machines, and with said parties the respondent Sanitary, Berlo, and Cabinet, at all times referred to herein have been, and are, in active competition.

PAR. 10. For many years, in the course and conduct of its aforesaid business, the respondent Kohler has manufactured, and respondent Lamont, its exclusive selling agent, has sold a variety of chocolate candy products under the trade name Nestle. Among the products manufactured by respondent Kohler and sold by respondent Lamont are special chocolate bars manufactured for the vending-machine trade. The special chocolate bars so manufactured have been sold to the respondents Sanitary, Berlo, and Cabinet, and to the competitors of the last named respondents, except insofar as sales of said products have been restricted as hereinafter set forth, for many years, pursuant to which sales said products have been shipped by respondent Kohler into and through the various States of the United States to said purchasers.

PAR. 11. For many years, in the course and conduct of its aforesaid business the respondent Hershey has manufactured, and the respondent Chocolate Sales Corporation (until it was dissolved in June 1937), sold a variety of chocolate candy products under the trade name Hershey. Since June 1937 the products manufactured by respondent Hershey have been sold through its own selling organization. Among the products manufactured and sold as aforesaid by respondent Hershey are special chocolate bars manufactured for the vending-machine

trade. The special chocolate bars so manufactured have been sold to the respondents Sanitary, Berlo, and Cabinet, and to competitors of the last-named respondents, except insofar as sales of said products have been restricted as hereinafter set forth, for many years, pursuant to which sales said products have been shipped by respondent Hershey into and through the various States of the United States to said purchasers.

PAR. 12. The special Hershey and Nestle solid chocolate bars manufactured by respondents Hershey and Kohler, respectively, for the vending-machine trade are by far the most popular solid chocolate bars manufactured and they enjoy a much greater consumer demand than any competing solid chocolate bars.

PAR. 13. In the course and conduct of their respective businesses, each of the respondents Sanitary, Berlo, and Cabinet, seek to and do negotiate contracts with theater owners and operators providing for the installation of one or more of their machines on the premises of the theaters operated by such theater owners or managements. Some of the vending machines used by respondents Sanitary, Berlo, and Cabinet, contain six slots and some contain nine slots. A large variety of confectionery products, probably 25 or more, are sold through the machines. The types of confectionery products with which the vending machines are serviced are determined upon the basis of the relative popularity of confectionery items in the particular locality in which the machines are located. Respondent Sanitary operates in the metropolitan area of New York, and to some extent through subsidiaries on the West coast. Respondent Berlo operates in the Middle Atlantic States and respondent Cabinet operates throughout the United States. The products are taken from the vending machines by customers, who are patrons of the theaters in which such machines are located, upon deposit of a coin therein. Generally the machines are serviced with confectionery products by the operator installing the machines. Occasionally, they are serviced by the theater management with confectionery products purchased from the machine operator.

The predominant consideration in the negotiation of contracts permitting installation of machines on theater premises is the percentage of the gross take, or income, of each machine offered the theater management for such privilege. Other considerations are the type of machine used, service offered, and quality of the products with which the machines are to be serviced. Respondents Sanitary, Berlo, and Cabinet are the three largest operators of vending machines in the industry which is composed of 25 or more vending-machine operators. The respondents Sanitary, Berlo, and Cabinet for several years have

serviced their vending machines with the special solid chocolate bars manufactured for the vending machine trade by the respondents Hershey and Kohler.

PAR. 14. In 1932 respondent Lamont solicited the business of the respondent Sanitary and was informed that respondent Sanitary was not interested in the solid chocolate bars then being manufactured by respondent Kohler, but would be interested in a bar of such size and shape as would be suitable for use in its vending machines. Negotiations ensued between respondents Lamont and Sanitary resulting in respondent Sanitary submitting to respondent Lamont a design and specifications for a special chocolate bar for use in vending machines. Respondent Lamont, accepted the design submitted by respondent Sanitary and respondent Kohler began the production of a solid chocolate bar in accordance therewith. This bar was designated by respondent Kohler as Item No. 634, and purchase thereof was open to all candy vending machine operators. In 1934 respondent Sanitary requested a bar of lighter weight than No. 634 with a corresponding reduction in price. Respondent Lamont acceded to this request and respondent Kohler thereupon discontinued the manufacture of Item No. 634 and began the manufacture of a lighter solid chocolate bar which was designated No. 635. At this time respondent Kohler also began the manufacture of a special almond bar for the vending machine trade, which bar was designated as Item No. 637. The special bars Nos. 635 and 637 manufactured by respondent Kohler were sold generally to the candy vending-machine trade until the summer of 1935. In the period between September 1, 1934, and May 1, 1935, respondent Lamont sold 4,400,000 bars of Items Nos. 635 and 637 to 22 different vending-machine operators, of which approximately 1,200,000 were purchased by parties other than respondents Sanitary, Berlo, and Cabinet.

PAR. 15. In 1934 respondent Hershey in an effort to meet competition of the Special bars, Nos. 635 and 637, then being manufactured by respondent Kohler and sold by respondent Lamont to the vending-machine trade, obtained some of said bars and designed a mold in imitation thereof and began the production of a solid chocolate bar and an almond bar through the use thereof, which said bars were designated Items Nos. 38 and 106, respectively. Respondent Chocolate Sales Corporation offered and sold the Items Nos. 38 and 106 manufactured by respondent Hershey to the vending-machine trade at large until the summer of 1935.

PAR. 16. In the spring of 1935 respondent Lamont, in an effort to increase the volume of sales of chocolate bars for vending machines, requested respondent Sanitary to confine its purchases of solid choco-

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late bars to respondent Lamont. Respondent Sanitary rejected this request and countered with the proposal that respondent Lamont confine the sale of Items Nos. 635 and 637 being manufactured by respondent Kohler to respondent Sanitary. After several months of negotiation, during which time respondents Sanitary, Berlo, and Cabinet, held numerous conferences with reference to obtaining an exclusive distributor contract of Items Nos. 635 and 637 then being manufactured by respondent Kohler and sold by respondent Lamont to the vending-machine trade at large, a contract was entered into between respondent Lamont and respondent Sanitary on August 29, 1935, which provided in substance that sales of the special chocolate bars No. 635 and No. 637 being manufactured by respondent Kohler in accordance with the design submitted by respondent Sanitary would be confined to respondents Sanitary, Berlo, and Cabinet, in consideration of their agreement to purchase at least 10,000,000 bars per year. The contract also provided that such bars would, in the future, be wrapped with the ABC monogram, which is a symbol for respondent Sanitary's trade-mark, America's Best Candies. In compliance with said contract respondent Lamont immediately notified its vending-machine customers that respondent Kohler had discontinued the manufacture of Items Nos. 635 and 637, and that it would not be able to supply other special bars as substitutes therefor. The Nos. 681 and 682 were used in said exclusive distributor contract to designate the special chocolate bars referred to therein in lieu of the Nos. 635 and 637 which were used prior to the execution of said contract, but respondent Lamont continued to sell Items Nos. 635 and 637 to respondents Sanitary, Berlo, and Cabinet as late as the middle of November 1935. The Items Nos. 681 and 682, which were ultimately substituted by respondent Kohler for Items Nos. 635 and 637, were substantially the same as the bars which were formerly designated Nos. 635 and 637, the only difference being a slight change in design and the ABC monogram with which they were wrapped. The substituted bars, namely, Items Nos. 681 and 682, were sold to the respondents Sanitary, Berlo, and Cabinet under the exclusive distributor contract at the same price that Items Nos. 635 and 637 were previously sold to the trade at large.

Prior to the execution of the said exclusive distributor contract between respondent Lamont and respondent Sanitary, respondent Sanitary had sold respondents Berlo and Cabinet vending machines bearing respondent Sanitary's trade-mark, America's Best Candies, and respondents Berlo and Cabinet were granted the privilege of using said trade-mark on confectionery products sold through such machines.

Respondent Sanitary's requirements of special chocolate bars for use in its vending machines have never amounted to 10,000,000 bars per year. Prior to the execution of the said exclusive distributor contract between respondent Lamont and respondent Sanitary for the special chocolate bars manufactured by respondent Kohler, conferences were held between respondents Sanitary, Berlo, and Cabinet with the view of pooling their requirements in order to comply with the condition of agreeing to purchase 10,000,000 bars per year in consideration of the exclusive distributor arrangement. Pursuant to such conferences respondents Berlo and Cabinet authorized respondent Sanitary to execute said exclusive distributor contract on their behalf and each of the respondents Berlo and Cabinet committed itself to purchase 2,500,000 bars per year.

After the expiration of the first year under the said exclusive distributor contract between respondents Lamont and Sanitary, respondents Sanitary, Berlo, and Cabinet had failed to purchase the 10,000,000 bars stipulated in said contract, and a controversy arose between the parties thereto with respect to the provisions thereof, whereupon the said exclusive distributor contract was terminated. At this time respondent Lamont agreed to continue to supply respondents Sanitary, Berlo, and Cabinet with its Items Nos. 681 and 682 wrapped with Sanitary's ABC monogram.

At no time since the execution of the exclusive distributor contract between the respondents Lamont and Sanitary on August 29, 1935, and its termination in October 1936, to the date of the closing of the taking of testimony herein, viz, April 6, 1938, did respondent Kohler manufacture and respondent Lamont offer and sell to any member of the vending-machine trade other than the respondents Sanitary, Berlo, and Cabinet, any solid chocolate bar equal in size and weight to, and at a price as low as, the size, weight, and price of its Items Nos. 681 and 682.

PAR. 17. Almost simultaneously with the execution of the exclusive distributor contract between respondents Lamont and Sanitary, respondents Sanitary, Berlo, and Cabinet protested to respondent Hershey with reference to the sale of its special chocolate bars Nos. 38 and 106 to the vending-machine trade at large. Respondent Hershey immediately established the policy of restricting sales of its Items Nos. 38 and 106 to respondents Sanitary, Berlo, and Cabinet, and so informed the trade. Respondent Hershey agreed to confine sales of Items Nos. 38 and 106 to respondents Sanitary, Berlo, and Cabinet for fear that it would not obtain as large a percentage of the business of respondents Sanitary, Berlo, and Cabinet as it had previously obtained

unless it did so. Respondent Hershey has never labeled any of its products with respondent Sanitary's ABC trade-mark.

From the time respondent Hershey established the policy of confining sales of its Items Nos. 38 and 106 to respondents Sanitary, Berlo, and Cabinet in the summer of 1935 to the spring of 1938, respondent Hershey did not manufacture and offer to the vending-machine trade at large, either through its selling agent, respondent Chocolate Sales Corporation, or through its own selling organization, any solid chocolate bar comparable in size and weight to, and at a price as low as, the size, weight, and price of its Items Nos. 38 and 106.

Respondent Hershey professes to have abandoned the policy of confining sales of its Items Nos. 38 and 106 to respondents Sanitary, Berlo, and Cabinet in the spring of 1938. Sales of Items Nos. 38 and 106 were made to only one customer other than respondents Sanitary, Berlo, and Cabinet prior to the closing of the taking of testimony herein on April 6, 1938.

PAR. 18. Some theater managements prefer that vending machines located on their premises be serviced with Hershey and Nestle solid chocolate bars and have requested competitors of respondents Sanitary, Berlo, and Cabinet to service their machines with such bars.

Vending-machine operators competing with respondents Sanitary, Berlo, and Cabinet have been unable to service their machines with Hershey and Nestle solid chocolate bars during the period covered by the exclusive distributor arrangements between respondents Lamont and Sanitary, Berlo, and Cabinet on the one hand, and between respondents Hershey and Sanitary, Berlo, and Cabinet on the other hand, because of their inability to obtain such bars at a price which would insure sufficient profit to them to permit such competing operators to grant the theater managements a percentage of the gross take necessary to obtain locations.

Vending-machine operators competing with respondents Sanitary, Berlo, and Cabinet have met with difficulty in their negotiations for, and have lost, theater locations because of their inability to obtain Hershey and Nestle solid chocolate bars because of the exclusive distributor arrangements above referred to.

PAR. 19. The effects of the aforesaid exclusive distributor arrangements between respondents Lamont and Sanitary, Berlo, and Cabinet on the one hand, and between respondent Hershey and Sanitary, Berlo, and Cabinet on the other hand, entered into pursuant to the agreements and understandings between the said parties respondent hereinabove set out has been to effectively close the sources of supply of the Hershey and Nestle special chocolate bars manufactured by respondents Hershey and Kohler respectively, to members of the vending-

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machine trade other than respondents Sanitary, Berlo, and Cabinet, thereby depriving members of the consuming public who may desire to purchase said special chocolate bars from the vending machines of competitors of said respondents Sanitary, Berlo, and Cabinet, of the opportunity to do so.

CONCLUSION

The aforesaid acts and practices of respondents have a dangerous tendency to monopolize the sale of said solid chocolate bars in the respondent vending-machine operators, and have actually hindered and prevented competition in the sale of said products in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in the vending-machine industry, 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, the answers filed on behalf of the parties respondent named in the caption hereof, testimony and other evidence taken before Arthur F. Thomas, 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, and oral arguments by John Darsey, counsel for the Commission, and by the several counsel for the said parties respondent, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, Sanitary Automatic Candy Corporation, Berlo Vending Co., and Confection Cabinet Co., their officers, representatives, agents, and employees, in connection with the sale or purchase of confectionery products in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Entering into or carrying out any agreement or understanding among themselves, or between or among any two of them, or between or among any one of them and any other or others, to influence, persuade, or coerce any one or more of the respondents, Hershey Chocolate Corporation, Peter Cailler Kohler Swiss Chocolates Co., Inc., or Lamont, Corliss & Co., or any other manufacturer or seller of confectionery products, to refuse to sell any of such products to any other member of the vending-machine trade, or to refuse to sell any of such products to any other member of the vending-machine trade upon

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terms and conditions as favorable as the terms and conditions upon which such products are purchased by any one of the respondent vending-machine operators.

2. Entering into or carrying out any agreement or understanding among themselves, or between or among any two of them, or between or among any one of them and any other or others, to prevent, interfere with, or hinder, directly or indirectly, the purchase of any of such products by any other member of the vending-machine trade from any manufacturer or seller thereof, or to prevent, interfere with, or hinder, directly or indirectly, the purchase of any such products by any other member of the vending-machine trade from any manufacturer or seller thereof upon terms and conditions as favorable as the terms and conditions upon which such products are purchased by any one of the respondent vending-machine operators.

It is further ordered, That the respondents, Hershey Chocolate Corporation, Peter Cailler Kohler Swiss Chocolates Co., Inc., and Lamont, Corliss & Co., their officers, representatives, agents, and employees, and each of them, cease and desist from participating in, or doing any act or thing in furtherance of any agreement or understanding between or among any of the respondent vending-machine operators, or between or among any one of them and any other or others, having for its purpose the accomplishment of any of the restraints prohibited in paragraphs 1 and 2 of this order.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to the respondent, Chocolate Sales Corporation, for the reason that this respondent has been legally dissolved.

It is further ordered, That the said parties respondent 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.

IN THE MATTER OF
LUX-VISEL 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 3683. Complaint, Jan. 5, 1939—Decision, Mar. 14, 1939

Where a corporation engaged in manufacture and sale of electric hot water heaters under name "Lux" or "Superlux"; in advertising for salesmen to sell and distribute its said products throughout the various States, in newspapers and periodicals, and in follow-up literature, letters, pamphlets, and order blanks sent to prospective salesmen making inquiry—

- (a) Represented and implied to purchasing public and to prospective agents and salesmen, that by purchasing one heater at a stipulated amount they would receive an additional one free, or that by purchasing larger quantities they would receive others free of charge, or that they would receive a "free offer" or "free sample offer," through such statements as "Free Offer," "Free Sample Offer—No Risk," and "I will send you two Super Lux Heaters for the price of only one which is \$3.00," etc., and "Don't forget I give you Free Heaters to cover transportation charges regardless of the quantity you buy";

Facts being it did not make such free offer, nor would customer get heater free, but price of so-called "free heater" was included in price of other articles, rendering of a service or payment of money was required before such free heater was furnished by it, and price charged for the one heater and the "free" heater was the regular customary price charged for two, and said offer was not special, but one of long standing which constituted its permanent method of doing business, with price referred to included in that of other articles which must be purchased to obtain so-called "free" item;

- (b) Represented, as aforesaid, that its agents normally or usually made up to \$30 a day or other large amounts of money as profits derived from their efforts in selling its said product, through such statements as "Up to \$30 Profit Daily," "Up to \$30 and More Daily," and "Pays Agents Up to \$20, \$30, \$40 in a Day," and "Try to think of any business offering you the chance to make up to \$15 to \$35 and over in a single day that you can get into as easily as this one";

Facts being its said agents do not normally or usually make profits up to \$30 a day, or any comparable or similar amounts, its claims of earnings made by its agents were greatly in excess of average earnings made by active full-time agents under normal conditions in usual course of business, very few of its agents were full-time employees or had even given it "repeat" orders, only a small percentage of its customers actually worked as agents for it or made any further purchase of its said product other than the original small order, and its sales methods accomplished, in general, only initial sale to a customer, rather than continuous and numerous repeat sales to agents and salesmen; and