

Syllabus

IN THE MATTER OF
NUTRINE CANDY COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936; AND OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3756. Complaint, Apr. 11, 1939—Decision, Dec. 19, 1939

Where a corporation engaged in manufacture, offer, sale, and distribution of a small line of fancy boxed candy to dealers, and of bulk candy, in which it specialized, directly to retailers in some 15 States, and for sale of which bulk candy of like grade and quality it maintained 4 separate and distinct price schedules governing price to be charged in accordance with classification of particular dealer as Eastern Syndicate, National Syndicate, Small Syndicate, or Small Retail account, as case might be—

Discriminated in price through sale of its said candy to purchasers competitively engaged with one another in resale thereof at its "ES," "NS," "SS," and "SR" prices, in accordance with classification of such customers, governed by no standard rule, by its salesmen, and in accordance with permitted action of latter in selling to same customer certain items under "NS" or "SS" price classifications and rest of items purchased at same time under "SR" list price, and thereby sold different competitively engaged purchasers candy of like grade, quality, and quantity at varying prices and price differentials ranging from a low of \$0.0075 per pound to high of \$0.04% per pound, depending upon brand of candy thus sold and purchased;

With result that the effect of such discriminations in prices might be to lessen competition between those retailers who purchase from it in one of aforesaid price classifications and competing retailers who purchase in higher price classification, and to injure, destroy, and prevent competition between said retailers and to tend to concentrate in most favored retailers, who were in direct competition with those less favored, retail sales of its said products, and with tendency and capacity to eliminate and destroy bulk candy business of latter:

Held, That such discrimination in price in sale in commerce of bulk candies of like grade and quality to purchasers competitive one with the other, absent anything in record to justify same, constituted violation of provisions of section 2 (a) of Clayton Act, as amended by Robinson-Patman Act; and

Where said corporation engaged also, as aforesaid, in manufacture, offer, sale, and distribution of its fancy boxed candy to retail dealers in aforesaid States, including various assortments thereof which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumer, and were composed of (1) number of 1-pound boxes of candy, together with push card for use in sale and distribution of such candy under a plan in accordance with which customer and purchaser paid therefor varying amount, ranging from 1 cent to 39 cents, as determined by number concealed within disk bearing feminine name selected, or of (2) other assortments involving lottery or chance feature similar to aforesaid, and varying therefrom in detail only—

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Sold and distributed such assortments to and through direct and indirect retail dealer purchasers thereof, by whom, in accordance with aforesaid or similar plans as above described, same were exposed and sold to purchasing public, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its boxed candy, involving sale and distribution of such product by means of game of chance, gift enterprise, or lottery scheme, and under which, as set forth, fact as to whether purchaser paid 1 cent or any intervening amount up to 39 cents for pound box containing candy of like grade and quality, was determined solely and wholly by lot or chance, contrary to an established public policy of the United States Government and in violation of the criminal laws of many States, and in competition with (1) many who regard such method of sale and distribution of candy as contrary to public policy, as morally bad and encouraging gambling, as injurious to the candy industry itself as resulting in merchandising of candy through a lottery scheme, and as providing retail merchants with means of violating the public policy and laws of the several States, and with (2) many who are unwilling to adopt and use said or similar plan or method or any method involving sale of candy by chance or lottery in violation of public policy or of criminal statutes;

With the result that retailers were attracted by its said sales plan and element of chance involved therein, and were thereby induced to buy and sell its said boxed candy in preference to that offered and sold by competitors who do not use same or similar sales method, and trade was thereby diverted to it from its competitors aforesaid; to the substantial injury of competition in commerce among the various States:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Mr. John W. Carter, Jr., for the Commission.

Hickey & Hall, of Chicago, Ill., for respondent.

COMPLAINT

Count 1

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, has violated, and is now violating, the provisions of section 2 of the Clayton Act as amended by the Robinson-Patman Antidiscrimination Act approved June 19, 1936 (U. S. C., title 15, sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. The respondent, Nutrine Candy Co., is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 419 West Erie Street, Chicago, Ill.

PAR. 2. Respondent corporation is now and has been since prior to June 19, 1936, engaged in the business of manufacturing, offering for

sale, selling, and distributing, candy, including a small line of fancy candies packed in boxes, but in general specializing in bulk candy as more particularly described herein. Respondent sells bulk candy direct to retail dealers in commerce between and among the States of Illinois, Wisconsin, Minnesota, Nebraska, Oklahoma, Arkansas, Tennessee, Michigan, Iowa, Indiana, Kansas, Missouri, Ohio, Kentucky, West Virginia, and western Pennsylvania, and as a result of said sale causes said product to be shipped and transported from Chicago, Ill., to the purchasers thereof who are located in the aforementioned States. There is, and has been at all times herein mentioned, a continuous current of trade and commerce in said product across State lines between respondent's factory and the purchasers of said product.

PAR. 3. In the course and conduct of its business as aforesaid, respondent, during the time herein mentioned, has been and is now in substantial competition with other corporations, individuals, partnerships, and firms engaged in the business of manufacturing, selling, and distributing candy in commerce between and among the various States of the United States.

Purchasers of respondent's candy in the course of their business in reselling respondent's candy, during the time herein mentioned, have been and are now in substantial competition with each other.

PAR. 4. In the course and conduct of its business as aforesaid, since June 19, 1936, respondent has been and is now discriminating in price between different retailers buying said candy of like grade and quality sold by it in interstate commerce by giving and allowing certain of said retailers of its product different prices than given or allowed other retailers. Said discrimination in price is brought about by the following practice pursued by the respondent, to wit:

Respondent sells its products under four different price lists, which price lists are designated by the following letters:

ES, NS, SS, and SR

So-called Eastern Syndicate accounts are classified under the letters "ES." National Syndicate accounts are classified under the letters "NS." Small Syndicate accounts are classified under the letters "SS" and Small Retail accounts under the letters "SR." Customers purchasing on the "SR" price list pay the highest prices, while customers purchasing on the other price lists pay lower prices for goods of like grade and quality. For the purpose of illustrating the differential in price resulting from the four price lists, there is appended hereto and made a part of this paragraph a tabulation showing the prices at which the various kinds of candy were sold to customers purchasing

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under the various classifications during the period from July 1 to July 5, 1937, inclusive.¹

Respondent permits its salesmen to classify customers as the salesmen see fit and in many instances customers who are small retailers are classified as and sold at the prices specified for sales to syndicate accounts. Furthermore, the salesmen frequently sell certain items to their customers from the "NS" or "SS" price lists and then the rest of the items purchased by the same customer are from the "SR" price list.

Respondent does not make known to its customers that it sells its products at the prices set forth in the various classifications. The salesmen are promised commissions of 12 percent on the Small Retail accounts, 5 percent on the Small Syndicate accounts, and 2 percent on the National Syndicate accounts.

PAR. 5. The general effect of said discrimination in price by the respondent set forth above has been and may be substantially (a) to lessen competition between those retailers who purchase from respondents in one of the aforesaid lower-priced classifications and competing retailers who purchase in a higher-priced classification; (b) to injure, destroy, and prevent competition between the aforesaid retailers; and (c) to tend to create a monopoly in the more favored retailers who are in direct competition with retailers who are not so favored as to receive the benefit of said lower prices, in that a substantial amount of business in this line of commerce has been and is being diverted to the favored retailers with the cumulative effect of having a tendency and capacity to eliminate and destroy the bulk candy business of said small independent retail dealers.

PAR. 6. The foregoing alleged acts and practices of said respondent are violations of section 2 (a) of the first section of the said act of Congress approved June 19, 1936, entitled "An Act to amend section 2 of the act entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes."

Count 2

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 Nutrine Candy Co., a corporation in its own name and right and trading under the name and style of Superior Candy Co., hereinafter referred to as respondent, has violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof

¹ In the interest of brevity said "Tabulation" or "Table of prices," etc. is not published as appendix to complaint as it appears incorporated in findings *infra* at p. 123.

would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in paragraphs 1 and 2 of count 1 of this complaint to the same extent and as though the allegations of said paragraphs 1 and 2 of said count 1 were set out in full herein, and said paragraphs 1 and 2 of said count 1 are incorporated herein by reference and made a part of the allegations of this count.

PAR. 2. In the course and conduct of its business as aforesaid, respondent, during the time herein mentioned, has been and is now in substantial competition with other corporations, individuals, partnerships, and firms engaged in the business of manufacturing, selling, and distributing candy in commerce between and among the various States of the United States.

PAR. 3. In the course and conduct of its business as described in paragraph 1 hereof, respondent sells and has sold to dealers certain assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One of said assortments is sold and distributed to the purchasing public in the following manner: This assortment consists of a number of 1-pound boxes of candy together with a device commonly called a push card. The card contains a number of partially perforated disks with a feminine name printed immediately above each of said disks and with the word "push" printed on the face of said disk. Concealed within each disk is a number and when a disk is pushed or separated from the card the number is disclosed. The numbers range from 1 to 39 but are not arranged in numerical sequence. Sales are from 1 cent to 39 cents and the person pushing a disk from said card pays in cents the amount of the number disclosed. Each purchaser is entitled to and receives a box of candy. The push card bears legends or instructions as follows:

TRY YOUR LUCK

1¢ to 39¢

— EVERYBODY WINS —

A Full 1 Pound Box

HOME STYLE

CHOCOLATE COVERED CHERRIES

Pay What You Punch

FROM 1 TO 39¢ NO HIGHER

EVERY PUNCH WINS

1 Pound Box Chocolate Cherries

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Sales of said boxes of respondent's candy are made by means of said push cards in accordance with the above-described legends or instructions. The prices to be paid for said boxes of candy are thus determined wholly by lot or chance.

The respondent manufactures, sells, and distributes various assortments of candy involving a lot or chance feature but such assortments and the method of sale and distribution thereof are similar to the one hereinabove described and vary only in detail.

PAR. 4. Retail dealers who purchase respondent's said assortments of candy directly or indirectly expose and sell the same to the purchasing public in accordance with the aforesaid sales plans. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its candy in accordance with the sales plans or methods hereinabove set forth. The use by respondent of said sales plans or methods in the sale of its candy and the sale of said candy by and through the use thereof and by the aid of said sales plans or methods is a practice of the sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws of many of the States of the United States.

PAR. 5. The sale of candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure a box of candy at a price much less than the normal retail price thereof. Many persons, firms, and corporations who sell or distribute candy in competition with the respondent as above alleged are unwilling to adopt and use said sales plans or methods or any methods involving a game of chance or the sale of a chance to win something by chance or any other methods that are contrary to public policy or in violation of criminal statutes and such competitors refrain therefrom. Many persons are attracted by said sales plans or methods employed by respondent in the sale and distribution of its candy and the element of chance involved therein and are thereby induced to buy and sell respondent's candy in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said methods by respondent because of said game of chance has a tendency and capacity to and does unfairly divert trade to respondent from its said competitors who do not use the same or equivalent methods, and as a result thereof substantial injury is being, and has been done by respondent to competition in commerce between and among the various States of the United States.

PAR. 6. The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice and injury of the public and

of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress, entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (title 15, sec. 13) and pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on the 11th day of April 1939, issued and on April 12, 1939, served its complaint in this proceeding upon the respondent, Nutrine Candy Co., a corporation, charging it, the aforesaid corporation, in count 1 thereof, with violating the provisions of section 2 (a) of the Clayton Act, as amended, by the Robinson-Patman Antidiscrimination Act approved June 19, 1936 (U. S. C., title 15, sec. 13), and in count 2 thereof charging it, the aforesaid Nutrine Candy Co., with the use of unfair methods of competition in interstate commerce in violation of the provisions of section 5 of the Federal Trade Commission Act (U. S. C., title 15, sec. 45).

After the issuance and service of the said complaint and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's 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, which substitute answer was duly filed in the office of the Commission.

Thereafter, the proceeding regularly came on for final hearing before the Commission on the complaint aforesaid, the respondent's substitute answer thereto, and the Commission now having duly considered the record and being 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

Count 1

PARAGRAPH 1. Respondent, Nutrine Candy Co., is a corporation organized under the laws of the State of Illinois with its principal office and place of business located at 419 West Erie Street, in the city of Chicago, State of Illinois. Respondent is now, and for sev-

eral years last past has been, engaged in the manufacture of candy in the city of Chicago, and in the sale, offering for sale, selling, and distribution to dealers of a small line of fancy candies packed in boxes, but specializing generally in the sale, offering for sale, selling, and distribution of bulk candy direct to retail dealers in the States of Wisconsin, Minnesota, Nebraska, Oklahoma, Arkansas, Tennessee, Michigan, Iowa, Indiana, Kansas, Missouri, Ohio, Kentucky, West Virginia, and western Pennsylvania. It causes said bulk candy, when sold, to be shipped or transported from its principal place of business in the State of Illinois to purchasers thereof in the State of Illinois and in the other States of the United States as hereinabove named. In so carrying on said business, respondent has been, and now is, engaged in active competition with other corporations and with partnerships, individuals, and firms engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States, and the purchasers of respondent's candy in the course of their business in reselling same have been for several years last past and are now in substantial competition with each other.

PAR. 2. In the course and conduct of its business, as aforesaid, respondent has established, and subsequent to June 19, 1936, has maintained and now maintains, four separate and distinct price schedules on bulk candies of like grade and quality. Upon each schedule, so established and maintained, respondent causes to be listed under the various brand and trade names all of the bulk candy manufactured, sold, handled, and distributed by it, together with the price per pound of each brand so listed. The schedules, as aforesaid, are designated by symbols, to wit: "ES," "NS," "SS," and "SR." Theoretically, all dealers who qualify as Eastern Syndicate accounts are so classified and the schedule or price list designated "ES" is used in determining what price per pound such dealer must pay for the bulk candy so purchased; all dealers who qualify as National Syndicate accounts are so classified and the schedule or price list designated "NS" is used in determining what price per pound such dealer must pay for the bulk candy so purchased; all dealers who qualify as Small Syndicate accounts are so classified and the schedule or price list designated "SS" is used in determining what price per pound such dealer must pay for the bulk candy so purchased, and all dealers who qualify as Small Retail accounts are so classified and the schedule or price list designated "SR" is used in determining what price per pound such dealer must pay for the bulk candy so purchased, and the price per pound for its bulk candy of like grade and quality varies according to such schedules. Dealers purchasing

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under the "ES" price list pay the lowest price per pound, while dealers purchasing under the "SR" pay the highest price per pound for candy of like grade and quality.

Respondent, during the period July 1 to July 5, 1937, inclusive, sold and offered for sale in commerce to purchasers, competitive one with the other, its bulk candies of like grade and quality at varying differentials, as hereinbelow illustrated:

Table of prices of Nutrine Candy Co. from July 1 to July 5, 1937, at which sales have been made

	Woolworth-Kresge-Niesner Bros.				S. S.	S. R.	Maximum price differential	Percent of increase over the minimum price
	E. S.		N. S.					
Butter cream chocolate drops.....	0.06 $\frac{1}{4}$		0.06 $\frac{1}{2}$		0.07	0.08 $\frac{3}{8}$	0.02 $\frac{5}{8}$	42
Cocoanut bon bons.....		0.10 $\frac{1}{4}$	.11		.11	.14 $\frac{1}{4}$	.04	39
Chocolate panned fruit and nut mix.....	.11 $\frac{1}{4}$	.11 $\frac{1}{2}$						
Chocolate fruit fudge.....	.06 $\frac{1}{2}$	.06 $\frac{1}{2}$			.08 $\frac{1}{2}$		.02	31
Cherub peanuts.....	0.08 $\frac{1}{2}$	.09	.09 $\frac{1}{4}$		.10 $\frac{1}{2}$	.12 $\frac{1}{8}$	.06 $\frac{3}{8}$	98
Creamed coco dips.....	.10 $\frac{1}{2}$	.10 $\frac{1}{2}$	.11 $\frac{1}{4}$		.13	.14 $\frac{1}{8}$	.04 $\frac{3}{8}$	42
Frosty peaks.....	.06 $\frac{1}{2}$		.10 $\frac{1}{8}$		.10 $\frac{1}{8}$		.04 $\frac{3}{8}$	67
Fruit salads.....	.06 $\frac{1}{2}$	.06 $\frac{1}{2}$	.07 $\frac{1}{2}$		.08 $\frac{1}{4}$	.08 $\frac{1}{4}$	.02 $\frac{1}{4}$	35
Giant jelly drops.....	.06	.06	.06 $\frac{1}{4}$		.06 $\frac{1}{4}$	.06 $\frac{1}{4}$	.0075	12 $\frac{1}{2}$
Hawaiian cocoanut sparklers.....	.12		.12 $\frac{1}{4}$		.14 $\frac{1}{8}$	.16 $\frac{1}{8}$	.04 $\frac{1}{4}$	41
Happy prince milk chocolates.....	.12		.18 $\frac{1}{8}$				.06 $\frac{1}{8}$	57
Iced fruit marmalade.....	.08 $\frac{1}{2}$		.10 $\frac{1}{4}$		.12 $\frac{1}{4}$	.12 $\frac{1}{4}$	.03 $\frac{1}{4}$	44
Iced caramel buds.....	.10 $\frac{1}{2}$		.11 $\frac{1}{4}$		.13 $\frac{1}{4}$	.13 $\frac{1}{4}$	.02 $\frac{1}{4}$	26
Iced maple nut snacks.....	.10 $\frac{1}{4}$		.11 $\frac{1}{4}$		.13 $\frac{1}{2}$	.13 $\frac{1}{2}$	.03 $\frac{1}{2}$	32
Jelly orange slices.....	.06	.06	.06 $\frac{1}{4}$		.06 $\frac{1}{4}$		.0075	12 $\frac{1}{2}$
Panama rainbow cubes.....	.09 $\frac{1}{4}$		.09 $\frac{1}{4}$			.12 $\frac{1}{8}$	.03 $\frac{1}{8}$	39
Spiced jelly strings.....		.06 $\frac{1}{4}$	.07		.08 $\frac{1}{4}$	.09 $\frac{1}{4}$	.03 $\frac{1}{4}$	52
Sunbeams.....	.08	.08	.09 $\frac{1}{4}$		.10 $\frac{1}{4}$	.11 $\frac{1}{8}$	.03 $\frac{1}{8}$	48
Tangerine slices.....	.06 $\frac{1}{2}$		.08 $\frac{1}{4}$		.08 $\frac{1}{4}$	.09 $\frac{1}{2}$	.03	46
Vanilla fruit fudge.....	.06 $\frac{1}{2}$	.06 $\frac{1}{2}$	.07		.08 $\frac{1}{2}$		.02	31
Sugar roasted peanuts.....	.10 $\frac{1}{2}$	.10 $\frac{1}{2}$	.11			.12 $\frac{1}{4}$	.02 $\frac{1}{4}$	21

PAR. 3. Every customer purchasing respondent's bulk candy is classified and placed under one of these price schedules. Respondent itself, however, does not classify each customer nor does it have any standard rule governing the classification of its customers but permits its salesmen to determine and decide the classification within which the particular purchaser is placed. This method in many instances has resulted, and will continue to result, in the classification of some small retailers either as "ES," "NS," or "SS" accounts and in sales to such retailers under either the "ES," "NS," or "SS" price schedules. Respondent has also permitted its salesmen to sell certain items to one customer under the "NS" or "SS" price classification and the rest of the items purchased by the same customer at the same time under the "SR" price list. This method of selling its products has resulted and is resulting in respondent's selling to different purchasers, competitive with each other, candy of like grade, quality, and quantity at varying

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prices. Said price differentials range from a low of \$0.0075 per pound to a high of \$0.047 $\frac{7}{8}$ per pound, depending upon the brand of candy so sold and purchased.

PAR. 4. The difference in price at which respondent sells its bulk candies of like grade and quality, as set out in paragraphs 2 and 3 above, amounts to and are discriminations in price in commerce between purchasers of respondent's bulk candies.

PAR. 5. The Commission finds that the discriminations in prices, hereinabove found in paragraphs 2 and 3 as having been made by respondent, in sale in commerce of its bulk candies of like grade and quality to purchasers competitive the one with the other in the resale of said candies has been, and may be:

(a) Substantially to lessen competition between those retailers who purchase from respondent in one of the aforesaid price classifications and competing retailers who purchase in a higher price classification.

(b) To injure, destroy, and prevent competition between the aforesaid retailers.

(c) To tend to concentrate in the more favored retailers who are in direct competition with the less-favored retailers the retail sales of its products, with the effect of having the tendency and capacity to eliminate and destroy the bulk candy business of said less-favored retailers.

CONCLUSION

Nothing appearing in the record to justify the price discriminations hereinabove found, the Commission, therefore, concludes that the respondent Nutrine Candy Co., has discriminated in price in the sale in commerce of its bulk candies of like grade and quality to purchasers competitive one with the other, as hereinabove set out, in violation of the provisions of subsection (a) section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec. 13).

Count 2

PARAGRAPH 1. Respondent, Nutrine Candy Co., a corporation doing business in the method and manner as aforesaid, and as hereinabove more fully set out in the findings as to the facts in paragraphs 1 and 2 under count 1, also in its own name and right and trading under the name and style of Superior Candy Co., with its principal office and place of business located at 419 West Erie Street, Chicago, Ill., is now and has been, subsequent to June 19, 1936, engaged in the manufacturing, offering for sale, selling, and distributing of fancy candy packed in boxes. Respondent sells its boxed candy direct to retail dealers in commerce between and among the States of Wisconsin,

Minnesota, Nebraska, Oklahoma, Arkansas, Tennessee, Michigan, Iowa, Indiana, Kansas, Missouri, Ohio, Kentucky, West Virginia, and western Pennsylvania. It causes said box candy, when sold, to be shipped or transported from its principal place of business in the State of Illinois to purchasers thereof in the State of Illinois and in the other States of the United States as hereinabove named. In so carrying on said business, respondent has been and now is engaged in active competition in the sale and distribution of its box candy with other corporations and with partnerships, individuals, and firms engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business of selling and distributing fancy candy packed in boxes, as aforesaid, the respondent, Nutrine Candy Co., in its own name and right and trading under the name and style of Superior Candy Co., since June 19, 1936, has been, and is now, selling to dealers various assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumer thereof.

One of such assortments manufactured, sold, and distributed by respondent, consists of a number of 1-pound boxes of candy, together with a device commonly known as a push card. The 1-pound boxes of candy are distributed to the purchasing public by means of this push card and in the following manner:

The card bears the following legend or instructions:

TRY YOUR LUCK
1c to 39c
— EVERYBODY WINS —
A Full 1 Pound Box
HOME STYLE
CHOCOLATE COVERED CHERRIES

Pay What You Punch
FROM 1 TO 39C NO HIGHER
EVERY PUNCH WINS
1 Pound Box Chocolate Cherries

and contains a number of partially perforated disks with a feminine name printed immediately above each disk and the word "push" printed on the face of each disk. Concealed from the purchaser or prospective purchaser and within each disk is a number ranging from 1 to 39 but the numbers are not arranged in numerical sequence. When a disk is pushed or separated from the card, the number concealed, as aforesaid, is for the first time disclosed or exposed and the purchaser pushing the disk or separating the disk from the

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card must pay in cents the amount of the number so disclosed and upon such payment receives for the amount so paid a 1-pound box of candy. One purchaser may thus be required to pay 39 cents for a pound box of respondent's candy, while another purchaser may be required to pay 1 cent or any other intervening amount between 1 cent and 39 cents for a pound box containing candy of like grade and quality. Whether a purchaser is to pay 1 cent or any intervening amount up to 39 cents for a pound box of candy of like grade and quality is determined solely and wholly by lot or chance. The other assortments of box candy manufactured, distributed, and sold by respondent as aforesaid involve a lottery or chance feature similar to the one just above described, varying only in detail.

PAR. 3. Retail dealers purchasing all or any one of respondent's said assortments of box candy, directly or indirectly, expose and sell the same to the purchasing public in accordance with the aforesaid sales plan or one similar thereto but varying in detail. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its box candy and the use of such plan or methods in the sale of its box candy and the sale of said box candy by and through the use thereof and by the aid of the aforesaid sales plan or methods similar thereto, varying only in detail, is a practice of the sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws of many States of the United States.

PAR. 4. The sale and distribution of candy by the retailers by the method described herein or methods similar thereto, varying only in detail, as distributed by respondent, is the sale and distribution of candy by means of a game of chance, gift enterprise, or lottery scheme. Many competitors regard such method of sale and distribution of candy as contrary to public policy; as morally bad and encouraging gambling; as injurious to the candy industry itself, because it results in the merchandising of candy by means of a lottery scheme; and as providing retail merchants with a means of violating the public policy and the laws of the several States. Many persons, firms and corporations who sell or distribute candy in competition with respondent are unwilling to adopt and use the same or a similar sales plan or methods or any method involving the sale of candy by chance or lottery in violation of public policy or in violation of criminal statutes. The retailers are attracted by the sales plan of respondent and the element of chance involved therein and are thereby induced to buy and sell respondent's box candy in preference to box candy offered for sale by the competitors

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of respondent who do not use the same or a similar sales method, resulting in diverting trade to respondent from its said competitors who do not use a similar sales method. As a result thereof, substantial injury is being, and has been, done by respondent to competition in commerce between and among the various States of the United States.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 substituted answer filed thereto by the respondent, Nutrine Candy Co., admitting the material allegations of fact in the complaint to be true, and waiving all intervening procedure and further hearing as to the said facts, and the Commission having made its findings as to the facts and its conclusions, which findings and conclusions are hereby made a part hereof, that said respondent has violated the provisions of an act of Congress entitled "An Act to supplement existing laws against unlawful restraints and for other purposes" approved October 15, 1914, as amended by the Robinson-Patman Act, approved June 19, 1936 (title 15, sec. 13) and that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondent, Nutrine Candy Co., a corporation, its officers, directors, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution, and delivery of its bulk candy and box candy in interstate commerce do forthwith cease and desist from:

1. The unlawful discrimination in prices found in paragraphs 2 and 3 of count 1 of the aforesaid findings as to the facts and conclusion.

2. Engaging in any similar discrimination in price in the sales of its bulk candy in interstate commerce under substantially like circumstances and conditions between purchasers competitively engaged one with the other in the resale of said candies of like grade and quality.

Order

30 F. T. C.

3. Selling or distributing candy or any other merchandise so packed and assembled that sales of said candy or other merchandise to the general public are to be made or may be made by means of a lottery, gaming device, or gift enterprise.

4. Supplying to or placing in the hands of dealers assortments of said candy or any other merchandise, together with punchboards, push or pull cards, or other lottery devices, which said punchboards, push or pull cards, or other lottery devices are to be used or may be used in selling or distributing said candy or other merchandise to the general public.

5. Supplying to or placing in the hands of dealers, punchboards, push or pull cards, or other lottery devices, either with assortments of said candy or other merchandise or separately, which said punchboards, push or pull cards, or other lottery devices are to be used or may be used in selling or distributing said candy or other merchandise to the general public.

6. Selling or otherwise disposing of said candy or any other merchandise by the use of punchboards, push or pull cards, or any other device or devices.

It is further ordered, That the respondent Nutrine Candy Co., a corporation, 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 the order to cease and desist hereinabove set forth.

Syllabus

IN THE MATTER OF
JOHN C. JOHNSON, TRADING AS JOHNSON'S LIXOLENE
COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 3887. Complaint, Sept. 9, 1939—Decision, Dec. 19, 1939

Where an individual engaged in manufacture, sale, and distribution of medicinal preparation which was recommended by him for treatment of eczema, ringworm, athlete's foot, and other diseases, ailments and conditions of skin and scalp, and which consisted, essentially, of solution of salicylic acid in diluted mixture of alcohols, together with small amount of boric acid and trace of methyl salicylate; in advertisements concerning his said product which he disseminated through the mails, through circulars and other printed or written matter distributed in commerce among the various States, and through continuities broadcast from radio stations of extrastate audience, and through various means, and which were intended and likely to induce, directly or indirectly, purchase of his said product—

- (a) Represented that his said product, or "Johnson's Lixolene," was a safe skin remedy and reliable compound and effective antiseptic and powerful germicide, and competent, adequate and effective remedy for treatment and cure of eczema, athlete's foot, acne, psoriasis, dandruff, poison ivy, warts, and corns;
- (b) Represented that all eczemas and other diseases of the skin are caused by parasitic infection, and that proper treatment for relief or cure thereof is local application of a mild germicide such as his said product, and that such product constituted competent, adequate and effective remedy for diseases of scalp, such as dandruff, seborrhea, and alopecia, and gave complete relief for all parasitic infections of skin and scalp; and
- (c) Represented that he was a physician or doctor of medicine and had a recognized standing and reputation as a dermatologist and chemist, and was properly qualified by education, research, and training to prescribe for various diseases of skin and scalp;

Facts being his said product or "Lixolene" did not have qualities or achieve results claimed and represented as above set forth, was neither skin remedy nor powerful germicide nor competent, adequate or effective remedy or cure for eczema or for various other conditions above set forth, and had no therapeutic value in treatment thereof, beyond temporarily relieving, due to its mildly antiseptic and counter-irritant properties, itching, all eczemas and other skin diseases are not caused by parasitic infection, but eczemas in many cases are due to allergic conditions resulting from food contacts, plant pollens or other causes, requiring, for proper treatment in many cases, complicated procedure of competent physician, he was neither physician or doctor of medicine nor possessed of recognized standing or reputation as dermatologist or chemist, and facts set forth by him with reference to cause of acne and reproduction of bacteria and functioning thereof in causing skin diseases were false;