

IN THE MATTER OF  
  
SCHUTTER CANDY COMPANY

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

*Docket 3636. Complaint, Oct. 26, 1938—Decision, Mar. 6, 1941*

Where a corporation engaged in the manufacture of candy, and in sale and distribution of various assortments, including as typical, assortment which (1) was composed of 126 small pieces of individually wrapped candy of uniform size and shape, of light color and vanilla flavor, 24 similar individually wrapped small pieces of dark color and chocolate flavor, and 25 5-cent candy bars, so packed that said 24 chocolate colored pieces were contained in small cardboard tray on top of others, with legend advising said 24 pieces were "For those who like chocolate \* \* \*," and that segregation of said otherwise indistinguishable 24 pieces was lost through simple expedient of emptying tray into lower compartment, (2) was customarily sold by retailers under plan whereby purchaser selecting by chance, for cent paid, one of light colored pieces received such piece only, while person thus selecting one of chocolate colored pieces received one of said candy bars, and purchaser of last piece of candy received 25th or last bar and (3) was similar to other "draw" and "break and take" assortments, sold principally by retailers near schools to children, purchasers and consumers in substantial number of such type of candy, well-known in candy industry and readily recognized, in case of assortment in question, as a "draw" or "break and take" one, with no explanation required as to manner of operation by retailer—

Sold its said "Bingo Country Store Advertising Deal" assortments to jobbers and wholesalers, by whom they were distributed and sold to retailers as "draw" and "break and take" assortments, and by retail dealer purchasers were exposed and sold to purchasing public in accordance with sales plan or method above described, involving game of chance or sale of a chance to procure piece of candy at much less than the normal retail price, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its candy, contrary to an established public policy of the United States Government and in violation of criminal laws, and in competition with those who are opposed to, and do not use, same or any sales plan or method involving game of chance or sale of a chance to win or plan contrary to public policy of the Government, and are thereby put to competitive disadvantage;

With the result that many persons were induced by said plan or method and element of chance involved therein to buy and sell its products in preference to those offered and sold by its said competitors, and substantial trade in commerce was unfairly diverted to it from them:

*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.

## Complaint

Before *Mr. Miles J. Furnas*, trial examiner.

*Mr. D. C. Daniel* for the Commission.

*Pennish & Rashbaum*, of Chicago, Ill., for respondent.

## 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 the Schutter Candy Co., a corporation, has 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. The respondent, Schutter Candy Co., is a corporation organized and doing business under the laws of the State of Delaware, with its principal offices and place of business located at 1013 North Cicero Avenue, Chicago, Ill. Respondent is now and for some time last past has been engaged in the manufacture of candy and in the sale and distribution thereof to dealers. Respondent causes and has caused its products, when sold, to be shipped or transported from its aforesaid place of business in the State of Illinois to purchasers thereof located in the various other States of the United States and in the District of Columbia at their respective places of business. There is now and has been for some time last past a course of trade by said respondent in such candy in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its business respondent is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold 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 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 small bars of candy of uniform size and shape, and a number of large bars of candy. The said large bars of candy are to be given as prizes to purchasers of certain of said small bars of candy, as follows: The majority of said small bars of candy of uniform size and shape in said assortment are of the same

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color, but the minority of said small bars of candy of uniform size and shape have a different color. The said small bars of candy of uniform size and shape retail at 1 cent each, but the purchasers procuring small bars of the minority portion of candy bars are entitled to and are given, without charge, said large bars of candy. The purchaser of the last bar of said small bars of candy is entitled to receive and is given, without charge, one of said large bars of candy. The colors of the minority portion of said small bars of candy are effectively concealed from purchasers and prospective purchasers until a purchase is made and the small bar unwrapped. The said large bars of candy are thus distributed to the purchasing public wholly by means of lot or chance.

PAR. 3. Retail dealers who purchase respondent's assortments of candy, directly or indirectly, expose and sell the same to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with the sales plan hereinabove set forth. Said sales plan has a tendency and capacity to induce purchasers of said candy to purchase respondent's candy in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure additional bars of candy without additional cost. The use by respondent of said method in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said method, is a practice of the sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws. The use by respondent of said method has a tendency unduly to hinder competition or to create a monopoly in that the use thereof has a tendency and capacity to exclude from the candy trade competitors who do not use and adopt the same method or equivalent methods involving the same or equivalent elements of chance or lottery. Many persons, firms, and corporations who make and sell candy in competition with respondent, as above alleged, are unwilling to offer for sale or to sell their products so packed and assembled as above described or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance or any other method which is contrary to public policy, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate consumers of candy are attracted by respondent's said method and manner of packing said

candy and by the element of chance involved in the sale thereof, in the manner above alleged, and thereby are induced to purchase said candy so packed and sold by respondent in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or equivalent sales plans or methods. The use of said method by respondent has a tendency and capacity, because of said game of chance, to unfairly divert to respondent trade and custom from its competitors who do not use the same or equivalent methods; to exclude from the candy trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are unlawful; to lessen competition in the candy trade; to create a monopoly of said candy trade in respondent and in such other distributors of candy as use the same or equivalent methods, and to deprive the purchasing public of the benefit of free competition. The use of said method by respondent has the tendency and capacity to eliminate from said candy trade all actual competitors and to exclude therefrom all potential competitors who do not adopt and use the same or equivalent methods.

PAR. 6. The aforesaid acts and practices of 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 the Federal Trade Commission Act, the Federal Trade Commission, on October 26, 1938, issued and thereafter served its complaint in this proceeding upon respondent Schutter Candy Co., a corporation, charging it with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint (respondent having filed no answer thereto), testimony, and other evidence in support of the allegations of the complaint were introduced by counsel for the Commission and in opposition to the allegations of the complaint by counsel for the respondent before Miles J. Furnas, 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, testimony, and other evidence, briefs in support of the complaint and in opposition

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thereto, and oral arguments of counsel, 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, Schutter Candy Co., is a corporation organized, existing, and doing business under the laws of the State of Delaware with its principal office and place of business located at 1013 North Cicero Avenue, Chicago, Ill. Respondent is now, and for more than 25 years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to jobbers at their respective places of business located in the various States of the United States. Respondent causes and has caused said candy, when sold, to be shipped or transported to said purchasers from its said place of business in the State of Illinois. There is now, and for more than 25 years last past has been, a course of trade by said respondent in such candy in commerce between and among the various States of the United States.

PAR. 2. In so carrying on said business as described in paragraph 1 hereof, respondent manufactured, sold, and distributed an assortment known as "Bingo Country Store Advertising Deal" from about the middle of April 1938 until November 1938. This assortment consisted of 150 small pieces of candy of uniform size and shape and 25 5-cent bars of candy. One hundred twenty-six of said small pieces of candy were of a light color and vanilla flavor; the remaining 24 of said small pieces of candy were of a dark color and chocolate flavor. Said small pieces of candy were all individually wrapped in wrappers on which there were no indications as to the colors of the said pieces of candy, thereby making it impossible to determine the colors of the pieces of candy until the wrappers were removed therefrom. The said pieces and bars of candy were all contained in one carton. The 25 bars of candy were placed in the center of the carton. On one side of the bars were placed 75 of said 126 pieces of candy. On the other side of said bars were placed the remaining 51 of said 126 pieces of candy, and immediately on top of said 51 pieces of candy were placed the said 24 chocolate colored pieces of candy which were contained in a small cardboard tray. On the top of the tray there appeared the following:

For those who like chocolate 24 chocolate bars in this tray.

Since all of the 150 pieces of candy were wrapped in identical wrappers, it was only necessary that said tray, on which appears the state-

ment "For those who like chocolate 24 chocolate bars in this tray," be removed from said carton and the 24 chocolate colored pieces of candy contained in said tray emptied into said carton and mixed with said 126 pieces of candy to make it impossible for a purchaser to ascertain the color of a piece of said candy without first removing the wrapper therefrom.

In the candy industry assortments such as the one hereinabove described are customarily sold by retail dealers in the following manner: Sales are 1 cent each. Each purchaser selecting one of said light-colored pieces of candy receives only such piece of candy for his 1 cent. Purchasers selecting one of the 24 chocolate colored pieces of candy are entitled to and receive one of said bars of candy and the purchaser of the last piece of candy in the assortment receives the 25th of said bars of candy. Purchasers and prospective purchasers are not able to determine the colors of the individual pieces of candy until said pieces of candy have been purchased and the wrappers removed therefrom. Said bars of candy are thus distributed to the purchasing public wholly by lot or chance.

Respondent has sold and distributed various other assortments of candy like or similar to said "Bingo Country Store Advertising Deal" assortment, but the sales plan or method involved in connection with each of said assortments was similar to the one hereinabove described, varying only in detail. Respondent sold a substantial number of cartons of said "Bingo Country Store Advertising Deal" assortment all of which were packed and assembled as above described.

PAR. 3. Candy assortments involving the chance or lot features as described in paragraph 2 hereof, are generally referred to in the candy trade or industry as "draw" or "break and take" assortments. Assortments of candy without any lot or chance feature in connection with their resale to the public are generally referred to in the candy trade or industry as "straight" merchandise. These terms will be used hereinafter to distinguish the various types of assortments. The "draw" or "break and take" assortments are sold principally by retail dealers located near schools to children who comprise a substantial number of the purchasers and consumers of this type of candy.

PAR. 4. Respondent's, "Bingo Country Store Advertising Deal" assortment is similar to other "draw" and "break and take" assortments which are well known in the candy industry. The contents of said "Bingo Country Store Advertising Deal" assortment are such that such assortment is readily recognized by candy dealers as a "draw" or "break and take" assortment and it is not necessary that the manner in which such assortment is to be operated as a "break and take" or "draw" assort-

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ment by the retail dealers be explained to candy dealers because such fact is obvious from the make-up and contents of the assortment. Said assortment was in fact distributed by wholesale dealers and jobbers as a "draw" or "break and take" assortment and in turn was sold to the retail trade as a "draw" or "break and take" assortment.

PAR. 5. The Commission finds that retail dealers who purchased respondent's said "Bingo Country Store Advertising Deal" assortment exposed and sold the same to the purchasing public in accordance with the sales plan or method described in paragraph 2 hereof. Respondent thus supplied to, and placed in the hands of, others a means of conducting lotteries in the sale of its candy in accordance with the sales plan or method described in paragraph 2 hereof. The use by respondent of said sales plan or method in the sale of its products and the sale of said products by and through the use thereof and by the aid of said sales plan or method 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.

PAR. 6. The Commission finds that the sale of said products in the manner above described involves a game of chance or the sale of a chance to procure a piece of candy at a price much less than the normal retail price thereof. Respondent has competitors who sell and distribute like or similar products in commerce between and among various States of the United States but who are opposed to the use of said sales plan or method in the sale of their said merchandise and who do not use said sales plan or method or any other sales plan or method involving a game of chance or the sale of a chance to win something thereby, or any other sales plan or method which is contrary to the public policy of the Government of the United States, and such competitors refrain from the use of such sales plan or method in the sale of their merchandise in commerce between and among the various States of the United States. Such competitors are thereby put to a competitive disadvantage. Because of said element of chance involved in said sales plan or method employed by respondent as hereinabove described, many persons have been induced to buy and sell respondent's products in preference to the products offered for sale and sold by its said competitors. As a result thereof, substantial trade has been unfairly diverted to respondent from its said competitors in commerce between and among the various States of the United States and in the District of Columbia.

## CONCLUSION

The aforesaid acts and practices of the 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 (respondent having filed no answer thereto), testimony, and other evidence taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein and oral argument by D. C. Daniel, counsel for the Commission, and Lewis E. Pennish, counsel for the respondent, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

*It is ordered,* That the respondent, Schutter Candy Co., a corporation, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of candy or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Selling or distributing any merchandise so packed and assembled that sales thereof to the public are to be made or may be made by means of a game of chance, gift enterprise, or lottery scheme.

2. Supplying to, or placing in the hands of, others, packages or assortments of candy which are to be used or may be used to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of said candy contained in said packages or assortments to the public.

3. Supplying to, or placing in the hands of, others for sale to the public assortments of candy, whether contained in one or more than one package, composed of different colored pieces of candy of uniform size and shape individually wrapped in opaque wrappers, and larger pieces of candy or other merchandise, which said larger pieces of candy or other merchandise are to be given or may be given as prizes to the purchasers procuring pieces of candy of a particular color.

4. Supplying to, or placing in the hands of, others any lottery device, which device is to be used or may be used in selling or dis-

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tributing respondent's merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

5. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

*It is further ordered,* That the respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

## Syllabus

IN THE MATTER OF  
NATIONAL MINERAL COMPANY, TRADING AS HELENE  
CURTIS INDUSTRIES

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

*Docket 4185. Complaint, July 12, 1940—Decision, Mar. 12, 1941*

Where a corporation engaged in competitive interstate sale and distribution of two products respectively designated as "Helene Curtis Duchess Machineless Oil Wave," or "Helene Curtis Duchess Machineless Oil Solution," and "Helene Curtis Duchess Machineless Pads"; by advertisements disseminated through the mails, in trade journals and other periodicals, and by circulars, pamphlets, and other advertising literature—

- (a) Represented, directly or through implication, that its said oil preparation supplied nourishment to the hair, imparted strength and vigor thereto and caused growth thereof, that it nourished and invigorated the hair roots and hair shaft, and that it was the original machineless oil wave, facts being said oil preparation was not capable of supplying any nourishment, strength or vigor to the hair, hair roots or hair shaft, nor of causing the growth of hair, and it was not the original machineless oil wave;
- (b) Represented, as aforesaid, that its said pads were equipped with a thermostatic device which controlled and regulated heat, facts being the device on said pads was not thermostatic, but only thermoscopic and merely indicated changes in temperature and would not control or regulate heat; and
- (c) Represented that it made the products it sold, through such statements as "Manufactured by National Mineral Co. \* \* \* World's largest manufacturer of products for the beauty shop," facts being it did not manufacture its solution, but only the pads aforesaid, and was not such a manufacturer, preferentially dealt with directly on part of substantial portion of purchasing public as affording, in its belief, lower prices, superior quality, and other advantages;

With capacity and tendency to mislead and deceive members of purchasing public into the erroneous and mistaken belief that such representations were true, and into the purchase of substantial quantities of its said products because of such belief, with result that trade was diverted unfairly to it from its competitors:

*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. R. P. Bellinger* for the Commission.

*Mr. Adolph A. Robinson*, of Chicago, Ill., for respondent.