

## Complaint

33 F. T. C.

## IN THE MATTER OF

DAVID S. WRIGHT, DOING BUSINESS AS LAKE SHORE  
SEED COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION  
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3994. Complaint, Jan. 19, 1940—Decision, July 23, 1941*

Where an individual engaged in packaging, and in competitive interstate sale and distribution of, vegetable and garden seeds, in the course of which he required from leading supplier-growers, from which he purchased, invoices showing high laboratory tests in all cases and, in addition, submitted seeds to the National Seed Laboratory for testing and made tests himself in mechanical germinators and in the fields, all of which tests showed high germinal powers; reselling, along with new seed, seed which he had theretofore sold to dealers and which he took off their hands at the end of the season—

- (a) Represented that seeds contained in certain packages would germinate in approximate percentages through causing to be stamped upon or attached thereto statements of their germination percentage and the month and year of the test on which such percentage was based; and
- (b) Represented also that his seeds would meet or exceed the published standard percentage of germination established by certain States in which he sold the same;

When in fact many of his said packages contained seeds of a much lower percentage of germination than that represented on packages or otherwise, as disclosed by various tests conducted by the States in question over a period of years, and action taken by said States with respect thereto;

With effect of misleading and deceiving a substantial portion of the purchasing public into the mistaken belief that his seeds would germinate in the percentages represented, and into purchase thereof, in consequence of such belief, to the injury and prejudice of the public, whereby trade was unfairly diverted to him from his competitors who do not misrepresent the germination percentages of their seeds; to their substantial injury:

*Held*, That such acts and practices constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Randolph Preston*, trial examiner.

*Mr. Morton Nesmith* for the Commission.

*Woodin & Woodin*, of Dunkirk, N. Y., 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 David S. Wright, an individual, doing business as Lake Shore Seed Co., hereinafter referred to as respondent, has violated the provisions of said act, and it appear-

ing 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. Respondent, David S. Wright, is an individual doing business as Lake Shore Seed Co., with his principal office and place of business located in the city of Dunkirk, State of New York.

PAR. 2. The respondent is now, and for several years last past has been, engaged in packing and distributing vegetable and garden seed. Respondent causes said vegetable and garden seed, when sold, to be transported from his place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. At all times mentioned herein, respondent has maintained a course of trade in said products in commerce between and among the various States of the United States and in the District of Columbia.

Other persons, firms, associations, and corporations have been and are engaged in offering for sale and selling, and transporting in commerce between and among the various States of the United States, like and competitive seed, and respondent is engaged in substantial competition with such concerns in the sale and distribution of such seed in commerce, as herein set forth.

PAR. 3. Respondent purchases vegetable and garden seed from various growers and, at his place of business in New York, packs such seed in small paper packages. The packages are then placed on wooden racks owned by respondent and are distributed to various local merchants in States other than the State of New York.

Certain of the States of the United States, including some of those in which respondent distributes and sells his seed, require by statute or statutes that vegetable seed sold in such States in addition to other requirements must contain a statement on the package as to the approximate percentage of germination and the month and year of the test on which the percentage is based, unless the germination percentage is equal to or higher than the percentage established for that particular variety of seed by the State authorities. A seed is considered to have germinated when it has developed into a normal seedling which might be expected to continue its development in soil under favorable conditions.

Respondent has caused to be stamped upon or attached to certain of the packages of seed distributed by him statements as to the germination percentage thereof and the month and year of the test on which such percentage is based. This stamping, or affixing, of such statement on the packages, constitutes a representation by the respondent that the seed will meet or exceed the published standard

percentage of germination permitted by the respective States for that particular year. Further, the stamping, or affixing, of such statement on the package is a representation by the respondent that the seed contained therein will germinate in the approximate percentages as stamped thereon.

PAR. 4. In truth and in fact many packages of respondent's seed sold by him as aforesaid, do not, and did not, possess the percentage of germination stated on the packages, but contained seed of a much lower percentage of germination.

PAR. 5. The acts and practices of the respondent, as herein set forth, have the tendency and capacity to, and do, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that respondent's seed will germinate in the percentages as represented, and that his seed has a higher percentage of germination than the actual germination of the seed under recognized tests and within recognized tolerances or allowances. As a result of such erroneous and mistaken belief so engendered; a substantial portion of the purchasing public have been, and are, induced to purchase respondent's seed, thereby unfairly diverting trade to the respondent from his aforesaid competitors who do not make false or misleading statements and representations concerning the germination percentage of their seed. As a result substantial injury has been done by respondent to such competitors in commerce among and between the various States of the United States and in the District of Columbia.

By use of such practices the respondent has also placed in the hands of uninformed or unscrupulous dealers a means and instrumentality whereby such dealers have been, and are, enabled to mislead and deceive members of the purchasing public.

PAR. 6. The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition in commerce 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 the 19th day of January, A. D. 1940, issued and thereafter served its complaint in this proceeding upon the respondent, David S. Wright, an individual doing business as Lake Shore Seed Co., charging him with the use of unfair methods of competition in commerce and unfair and deceptive acts and prac-

tices in commerce, in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, testimony, and other evidence in support of the allegations of the complaint were introduced by Morton Nesmith, attorney for the Commission, and evidence in opposition to the allegations of the complaint was introduced by G. W. Wooding, attorney for respondent, before Randolph Preston, duly appointed trial examiner of the Commission designated by it to serve in this proceeding; and said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, the proceedings regularly came on for final hearing before the Commission on said complaint, the answer thereto, testimony and other evidence, the report of the trial examiner thereon, and briefs in support of the complaint and in opposition thereto; 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 David S. Wright is an individual, doing business as Lake Shore Seed Company, with his principal place of business located in the city of Dunkirk, in the State of New York.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the business of packing, selling, and distributing vegetable and garden seeds, and causes his products, when sold, to be transported from his place of business in the State of New York to purchasers thereof located in various States of the United States and in the District of Columbia. Respondent, at all times mentioned herein, has maintained a course of trade and commerce in said products between and among various States of the United States and in the District of Columbia.

PAR. 3. During all of the time referred to herein, respondent has been in substantial competition with other persons, firms, associations, and corporations engaged in the offering for sale and the sale and distribution in commerce between and among various States of the United States of products of a similar nature to those sold by the respondent.

PAR. 4. Respondent purchases the vegetable and garden seeds sold by him from various growers, and packs such seed in small paper packages, some of which are placed on wooden racks owned by respondent, and when so packed are transported to various local mer-

## Findings

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chants throughout the State of New York. Respondent also sells and distributes his products to purchasers thereof located in various other States of the United States.

At the close of the planting season, respondent's dealer customers are authorized to return the unsold seeds to respondent and receive credit therefor, and more than 50 percent of each year's sales of seed are picked up by respondent's salesmen and returned to respondent, who cleans the seeds and separates them from the chaff, and the same seed, together with new seed, are resold the next season.

PAR. 5. A number of the States into which respondent ships his products, during all the time herein referred to, have had statutes relating to the sale and distribution of vegetable and garden seeds, which require the authorities of such States to establish standards as to the percentage of germination of the seeds sold in such States. Said statutes also provided that each package of seeds sold within the State shall contain thereon the approximate percentage of germination and the month and year of the test on which the percentage is based, unless the germination percentage is equal to, or higher than, the percentage established for that particular variety of seed by the State authorities.

PAR. 6. Respondent purchases the seeds sold by him from the leading growers of the world, and requires invoices showing that the laboratory tests were in all cases high; in addition, respondent has submitted such seeds to the National Seed Laboratory for testing, and report from this Laboratory shows that the seeds have high germinal powers. Respondent has also tested seed sold by him in mechanical germinators and also in the field. Such tests showed the seed to have high germinal powers.

PAR. 7. Respondent in certain instances has caused to be stamped upon, or attached to, the packages of seed distributed by him, statements of the germination percentage thereof and the month and year of the test on which such percentage is based. The stamping or affixing of such statement on the packages constitutes a representation by respondent that the seeds contained in such packages will germinate in the approximate percentages stated on such packages. The respondent has also represented that his seeds will meet or exceed the published standard percentage of germination established by certain States in which he has sold such seeds. In fact, many packages of respondent's seeds sold by him as aforesaid did not and do not possess the percentage of germination represented on the packages thereof, or otherwise, but contained seeds of a much lower percentage of germination.

## Findings

PAR. 8. The Department of Agriculture of the State of Virginia, in the year 1933, secured 128 samples of respondent's products from retail dealers located in said State, and after testing same found that 71.09 percent of the seed was equal to or better than the Virginia standard; 22.6 percent was more than 10 percent below the Virginia standard, and 2.34 percent showed less than 20 percent of germination.

The following table shows the results of tests made for the years 1935 to 1940, inclusive by the Department of Agriculture of the State of Virginia:

| Year      | Number of samples | Equal to or better than Virginia standards | More than 10 percent below Virginia standards | Less than 20 percent germination |
|-----------|-------------------|--------------------------------------------|-----------------------------------------------|----------------------------------|
|           |                   | <i>Percent</i>                             | <i>Percent</i>                                | <i>Percent</i>                   |
| 1935..... | 649               | 67.95                                      | 28.35                                         | 9.09                             |
| 1936..... | 233               | 12.88                                      | 83.69                                         | 13.73                            |
| 1937..... | 258               | 61.63                                      | 36.82                                         | 3.49                             |
| 1938..... | 114               | 73.68                                      | 24.56                                         | 2.63                             |
| 1939..... | 287               | 50.17                                      | 48.08                                         | 10.45                            |
| 1940..... | 105               | 19.05                                      | 80.00                                         | 13.33                            |

As the result of these tests, the Department wrote respondent:

It is our sincere hope that if it is your policy to continue to attempt to put out seed of this quality, that you forego any further effort in this State.

The Department seized a number of packages of respondent's seeds, because of their consistently poor showing as to germination.

The Department of Agriculture of the State of Michigan, in 1938, tested 245 samples of respondent's seeds, to determine their germinal power. The tests showed that in but 16.8 percent were the samples up to the standard of germination set by said department. It was also shown that respondent's seeds were inferior to the seeds of the 34 other concerns which were tested at the same time. The other tests ranged in results from 100 percent to 35.3 percent.

The said department, in the year 1938, seized certain seed distributed by respondent, because they did not comply with the State's requirement as to standard percentage of germination.

The Department of Agriculture of the State of West Virginia, during the years 1934 to and including 1939, made numerous tests of respondent's seeds to determine their germinal power. A test, made in 1939, showed that seed represented by respondent as of 90 percent germination had only 18 percent. In another instance, the claim made by respondent was 70 percent and the test showed only 31 percent; another test showed that for a claim of 72 percent there was only 31 percent.

In 1939, the testing of 65 samples of respondent's product showed that 70 percent were low in the germination stated on the packages, and 30 percent showed the germination claimed. In the year 1934-35, tests showed that of the 70 percent claimed in the case of respondent's seeds, only 31 percent was shown by the tests. In the year 1936-37, 250 samples of respondent's seeds were tested, and in 67 percent of the tests it was shown that the germination was lower than that stated on the packages. Tests made in 1937-38 showed that the germination was lower than that stated on respondent's packages in 83.33 percent of the product tested, and that in 13.6 percent the correct germination was stated on the package. In 1939, 67.69 percent of respondent's products were found to be lower in germination than as stated on the packages, and on only 32.31 percent of the packages was the true germination stated.

As a result of the tests made by the State of West Virginia, the Commissioner of Agriculture of that State, on April 15, 1938, addressed a letter to the respondent which reads:

Regarding my letter of April 2, 1938, our Laboratory reports, having completed 46 germination tests on Lake Shore Seed Company's seed collected from dealers throughout the State, show the percentage of germination so low and, in fact, so much below the guarantee of germination as represented in your sworn statement making application for registration, and the labels on seeds placed on sale in the State of West Virginia, as to clearly render a misstatement and to be worthless for seeding purposes. \* \* \*

By virtue of the authority vested in me as Commissioner of Agriculture of the State of West Virginia, by Chapter XIX, Article XVI of the Code of West Virginia, it becomes my duty to cancel and withdraw all Certificates of registration of the Lake Shore Seed Company. You will take due notice thereof and govern yourself accordingly.

This order made effective this the 15th day of April, 1938.

PAR. 9. The acts and practices of the respondent as herein set forth have the tendency and capacity to, and do, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the respondent's seeds will germinate in the percentages as represented, and that his seeds have a higher percentage of germination than the actual germination of the seed under recognized tests and within recognized tolerances or allowances and as a result of such erroneous and mistaken belief so engendered, a substantial portion of the purchasing public have been and are induced to purchase respondent's seed, to the injury and prejudice of the public. As a further result of said acts and practices of the respondent, trade has been unfairly diverted to the respondent from his competitors who do not make false or misleading statements and representations concerning the germination percentage of their seeds,

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and respondent's said acts and practices have resulted in substantial injury to such competitors in commerce between and among various States of the United States and in the District of Columbia.

## CONCLUSION

The aforesaid acts and practices of the respondent 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 answer of the respondent, testimony, and other evidence introduced before Randolph Preston, duly appointed trial examiner of the Commission designated by it to serve in this proceeding, the report of the trial examiner thereon, and briefs filed on behalf of the Commission and of the respondent; and the Commission having made its findings as to the facts and its conclusion that the respondent, David S. Wright, an individual doing business as Lake Shore Seed Co., has violated the provisions of the Federal Trade Commission Act.

*It is ordered,* That the respondent, David S. Wright, individually, or doing business or trading under the name Lake Shore Seed Co., or any other name or style, his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of vegetable and garden seed, in commerce as "commerce" is defined by the Federal Trade Commission Act, do forthwith cease and desist from representing by means of statements appearing on, or attached to, the packages containing his seed, that the germination percentage of such seed is greater than the actual germination percentage, or making such representation by means of letters, circulars, or other advertising matter, or by any other means.

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

## Complaint

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IN THE MATTER OF  
NASSIF CANDY COMPANY

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

*Docket 4025. Complaint, Feb. 7, 1940—Decision, July 23, 1941*

Where a corporation engaged in competitive interstate sale and distribution of candy and confectionery products, including certain candy assortments so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to consumers, a typical assortment consisting of small pieces of caramel candy of uniform size and shape, medium sized candy bars, and a three-section push card, for use in sale and distribution thereof under a plan, as explained thereon, by which person securing by chance one of certain numbers in each section, for cent paid, was entitled to one of said candy bars, person making last punch in each section receiving two of said bars, and all others received a caramel—

Sold such assortments to wholesalers, jobbers, and directly or indirectly to retailers, by whom they were exposed and sold to the purchasing public in accordance with aforesaid sales plan involving chance to procure without additional cost, additional or larger pieces of candy, and thereby supplied to and placed in the hands of others the means of conducting lotteries in sale of its products, contrary to an established public policy of the United States Government, and in violation of criminal laws, and in competition with many who, unwilling to use any method involving a game of chance to win by chance, or one contrary to public policy, refrain therefrom;

With the result that many persons were attracted by said sales plan and the element of chance involved therein, and were thereby induced to buy and sell its candy in preference to that of aforesaid competitors, thereby unfairly diverting trade in commerce to it from said competitors; to the substantial injury of competition in commerce:

*Held*, That such acts and practices, as above 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. J. V. Mishou* for the Commission.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Nassif Candy Co., a corporation, hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a pro-