

Complaint

34 F. T. C.

IN THE MATTER OF
JOHN SHAPIRO, TRADING AS FEDERAL SALES
COMPANY

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

Docket 4270. Complaint, Aug. 27, 1940—Decision, Nov. 14, 1941

Where an individual engaged in competitive interstate sale and distribution of candy as a middleman representing manufacturers on a commission basis, soliciting orders personally and through a number of employee salesmen, selling certain assortments of candy and other merchandise so packed and assembled as to involve the use of games of chance, gift enterprises or lottery schemes when sold and distributed to the consuming public; a typical assortment consisting of 150 individually wrapped penny caramels of uniform size and shape, together with 12 lead pencils and 8 pencil sets, for sale and distribution under a plan by which purchasers securing by chance the 12 chocolate caramels received such lead pencils, without charge, the 7 purchasers obtaining the red caramels similarly received the pencil sets, and purchaser of last caramel also received one of said sets—

Sold such assortments to wholesalers and jobbers, retail purchasers from whom exposed and sold them to the purchasing public in accordance with sales plan above described, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of his products, contrary to an established public policy of the United States Government, and in competition with many who, unwilling to use any such plan, refrain therefrom;

With tendency and capacity unfairly to divert substantial trade in commerce to him from his said competitors:

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

Before *Mr. Andrew B. Duvall*, trial examiner.

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 John Shapiro, individually and trading as Federal Sales Company, hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, John Shapiro, is an individual trading as Federal Sales Co., with its principal office and place of business located at 150-35 Thirty-fourth Avenue, Flushing, Long Island, N. Y. Respondent is now and for more than one year last past has been engaged in the sale and distribution of candy and confectionery products to wholesale dealers, jobbers, and retail dealers. Respondent causes and has caused said products, when sold, to be shipped from manufacturers in the State of New York to purchasers thereof at their respective points of location in the various States of the United States other than New York and in the District of Columbia. There is now and has been for more than one year last past a course of trade by 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 said business respondent is and has been in competition with other individuals and with partnerships and corporations 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 his business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale dealers, jobbers, and retail dealers certain assortments of candy and other articles of merchandise so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to the consumers thereof. One of said assortments is hereinafter described for the purpose of showing the method used by respondents and is as follows:

This assortment consists of 150 pieces of caramel candy of uniform size and shape, together with 12 common lead pencils and 8 pencil sets. The said pencil sets contain a ruler, a pencil, and a pen holder. Seven of said caramels are red, 12 are chocolate and the remainder, 131, are vanilla. The said caramels are individually wrapped and the color of each is effectively concealed from purchasers and prospective purchasers until a purchase had been made and the wrapper removed therefrom. All of the caramels retail at the price of 1 cent each. Purchasers procuring 1 of the said chocolate caramels are entitled to and receive, without additional cost, 1 of the said pencils. Purchasers procuring one of the said red caramels are entitled to and receive, without additional cost, one of the said pencil sets. The purchaser of the last caramel in said assortment is entitled to and receives, without additional cost, 1 of the said pencil sets. The said pencils and pencil sets are thus distributed to the purchasing and consuming public wholly by lot or chance.

Respondent sells and distributes and has sold and distributed various assortments of candy and other articles of merchandise involving a lot or chance feature, but such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who directly or indirectly purchase respondent's said candy and other articles of merchandise expose and sell the same to the purchasing public in accordance with the sales plan aforesaid. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of his products in accordance with the sales plan hereinabove set forth. The use by respondent of said sales plan or method in the sale of his 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 a sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws.

PAR. 4. The sale of candy and other articles of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure an article of merchandise at a price much less than the normal retail price thereof. Many persons, firms, and corporations who sell or distribute candy and other articles of merchandise in competition with the respondent, as above alleged, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance or any other method that is contrary to public policy and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of his candy and other articles of merchandise and the element of chance involved therein and are thereby induced to buy and sell respondent's said products in preference to products offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent because of said game of chance has a tendency and a capacity to, and does, unfairly divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondent from his said competitors, who do not use the same or equivalent methods, and as a result thereof substantial injury is being done and has been done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. 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 August 27, 1940, issued and thereafter served its complaint in this proceeding upon the respondent, John Shapiro, individually and trading as Federal Sales Co., charging him 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 (no answer thereto being filed by respondent), testimony and other evidence in support of the allegations of the complaint were introduced by J. V. Mishou, attorney for the Commission, before Andrew B. Duvall, a trial examiner of the Commission theretofore duly designated by it (no testimony or other evidence being offered by respondent), and such 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 complaint, testimony and other evidence, report of the trial examiner upon the evidence, and brief in support of the complaint (respondent not having filed brief and oral argument not having been requested); 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 John Shapiro, is an individual trading as Federal Sales Co., with his office and place of business located at 150-35 Thirty-fourth Avenue, Flushing, Long Island, N. Y. Respondent is now, and for more than 3 years last past, has been, engaged in the sale and distribution of candy to wholesale dealers and jobbers.

PAR. 2. Respondent causes and has caused his products, when sold, to be shipped from manufacturers in the State of New York and in other States to purchasers thereof located in various States of the United States other than the States in which such shipments originate. Respondent maintains, and for more than 3 years last past, has maintained, a course of trade in his candy in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of his business respondent is, and at all times mentioned herein has been, in substantial competition with other individuals and with corporations and firms engaged in the

sale and distribution of candy in commerce among and between the various States of the United States.

PAR. 4. Respondent is not a manufacturer and does not manufacture any of the candy which he sells. He is a middleman, representing certain manufacturers of candy and selling the products of such manufacturers to wholesalers and jobbers on a commission basis. Upon obtaining an order for candy respondent transmits such order to the particular manufacturer whose product is desired and the manufacturer ships the candy to the purchaser. Respondent receives for his services in procuring the order a designated percentage of the purchase price of the candy. Not only does respondent personally solicit orders, but he has a number of salesmen employed who assist him in soliciting orders. While most of the respondent's sales are made to purchasers located in the New England States and other States in the eastern portion of the United States, some of his sales have been made to purchasers located in the State of California and in various other States throughout the United States.

PAR. 5. In the course and conduct of his business respondent has sold certain assortments of candy and other merchandise so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when such candy and other merchandise was sold and distributed to the consuming public. One of these assortments was made up as follows:

This assortment consisted of 150 pieces of caramel candy of uniform size and shape, together with 12 lead pencils and 8 pencil sets. The pencil sets contained a ruler, a pencil, and a pen-holder. Seven of the pieces of candy were red, 12 were chocolate, and the remaining 131 pieces were vanilla or white in color. The pieces of candy were individually or separately wrapped, and the color of the various pieces was effectively concealed from purchasers and prospective purchasers until a purchase had been made and the wrapper removed from the candy. All of the pieces of candy sold at retail for 1 cent each. Purchasers who happened to obtain one of the chocolate caramels were entitled to and received without additional cost one of the lead pencils. Purchasers who happened to obtain 1 of the red caramels were entitled to and received without additional cost 1 of the pencil sets. The purchaser of the last caramel or piece of candy in the assortment was entitled to and received without additional cost 1 of the pencil sets. The pencils and pencil sets were thus distributed to the purchasing public wholly by lot or chance.

The sale of this particular assortment was discontinued by respondent sometime during the year 1939. Prior to that time respondent sold and distributed certain other assortments of candy which involved

lot or chance features similar in all material respects to the plan described above.

PAR. 6. Retail dealers who purchased respondent's assortments of candy and other merchandise from wholesalers and jobbers exposed and sold such candy and other merchandise to the purchasing public in accordance with the sales plan herein described. Respondent thus supplied to and placed in the hands of others the means of conducting lotteries in the sale of his products. The use by respondent of such sales plan or method and the sale of respondent's products to the purchasing public by and through the use of such sales plan or method is a practice of a sort which is contrary to an established public policy of the Government of the United States.

PAR. 7. Many of the persons, firms, and corporations who sell and distribute candy in competition with respondent are and have been unwilling to adopt and use the sales plan or method used by respondent in the sale and distribution of his candy, or any other sales plan or method involving the use of a game of chance, gift enterprise, or lottery scheme, and such competitors refrain therefrom. The use by respondent of such game of chance or lottery scheme has the tendency and capacity to divert unfairly to respondent from his said competitors substantial trade in commerce among and between the various States of the United States.

CONCLUSION

The acts and practices of the respondent as herein found are all to the prejudice of the public and of respondent's competitors, and constitute *unfair methods of competition in commerce and unfair 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 (no answer having been filed by respondent), testimony and other evidence taken before Andrew B. Duvall, trial examiner of the Commission theretofore duly designated by it, in support of the allegations of the complaint (no testimony or other evidence being offered in opposition thereto), report of the trial examiner upon the evidence, and brief in support of the complaint (no brief having been filed by respondent and oral argument not having been requested); and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act.

Order

34 F. T. C.

It is ordered, That the respondent, John Shapiro, individually and trading as Federal Sales Co., or trading under any other name, his 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, do forthwith cease and desist from:

1. Selling or distributing candy or any other merchandise so packed and assembled that sales of such candy or other merchandise 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 for ultimate sale to the public, assortments of candy composed of individually wrapped pieces of candy of uniform size and shape but of different colors, such colors being effectively concealed, together with articles of merchandise which are to be or may be given as prizes to purchasers procuring pieces of said candy of a particular color.

3. Supplying to or placing in the hands of others any device which is to be used or may be used in the sale or distribution of respondent's candy or other merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

4. 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 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

IN THE MATTER OF

A. KRASNE, INC.

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

Docket 4280. Complaint, Aug. 28, 1940—Decision, Nov. 14, 1941

Where a corporation engaged in purchasing, selling, and distributing food products at wholesale, buying a substantial portion of its requirements from sellers in other States—

Received and accepted allowances and discounts in lieu of brokerage in substantial amounts through, usually, purchasing commodities at prices lower than those at which they were sold to other purchasers by an amount which reflected all or a portion of the brokerage currently being paid by the sellers to their respective brokers for effecting such sales:

Held, That in receiving and accepting allowances and discounts in lieu of brokerage fees or commissions from sellers upon such purchases, it violated the provisions of subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John T. Haslett for the Commission.

Poses, Katcher & Driesen, of New York City, for respondent.

COMPLAINT¹

The Federal Trade Commission having reason to believe that the 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 subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. title 15, sec. 14), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, A. Krasne, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 845 East One Hundred and Thirty-sixth Street, New York, N. Y. Respondent is engaged in the business of purchasing, selling, and distributing food products at wholesale.

PAR. 2. In the course and conduct of its said business respondent purchases a substantial portion of its requirements from sellers located in States other than the State in which the respondent is located, pursuant to which purchases commodities are caused to be shipped

¹ By a stipulation between respondent and the Commission, approved October 15, 1940, the complaint was amended, nunc pro tunc, by correcting respondent's name to "A. Krasne, Inc."