

Complaint

IN THE MATTER OF

HUGH C. MITCHUM AND CARL B. TUCKER, TRADING AS
SOUTHERN CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4266. Complaint, Aug. 26, 1940—Decision, Feb. 24, 1942*

Where two individuals, engaged in the manufacture and interstate sale and distribution of candy so packed as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to consumers, a typical assortment including 40 uniform candy bars for which purchasers paid from 1 cent to 5 cents, depending upon particular number secured by chance from the accompanying push card—

Sold such assortments to wholesalers, jobbers, and retailers by whom, as direct or indirect purchasers, they were exposed and sold to the purchasing public in accordance with aforesaid sales plan involving sale of a chance to procure candy bars at much less than their normal retail price; and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of their products, contrary to an established public policy of the United States Government, and in competition with many who, unwilling to use methods involving chance or contrary to public policy, refrain therefrom;

With the result that many persons were attracted by said plan and were thereby induced to buy and sell their candy in preference to that of aforesaid competitors, from whom trade was thereby unfairly diverted to them, to the substantial injury of competition in commerce:

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

Before *Mr. W. W. Sheppard*, trial examiner

Mr. L. P. Allen, Jr. and *Mr. J. V. Mishou* for the Commission.

Mr. Fred Henderson Hasty, of Charlotte, N. C., for respondents.

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 Hugh C. Mitchum and Carl B. Tucker, individually, and trading as Southern Candy Co., hereinafter referred to as respondents, have 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. Respondents, Hugh C. Mitchum and Carl B. Tucker, are individuals trading as Southern Candy Co., with their principal

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office and place of business located at 219 North Graham Street, Charlotte, N. C. Respondents are now, and for more than 3 years last past have been, engaged in the manufacture and in the sale and distribution of candy to wholesale dealers, jobbers and retail dealers. Respondents cause, and have caused, said products when sold to be transported from their place of business in the city of Charlotte, N. C., to purchasers thereof at their respective points of location in various States of the United States other than North Carolina. There is now, and for more than 3 years last past has been, a course of trade by respondents in said candy in commerce between and among various States of the United States. In the course and conduct of said business respondents are, and have 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 their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesale dealers, jobbers, and retail dealers, certain assortments of candy 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 is composed of 40 bars of candy of uniform size and shape, together with a device commonly called a push card. The said push card has 40 partially perforated disks, on the face of which is printed the word "Push." Concealed within the said disks are numbers ranging from 1 to 5, inclusive. When the disks are pushed or separated from the card a number is disclosed. Purchasers punching numbers 1, 2, 3, 4 and 5 pay 1¢, 2¢, 3¢, 4¢ and 5¢, respectively. The numbers are effectively concealed from purchasers and prospective purchasers until the disks are pushed or separated from the card. The prices of said bars of candy are thus determined wholly by lot or chance.

The respondents furnish, and have furnished, various push cards for use in the sale and distribution of their candy by means of a game of chance, gift enterprise or lottery scheme. Such cards are similar to the one herein described and vary only in detail.

PAR. 3. Retail dealers who, directly or indirectly, purchase respondents' said candy, expose and sell the same to the purchasing public, in accordance with the sales plan aforesaid. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their products in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plan or method in the sale of their candy and the sale of said candy 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 to the purchasing public by the method or plan hereinabove set forth involves a game of chance or the sale of a chance to procure bars of candy at prices much less than the normal retail price thereof. Many persons, firms, and corporations who sell and distribute candy in competition with respondents, 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 contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondents in the sale and distribution of their candy and in the element of chance involved therein, and are thereby induced to buy and sell respondents' candy in preference to candy of said competitors of respondents who do not use the same or equivalent methods. The use of said method by respondents because of said game of chance has a tendency and capacity to, and does, unfairly divert trade in commerce between and among various States of the United States to respondents from their 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 respondents to competition in commerce between and among various States of the United States.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' 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 26, 1940, issued and thereafter served its complaint in this proceeding upon respondents, Hugh C. Mitchum and Carl B. Tucker, individually, and trading as Southern Candy Co., charging them 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 the complaint, the case was set down for the taking of testimony on December 3, 1940; however, due to the illness of a witness

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subpoenaed to testify at the instance of the Commission at that time, no testimony was taken. Thereafter a stipulation was entered into whereby it was stipulated and agreed that a statement of facts signed and executed by the counsel for the respondent on behalf of the respondents and W. T. Kelley, chief counsel for the Commission, subject to the approval of the Commission, may be taken as the facts in this proceeding and in lieu of testimony in support of the charges stated in the complaint or in opposition thereto and that the Commission may proceed upon said statement of facts to make its report, stating its findings as to the facts (including inferences which may be drawn from said stipulated facts) and its conclusion based thereon, and enter its order disposing of the proceeding as to them without the presentation of further testimony, argument, filing of briefs, or other intervening procedure. Counsel for the respondents also expressly waived the filing of a report upon the evidence by the trial examiner.

Thereafter this proceeding regularly came on for final hearing before the Commission on the complaint and the stipulation as to the facts, said stipulation having been approved, accepted, and filed, 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. Respondents, Hugh C. Mitchum and Carl B. Tucker, are individuals, trading as Southern Candy Co., with their principal office and place of business located at 219 North Graham Street, Charlotte, N. C. Respondents are now, and for more than 3 years last past have been, engaged in the manufacture and in the sale and distribution of candy to wholesale dealers, jobbers, and retail dealers. Respondents cause, and have caused, said products when sold to be transported from their place of business in the city of Charlotte, N. C., to purchasers thereof at their respective points of location in various States of the United States other than North Carolina. There is now, and for more than 3 years last past has been, a course of trade by respondents in said candy in commerce between and among various States of the United States. In the course and conduct of said business respondents are, and have 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 their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesale dealers, jobbers and retail dealers certain assortments of candy 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 is composed of 40 bars of candy of uniform size and shape, together with a device commonly called a push card. The said push card has 40 partially perforated disks, on the face of which is printed the word "Push." Concealed within the said disks are numbers ranging from 1 to 5, inclusive. When the disks are pushed or separated from the card a number is disclosed. Purchasers punching numbers 1, 2, 3, 4, and 5 pay 1¢, 2¢, 3¢, 4¢, and 5¢, respectively. The numbers are effectively concealed from purchasers and prospective purchasers until the disks are pushed or separated from the card. The prices of said bars of candy are thus determined wholly by lot or chance.

The respondents furnish, and have furnished, various push cards for use in the sale and distribution of their candy by means of a game of chance, gift enterprise, or lottery scheme. Such cards are similar to the one herein described and vary only in detail.

PAR. 3. Retail dealers who, directly or indirectly, purchase respondents' said candy, expose and sell the same to the purchasing public, in accordance with the sales plan aforesaid. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their products in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plan or method in the sale of their candy and the sale of said candy 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.

PAR. 4. The sale of candy to the purchasing public by the method or plan hereinabove found involves a game of chance or the sale of a chance to procure bars of candy at prices much less than the normal retail price thereof. Many persons, firms, and corporations who sell and distribute candy in competition with respondents, as above found, 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 contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondents in the sale and distribution of their candy and in the element of chance involved therein, and are thereby induced to buy and sell respondents' candy in preference to candy of said competitors of respondents who do not use the same or equiva-

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lent methods. The use of said method by respondents because of said game of chance has a tendency and capacity to, and does, unfairly divert trade in commerce between and among various States of the United States to respondents from their 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 respondents to competition in commerce between and among various States of the United States.

CONCLUSION

The aforesaid acts and practices of respondents as herein found are to the prejudice and injury of the public and of respondents' 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 and a stipulation as to the facts entered into by counsel for the respondents in behalf of the respondents and W. T. Kelley, chief counsel for the Commission, which provides, among other things, that without adducing further evidence or without other intervening procedure the Commission may issue and serve upon the respondents its findings as to the facts and conclusion based thereon and an order disposing of the proceeding, and the Commission having made its findings as to the facts and conclusion that respondents have violated the provisions of the Federal Trade Commission Act;

It is ordered, That Hugh C. Mitchum and Carl B. Tucker, individually, and trading as Southern Candy Co., or trading under any other name, their 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 by the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or distributing candy or any merchandise so packed and assembled that sales of such candy or other merchandise 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 push or pull cards, punch boards, or other lottery devices, either with assortments of candy or with other merchandise, or separately, which said push

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or pull cards, punch boards, or other lottery devices are to be used, or may be used, in selling or distributing such candy or other merchandise.

3. 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 respondents shall, within 60 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

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IN THE MATTER OF

LITTLE ROCK TENT & AWNING COMPANY, TRADING AS
TUF-NUT GARMENT MANUFACTURING COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4481. Complaint, Apr. 4, 1941—Decision, Feb. 24, 1942*

Where a corporation, which was engaged in the manufacture and competitive interstate sale and distribution of its "Tuf-Nut" work garments to wholesalers, jobbers, and retailers, and which, during a recent 8-month period sold about 1½ million pants, shirts, and overalls and awarded about 1,000 suits or garments as below described—

Sold its said products through use of a scheme which involved a lottery in the sale and distribution thereof to consumers, it furnishing dealers with a display poster card explaining their plan, pursuant to which purchasers became entitled to "Join the Khaki Suit Club," and that one of the 60 provided for whose number corresponded to that under the poster's master seal, received a "Tuf-Nut Khaki Suit" consisting of matching shirt and pants; and thereby

Supplied to and placed in the hands of others means of conducting a lottery in the sale of its products, through use of aforesaid sales plan by retail dealers who exposed and sold its garments to the purchasing public in accordance with game of chance to procure suit or other garment without cost, contrary to the established policy of the United States Government, and in competition with many who do not use methods involving chance; With the result that many persons were attracted by its said sales plan and the element of chance involved therein, and were thereby induced to buy its garments in preference to those of its aforesaid competitors, with tendency and capacity thereby to divert trade unfairly 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 acts and practices therein.

Before *Mr. William C. Reeves* and *Mr. Lewis C. Russell*, trial examiners.

Mr. J. W. Brookfield, Jr., for the Commission.

House, Moses & Holmes, of Little Rock, Ark., 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 Little Rock Tent & Awning Co., a corporation, trading as Tuf-Nut Garment Manufacturing Co., hereinafter referred to as respondent has violated the pro-