

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, JULY 1, 1943, TO DECEMBER 31, 1943

IN THE MATTER OF

FISHER NUT AND CHOCOLATE COMPANY

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

Docket 4594. Complaint, Sept. 25, 1941—Decision, July 7, 1943

Where a corporation, engaged in the manufacture and competitive interstate sale and distribution of assortments of candy and nut products so packed and assembled as to involve the use of games of chance in retail sale thereof, a typical assortment consisting of several tins of salted peanuts and a punch-board for use in their sale and distribution to consumers under a plan by which chance selection of certain numbers entitled purchaser, for the 2 cents paid, to a tin of peanuts, value of which was in excess thereof, and purchaser of last punch in each of the six sections into which board was divided received a tin, others receiving nothing for their money—

Sold to wholesalers such assortments, and thereby supplied to and placed in the hands of retail purchasers, who exposed and sold same to purchasing public, in accordance with aforesaid plan, the means of conducting lotteries in the sale and distribution of its said products, contrary to an established public policy of the United States Government, and in competition with many who refrain from use of any such method;

With result that many persons were attracted by its said plan and the element of chance involved therein, and were thereby induced to buy and sell its said products in preference to those of its aforesaid competitors; and with capacity and tendency thereby unfairly to divert trade in commerce 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. John W. Addison*, trial examiner.

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

Weinstein & Kline, of Milwaukee, Wis., for respondent.

Complaint

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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 Fisher Nut and Chocolate Co., a corporation, 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, Fisher Nut and Chocolate Co., is a corporation, organized and doing business under and by virtue of the laws of the State of Minnesota with its office and principal place of business located at 2327 Wycliff Street, St. Paul, Minn. Respondent is now and for more than 6 months last past has been engaged in the manufacture of candy and nut products and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States and in the District of Columbia. Respondent causes and has caused said products, when sold, to be transported from its aforesaid principal place of business in the city of St. Paul, Minn., to purchasers thereof at their respective points of location in various States of the United States other than Minnesota and in the District of Columbia. There is now, and has been for more than 6 months last past, a course of trade by respondents in such candy and nut products 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 corporations and with partnerships and individuals engaged in the sale and distribution of candy and nut products 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 wholesale dealers, jobbers, and retail dealers certain assortments of candy and nut products so packed and assembled as to involve the use of games of chance, gift enterprizes, or lottery schemes when sold and distributed to the consumer thereof. One of said assortments is hereinafter described for the purpose of showing the method used by respondent, and is as follows:

This assortment includes several tins of salted peanuts and a punch board. Appearing on the face of the punch board is the following inscription:

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FISHER'S VACUUM
FRESH

2¢ per sale

(Depletion
of can of
peanuts)

Numbers 10, 20, 30, 110, 120, 130, 210

220, 230, 310, 320, 330 Each Receive

8 oz. Vacuum Pack

FISHER'S PARTY PACK

Numbers 15, 25, 35, 115, 125, 135, 215

225, 235, 315, 325, 335 Each Receive

8 oz. Vacuum Pack

"SALTED IN THE SHELL" PEANUTS

LAST SALE IN EACH SECTION REC'S

8 oz. Vacuum Pack

"SALTED IN THE SHELL" PEANUTS

Said peanuts are distributed to the purchasing public by means of said punch board in the following manner: Sales are 2 cents each, and when a purchase is made, a number is disclosed. The numbers begin with one and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence and said numbers are arranged in 6 sections. The board bears a statement informing purchasers and prospective purchasers that said specified numbers entitle the purchaser thereof to receive a can of peanuts, and the last sale in each of the sections completely sold entitles the purchaser to receive a can of peanuts. A purchaser who does not qualify by obtaining one of the specified numbers or the last punch in a section receives nothing for his money. The peanuts are worth more than 2 cents a can, and the purchaser who obtains a number calling for a can of peanuts receives the same for 2 cents. The numbers are effectively concealed from purchasers and prospective purchasers until a purchase or selection has been made and the particular punch separated from the board. The peanuts are thus distributed to members of the purchasing public wholly by lot or chance.

The respondent furnishes and has furnished various punch boards and push cards for use in the sale and distribution of its candy and other products by means of a game of chance, gift enterprise or lottery scheme. Such punch boards and push cards are similar to the one herein described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's candy and nut products, directly or indirectly, 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 and distribution of its products in accordance with the sales plan or method hereinabove set forth.

The use by respondent of said sales plan or method in the sale of its candy and nut products and the sale of said candy and nut 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.

PAR. 4. The sale of candy and nut products 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 candy and nut products at prices much less than the normal retail price thereof. Many persons, firms, and corporations who sell and distribute candy and nut products in competition with respondent as above alleged do not 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 respondent in the sale and distribution of its candy and nut products and in the element of chance involved therein and are thereby induced to buy and sell respondent's candy and nut products in preference to candy and nut products of 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 capacity to unfairly divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondent from its said competitors who do not use the same or equivalent method, 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 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 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 September 25, 1941, issued and subsequently served its complaint in this proceeding on the respondent, Fisher Nut and Chocolate Co., a corporation, charging it with the use of unfair methods of competition in commerce and unfair acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of, and in opposition to, the allegations of said complaint were introduced before a trial

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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, this proceeding regularly came on for final hearing before the Commission upon said complaint, testimony, and other evidence, report of the trial examiner upon the evidence, and briefs filed in support of the complaint and in opposition thereto (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. Respondent, Fisher Nut and Chocolate Co., is a corporation, organized and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 2327 Wycliff Street, St. Paul, Minn. Respondent is now, and for more than 1 year last past has been, engaged in the manufacture of candy and nut products and in the sale and distribution thereof to wholesale dealers and jobbers located in the various States of the United States. Respondent causes, and has caused, said products, when sold, to be transported from its aforesaid principal place of business in the city of St. Paul, Minn., to purchasers thereof at their respective points of location in various States of the United States other than Minnesota. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in such candy and nut products in commerce between and among the various States of the United States.

In the course and conduct of said business, respondent is, and has been, in competition with other corporations and with partnerships and individuals engaged in the sale and distribution of candy and nut products 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, respondent sells, and has sold, to wholesale dealers and jobbers certain assortments of candy and nut products so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to the consumer thereof. One of said assortments is hereinafter described for the purpose of showing the method used by respondent, and is as follows:

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This assortment includes several tins of salted peanuts and a punch board. Appearing on the face of the punch board is the following inscription:

	FISHER'S VACUUM FRESH	
		2¢ per sale
	Numbers 10, 20, 30, 110, 120, 130, 210	
	220, 230, 310, 320, 330 Each Receive	
	8 oz. Vacuum Pack	
	FISHER'S PARTY PACK	
	Numbers 15, 25, 35, 115, 125, 135, 215,	
	225, 235, 315, 325, 335 Each Receive	
	8 oz. Vacuum Pack	
	"SALTED IN THE SHELL" PEANUTS	
	LAST SALE IN EACH SECTION REC'S	
	8 oz. Vacuum Pack	
	"SALTED IN THE SHELL" PEANUTS	

(Depletion
of can of
peanuts)

Said peanuts are distributed to the purchasing public by means of said punch board in the following manner: Sales are 2 cents each, and when a purchase is made, a number is disclosed. The numbers begin with one and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence and said numbers are arranged in 6 sections. The board bears a statement informing purchasers and prospective purchasers that said specified numbers entitle the purchaser thereof to receive a can of peanuts, and the last sale in each of the sections completely sold entitles the purchaser to receive a can of peanuts. A purchaser who does not qualify by obtaining one of the specified numbers or the last punch in a section receives nothing for his money. The peanuts are worth more than 2 cents a can, and the purchaser who obtains a number calling for a can of peanuts receives the same for 2 cents. The numbers are effectively concealed from purchasers and prospective purchasers until a purchase or selection has been made and the particular punch separated from the board. The peanuts are thus distributed to members of the purchasing public wholly by lot or chance.

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

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PAR. 3. Retail dealers who purchase respondent's candy and nut products expose and sell the same to the purchasing public in accordance with the sales plan hereinbefore described. Respondent thus supplies to, and places in the hands of, others the means of conducting lotteries in the sale and distribution of its products in accordance with the sales plan or method hereinabove set forth. The use by respondent of said sales plan or method in the sale of its candy and nut products and the sale of said candy and nut 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.

PAR. 4. The sale of candy and nut products 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 candy and nut products at prices much less than the normal retail price thereof. Many persons, firms, and corporations who sell and distribute candy and nut products in competition with respondent as above described do not 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 respondent in the sale and distribution of its candy and nut products and in the element of chance involved therein and are thereby induced to buy and sell said candy and nut products so packed and sold by the respondent in preference to candy and nut products of 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 capacity to unfairly divert trade in commerce between and among the various States of the United States to respondent from its said competitors who do not use the same or equivalent method.

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 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, answer of the re-

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spondent, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, report of the trial examiner upon the evidence, and briefs filed in support of the complaint and in opposition thereto; and the Commission having made its findings as to the facts and its conclusion that said respondent, Fisher Nut and Chocolate Co., a corporation, has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Fisher Nut and Chocolate 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 and nut products or 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, nut products, or any other merchandise so packed or assembled that sales of said merchandise to the public are to be made or, due to the manner in which such candy, nut products, or other merchandise is packed or assembled at the time it is sold by respondent, 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, nut products, or other merchandise or separately, which said push or pull cards, punch boards, or other lottery devices are to be used or may be used in selling or distributing said candy, nut products, or other merchandise to the public.

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 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
LEKAS AND DRIVAS, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4815: Complaint, Aug. 14, 1942—Decision, July 7, 1943*

Where a corporation, engaged in the importation and sale of its "Aristocratic Imported Virgin Olive Oil" and "L. & D. Olive Oil", in advertisements in newspapers, periodicals, circulars, and other advertising literature, and by radio broadcasts—

- (a) Represented that its olive oil had value as a tonic and would invigorate and build up the vital organs; and that use thereof would promote and maintain health, and prevent such diseases as appendicitis, gallstones, and bladder infections; and
- (b) Represented that the nutritive value of its olive oil was three and one-half times greater than that of dried meat; that it contained 45 times more calories than fresh meat; that use thereof supplied substantial quantities of vitamins A, E, and F, and that it was second only to cod liver oil in vitamin A content;

The facts being that olive oil does not have therapeutic and medicinal values thus attributed to it, being practically a pure fat and acting as such in nutrition; it contains very small amounts of vitamin A and E, content of former being in no way comparable to that of cod liver oil or ranking second thereto; it has no therapeutic value in the treatment of any condition where use of such vitamins might be beneficial and no specific value in treatment of any disease or condition; vitamin F is not generally known or recognized by the medical or biochemical professions; and comparison of the nutritive value of olive oil with that of meat on the basis of caloric content is misleading, since it supplies only pure fat or fatty acids and food value of meat lies chiefly in its proteins; and

- (c) Represented that its olive oil, applied externally, would cure many skin irritations and relieve neuralgia and rheumatic aches;

The facts being the value obtained from external use thereof was that of a lubricant, and while it might be beneficial to the skin when a deficiency of natural oils existed, it has little or no therapeutic value in the treatment of skin irritations other than as a lubricant or as an oily base for other drugs, and none in the treatment or alleviation of pain resulting from neuralgia or rheumatism other than facilitating rubbing or massage;

With capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that said representations were true, thereby causing it to purchase substantial quantities of said product:

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

Before *Mr. John L. Horner*, trial examiner.

Mr. DeWitt T. Puckett for the Commission.

Mr. James Madison Blackwell and *Mr. Louis S. Lewis*, of New York City, for respondent.