

Syllabus

IN THE MATTER OF

JOE WLODINGER, CELIA WLODINGER, AND HARRIET WLODINGER, TRADING AS FARMERS' MAIL ORDER HOUSE

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914

Docket 5461. Complaint, Sept. 23, 1946—Decision, Nov. 3, 1947

Where two partners, engaged in the interstate sale and distribution of new, used, made-over, and second-hand wearing apparel, in advertising their merchandise in various trade and farm journals, and by catalogs mailed directly to prospective purchasers, and in various other ways—

- (a) Represented that they were making an introductory or bargain offer of their products, through such statements as "Our Introductory Bargain Offer to You * * * 10 Dresses \$2.98—20 Dresses \$5.90"; when in fact such merchandise could be purchased by anyone, or repeatedly by the same purchaser, at the prices specified therein;
- (b) Represented that with every purchase of \$5.90 or more a purchaser would receive a dress "absolutely free" as a special introductory gift; the fact being the purchase of other merchandise and payment of a valuable consideration was required before delivery of said dress to the purchaser; and
- (c) Represented that they were offering for sale work socks which contained wool, waterproof raincoats, women's wool skirts and ladies' linen or part linen handkerchiefs; when in fact the socks advertised as having a "cashmere finish" contained no wool whatever, the raincoats were not waterproof, the "wool skirts" were predominantly rayon, and the "linen" handkerchiefs were made of cotton;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that said representations were true, and thereby to cause its purchase of their merchandise; and

Where said partners, engaged, in the course of their said business, in the purchase of old, worn, or previously used hats, which they had cleaned, dyed and blocked, and to which, whenever necessary, they added new trimmings, sweat bands, and linings, and some of which when thereafter offered for sale, had the appearance of new—

- (d) Sold their said hats with no label, marking, or designation stamped thereon or attached thereto to indicate to the purchasing public that they were in fact second-hand or reconditioned products, which had been processed to appear new and were readily accepted by members of the purchasing public as new;

With the result that a substantial portion of said public was led to believe that said hats were in fact new hats, made entirely of new materials, and purchased substantial quantities thereof; and with the effect of placing in the hands of purchasers of their said hats for resale, a means and instrumentality whereby the latter might and did mislead and deceive the purchasing public as to the true facts in regard thereto:

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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.

In a proceeding in which respondents—engaged in the sale and distribution of new, and of used, made-over, and second-hand wearing apparel—were charged, among other things, with failing to disclose through use of tags, labels, or other markings on their merchandise that certain of their products were second-hand or previously used or worn, and, where affirmative statements of fiber content had been made, with failing to disclose the true constituent fiber or material from which certain of their said products were made, thereby placing in the hands of purchasers for resale means and instrumentalities whereby the consumer purchaser could be misled and deceived; but in which it did not affirmatively appear that the second-hand garments sold by them were so renovated or refinished as to permit their being passed off as new by purchasers for resale, or that in the circumstances there was necessity for disclosing their fiber content, lacking any affirmative misrepresentation thereof; no findings were made pursuant to the aforesaid charges of the complaint.

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

Mr. DeWitt T. Puckett for the Commission.

Mr. Harold Kornfeld, of New York City, 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 Joe Wlodinger, Celia Wlodinger, and Harriet Wlodinger, individually and as copartners trading as Farmers' Mail Order House, 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 public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents, Joe Wlodinger, Celia Wlodinger, and Harriet Wlodinger, are copartners trading as Farmers' Mail Order House and have their principal office and place of business at 628 Broadway, New York, N. Y. Respondents are now, and for more than 1 year last past have been, engaged in the sale and distribution of new, used, made-over and second-hand wearing apparel.

Respondents cause said products, when sold, to be transported from their aforesaid place of business in the State of New York to purchasers thereof in their respective points of location in various States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course

of trade in said products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of their said merchandise, the respondents advertise their products in trade and farm journals, by catalogs mailed direct to prospective purchasers, and in various other ways.

Illustrative of respondents' initial or contract advertisements is the following:

CLOTHING FOR SALE

10 DRESSES, CLEANED, PRESSED, \$2.98. FREE Catalog, 200 used, new clothing bargains for entire family. Winter and Spring Coats, suits, shoes, hats, skirts, sweaters, army shoes, pants. All ready to wear. (Complete stock of Army goods.) Farmers' Mail Order House, 628-J Broadway, New York, N. Y.

Among and typical of the statements and representations that appeared in respondents' aforesaid catalogs are the following:

Our Introductory Bargain Offer to You Just One of the Many Bargains That the FARMERS MAIL ORDER HOUSE Brings to You—10 Dresses \$2.98—20 Dresses \$5.90

* * * * *

Special

Introductory Gift

With every order of \$5.90 or more—containing the Special Dress Bargain—10 Dresses \$2.98, we will give you ABSOLUTELY FREE a beautiful Ladies' Dress, Cleaned and Pressed, Ready to Wear.

* * * * *

LADIES' & MISSES'

SMART DRESSES

Assorted Styles in Silk and Rayon Acetate

* * * * *

MEN'S BRAND NEW SOCKS

Cashmere Finish.

* * * * *

Reclaimed Army

LIGHTWEIGHT RAINCOATS—

Water proof.

* * * * *

LADIES' AND MISSES' SKIRTS—

Wool.

* * * * *

Ladies' and Misses' Silk Blouses

* * * * *

Ladies' New Domestic Hankies

A beautiful all white linen finish hanky with hemstitched borders.

* * * * *

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PAR. 3. Through the use of the foregoing statements and representations and others of similar import not set out herein, the respondents represented that they are making an introductory or bargain offer of certain merchandise; that with every purchase of \$5 or more, such purchaser will receive a free dress as a special introductory gift; that they are offering for sale silk dresses and blouses, work socks that contain wool, rainproof raincoats, women's wool skirts, and ladies' linen or part linen handkerchiefs.

PAR. 4. The foregoing statements and representations are false and misleading. In truth and in fact, respondents have no introductory or bargain offer. The merchandise referred to, described in said advertisement as an introductory or bargain offer, can be purchased by anyone or repeatedly by the same purchaser at the prices specified in the advertisement. The dress referred to as a special introductory gift is not given free by respondents but requires the purchase of other merchandise and the payment of a valuable consideration before the dress is delivered to the purchaser. The socks advertised as having a cashmere finish contain no wool whatever but are composed of other fibers. The raincoats advertised as waterproof are not waterproof. The skirts advertised as wool skirts are not composed wholly of wool but are predominantly rayon. The handkerchiefs advertised as being composed of linen or containing linen are made of cotton.

PAR. 5. In addition to the misrepresentations hereinabove set out the respondents have engaged in the use of false, deceptive, and misleading practices in their said business by failing to disclose by the use of tags and labels or other markings on said merchandise that certain of said products were second-hand or previously used or worn, and where affirmative statements of fiber content have been made, by failure to disclose the true constituent fiber or material from which certain of their said products were made, thereby placing in the hands of purchasers thereof for resale the means and instrumentalities whereby the consumer-purchaser of said goods can be misled and deceived.

PAR. 6. The use by the respondents of the aforesaid false, misleading, and deceptive statements and representations has had and now has a tendency and capacity to mislead and deceive, and has misled and deceived, a substantial portion of the purchasing public into the erroneous and mistaken belief that said representations and statements are true, and has caused and now causes a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' merchandise.

PAR. 7. In the course and conduct of their business as aforesaid, the respondents buy old, worn or previously used hats, have them cleaned, dyed, and blocked and wherever necessary add new trimmings, sweat bands and linings, and sell said products in commerce as aforesaid.

PAR. 8. Some of the aforesaid hats, when offered for sale and sold by respondents, have the appearance of new hats. When such hats having the appearance of new hats are offered to the purchasing public and are not clearly and conspicuously labeled as being reconditioned or second-hand hats, they are readily accepted by members of the purchasing public as being new products.

Said hats are sold to purchasers without any label, marking, or designation stamped thereon or attached thereto to indicate to the purchasing public that said hats are in fact second-hand or reconditioned products that have undergone certain processes which have given them the appearance of new products. As a result, a substantial portion of the purchasing public has been led to believe, and are now being led to believe, that they were and are in fact new hats manufactured entirely from new materials. As a result of this erroneous and mistaken understanding and belief, substantial quantities of respondents' said hats have been purchased and are now being purchased by members of the public. By said acts and practices respondents also place in the hands of purchasers of their merchandise for resale a means and instrumentality whereby they may and do mislead and deceive the purchasing public as to the true facts in regard to respondents' said hats.

PAR. 9. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice and injury of the public and constitute unfair or 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 September 23, 1946, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After respondents filed answer, a stipulation was entered into upon the record and certain exhibits were introduced into evidence at a hearing before an examiner of the Commission theretofore duly designated by it; and it was agreed that, subject to the approval of the Commission, the facts stipulated into the record may be taken

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as the facts in this proceeding and in lieu of testimony in support of the charges stated in the complaint and 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 and its conclusions based thereon and enter its order disposing of the proceeding without intervening procedure. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, answer, the facts stipulated into the record (said stipulated facts having been approved and accepted), the exhibits introduced into evidence, and the recommended decision of the trial examiner; 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 Joe Wlodinger and Celia Wlodinger are copartners trading as Farmers' Mail Order House, with their office and principal place of business at 628 Broadway, New York, N. Y. They are now, and for a number of years last past have been, engaged in the sale and distribution of new, used, made-over, and second-hand wearing apparel. Respondent Harriet Wlodinger, charged in the complaint as a copartner with the other respondents, is not now and never has been a member of said partnership, and is not hereafter referred to in these findings of fact as a respondent in this proceeding.

PAR. 2. In the course and conduct of their aforesaid business, respondents cause their said products, when sold, to be transported from their place of business in the State of New York to the purchasers thereof at their respective points of location in various other States of the United States and in the District of Columbia, and maintain and at all times mentioned herein have maintained a course of trade in said products in commerce among and between various States of the United States and in the District of Columbia.

PAR. 3. For the purpose of inducing the purchase of their merchandise, respondents advertise in various trade and farm journals, by catalogs mailed directly to prospective purchasers, and in various other ways. Illustrative of respondents' initial or contact advertisement is the following:

CLOTHING FOR SALE

10 DRESSES, CLEANED, PRESSED, \$2.98

FREE Catalog, 200 used, new clothing bargains for entire family. Winter and Spring Coats, suits, shoes, hats, skirts, sweaters, army shoes, pants. All ready

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to wear. (Complete stock of Army goods.) Farmers' Mail Order House, 628-J Broadway, New York, N. Y.

Among and typical of the statements and representations that appeared in respondents' said catalogs are the following:

Our introductory Bargain Offer to You Just One of the Many Bargains That the Farmers Mail Order House Brings to You—10 Dresses \$2.98—20 Dresses \$5.90.

* * * * *

Special

Introductory Gift

With every order of \$5.90 or more—containing the Special Dress Bargain—10 Dresses \$2.98, we will give you ABSOLUTELY FREE a beautiful Ladies' Dress, Cleaned and Pressed, Ready to Wear.

* * * * *

LADIES & MISSES'

SMART DRESSES

Assorted Styles in Silk
and Rayon Acetate

* * * * *

MEN'S BRAND NEW SOCKS

Cashmere Finish

* * * * *

Reclaimed Army

LIGHTWEIGHT RAINCOATS—

Water proof

* * * * *

LADIES' & MISSES' SKIRTS—

Wool

* * * * *

Ladies' and Misses' Silk Blouses

* * * * *

Ladies' New Domestic Hankies

A beautiful all-white linen finished hanky with hemstitched borders.

PAR. 4. Through the use of the aforesaid statements and representations, respondents represented that they were making an introductory or bargain offer of said merchandise; that with every purchase of \$5.90 or more a purchaser would receive a dress "absolutely free" as a special introductory gift; that they were offering for sale work socks that contained wool, waterproof raincoats, women's wool skirts, and ladies' linen or part-linen handkerchiefs.

PAR. 5. The aforesaid statements and representations are false and misleading. In truth and in fact respondents have had no special introductory or bargain offer. The merchandise referred to in said

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advertisements as an introductory or bargain offer could be purchased by anyone, or repeatedly by the same purchaser, at the prices specified in the advertisement. The dress referred to as the special introductory gift was not given free by respondents, but the purchase of other merchandise and payment of a valuable consideration was required before delivery of the dress to the purchaser. The socks advertised as having a cashmere finish contained no wool whatever. The raincoats advertised as waterproof were not waterproof. The skirts advertised as wool skirts were not composed wholly of wool, but were predominately rayon. The handkerchiefs advertised as being composed of linen or containing linen were made of cotton.

PAR. 6. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, and practices has had, and has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the statements and representations made are true and to cause a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase respondents' merchandise.

PAR. 7. In carrying on their said business, respondents buy old, worn, or previously used hats, have them cleaned, dyed, and blocked, and whenever necessary add new trimmings, sweatbands, and linings, and thereafter sell said hats in commerce as aforesaid. These hats are sold to the purchaser without any label, marking, or designation stamped thereon or attached thereto to indicate to the purchasing public that said hats are in fact second-hand or reconditioned products that have undergone processes that have given them the appearance of new products. Some of such hats, when offered for sale and sold by respondents, have the appearance of new hats, and when offered to the purchasing public without being clearly and conspicuously labeled as being reconditioned or second-hand hats, they are readily accepted by members of the purchasing public as being new hats. As a result, a substantial portion of the purchasing public has been led to believe, and is now being led to believe, that they were, and are in fact, new hats manufactured entirely from new materials. As a result of this erroneous and mistaken understanding and belief, substantial quantities of respondents' said hats have been purchased, and are now being purchased, by members of the public. Said hats and practices of respondents also place in the hands of purchasers of their said hats for resale a means and instrumentality whereby they may, and do, mislead and deceive the purchasing public as to the true facts in regard to such hats.

CONCLUSION

The acts and practices of respondents, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Inasmuch as it does not affirmatively appear that the second-hand garments sold by respondents are so renovated or refinished as to permit their being passed off as new by purchasers for resale, or that in the circumstances of this case there is necessity for disclosing the fiber content of second-hand garments provided there is no affirmative misrepresentation of such content, no findings have been made pursuant to the charges of the complaint respecting failure to tag or label second-hand garments.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondents, a stipulation entered into upon the record and certain exhibits introduced in evidence at a hearing before an examiner of the Commission theretofore duly designated by it, and the recommended decision of the trial examiner, said stipulation providing, among other things, that without further evidence or other intervening procedure the Commission may make its findings as to the facts and conclusion based thereon and enter its order disposing of this proceeding, and the Commission having made its findings as to the facts and its conclusion that respondents Joe Wlodinger and Celia Wlodinger have violated the provisions of the Federal Trade Commission Act:

It is ordered, That respondents Joe Wlodinger and Celia Wlodinger, jointly or severally, their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of wearing apparel and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that an offer of merchandise which may be purchased repeatedly by the same person, at the price specified in such offer, is an introductory offer.

2. Using the word "free," or any other word or term of similar import or meaning, to designate, describe, or refer to any article the cost of which is included in the purchase price of other merchandise with which such article is offered.

3. Representing, directly or by implication, that any raincoat which is not in fact waterproof is waterproof.

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4. Representing, directly or by implication, that any garment or fabric which is not composed wholly of wool is wool; that any garment or fabric which is not composed wholly of linen is linen; or otherwise misrepresenting the fiber content of any garment or fabric.

5. Representing that hats composed in whole or in part of used or second-hand materials are new or are composed of new materials by failing to stamp on the exposed surface of the sweat bands thereof in legible and conspicuous terms which cannot be removed or obliterated without mutilating the sweat bands a statement that such products are composed of second-hand or used material (e. g., "second-hand," "used," or "made-over"); provided that if sweat bands are not affixed to such hats, then such stamping must appear on the exposed surface of the inside of the body of the hats in conspicuous and legible terms which cannot be removed or obliterated without mutilating said bodies.

It is further ordered, That respondents shall, within 60 days after the 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.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to respondent Harriet Wlodinger.

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IN THE MATTER OF
THE CURTISS CANDY COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATIONS OF SECTION 2 (a), (d), (e), and (f), AND SECTION 3 OF AN ACT OF CONGRESS APPROVED OCTOBER 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Dockets 4556 and 4673. Complaints, Aug. 5, 1941, and July 13, 1944¹—Decision, Nov. 12, 1947

Where a corporation engaged in the manufacture of many kinds of candy and confectionery products including, principally, its "Baby Ruth", "Butterfinger", "Jolly Jack", "Man-O-War" and "Kokonut Roll" and other 5-cent candy bars, and in the competitive interstate sale and distribution of its said products to jobbers, chain drug and chain grocery stores, syndicate stores, and vending machine operators, and which in 1940 made gross sales of about \$14,000,000, including over \$8,000,000 derived from the sale of the said bars;

In purchasing unmixed corn sirup or glucose, one of the principal ingredients in said products—prices of which were at all times uniform throughout the industry, with price changes customarily announced to the trade just prior to or on becoming effective, with users permitted to place orders at the old and lower prices for periods of from 5 to 10 days after the effective date of an announced advance, for delivery within an additional 30 days—and which it purchased from manufacturers usually in railroad tank carloads of about 95,000 pounds each, through a purchasing officer, who had charge of all the purchases of corn sirup made by it, and whose duty it was to keep, and who did keep, accurately and currently informed of the prices and terms of sale of said product—

- (a) Knowingly induced and knowingly received favorable discriminatory prices on corn sirup purchased by it from different manufacturers, and knowingly had the benefit, through delayed shipment, of price advantage on corn sirup received therefrom, through arrangements whereby it was permitted to deduct 10 cents per hundredweight (or about \$95 per tank car) from the invoice price of 19 cars thereof, procured 15 additional cars at a similar saving, and another 15 at 20 cents per hundredweight less than seller's published price to its customers; and
- (b) Knowingly induced and received price discriminations on more than 150 shipments at the old and more favorable prices through booking practices and extensions in shipping dates beyond the customary 30-day allowance, as above set forth;

With the result that the substantial savings thus procured by it in the purchase of said product—amounting in the case of reductions from the hundred-weight price, according to the estimate of its representative, to about \$10,000 for 1940 and 1941—were sufficient either in those cases or in the case of savings which accrued because of the deliveries at the lower price level after the customary 30-day period, to cause a candy manufacturer

¹ Date of the amended complaint in Docket 4673.

to divert the largest proportion of its business to the corn sirup manufacturer granting such favored price; and secured it a proportionate price advantage: Effect of which price discriminations was to substantially lessen competition by causing it to purchase from manufacturer granting the discrimination, in preference to competitors; and was to lessen, and injure, destroy, and prevent competition between it and other candy manufacturers by decreasing the cost to it of one of the principal ingredients of its products, give it a price advantage in the sale thereof; and confer thereby on it a financial power to further the sale of its products through the use of such increased saving by which it alone benefited:

Held, That such discriminations in price, knowingly induced and knowingly received by it, as above set forth, were in violation of section 2 (f) of the Clayton Act, as amended; and

Where said corporation, engaged in selling its products under a general price scheme in which customers were divided into (1) general sales, including jobbers, small chains, small vending machine operators, or all to whom sales were made through its salesmen; (2) syndicate stores; and (3) individual large purchasers, such as Confection Cabinet Co., Sanitary Automatic, Berlo, and Automatic Canteen Co. of America, its largest single purchaser—

- (c) Discriminated in price between competitor purchasers of its candy bars of like grade and quality, by selling such bars to certain large vending-machine operators or distributors at lower prices than to others, in that it sold the bars to said Automatic Canteen Co. in the 100-count package at \$1.98 f. o. b. Chicago, or \$2.10 delivered, during the years 1938 to 1941, inclusive, while selling other vending machine operators its 24-count package at 60 cents, or its 60-count package at \$1.35 during 1938 and 1939, and \$1.50 during 1940 and 1941; and in that it sold its said bars to Confection Cabinet Co., Sanitary Automatic Corp., and Berlo Vending Machine Corp., at 48 cents for a 24-count pack during 1938 and 1939, and at 49.2 cents during 1940 and 1941, at \$1.20 for the 60-count pack during 1938 and 1939, and at \$1.23 during 1940 and part of 1941, while at the same time selling other vending machine operators the 24-count package at 64 cents or its 60-count package at \$1.35 during 1938 and 1939, and at \$1.50 during 1940 and 1941;

With the result that the price discrimination thereby brought about adversely affected other vending-machine operators who did not obtain the lower price allowed to said favored customers, who were enabled through the additional profit thereby obtained, to offer larger commissions for locations—principal basis of competition by such operators (amounting to as much as 15 to 20 percent, as contrasted with the ordinary 10 percent commission) which the others were either unable to meet or were forced to meet at a decrease in profit, and were thereby forced in many instances to remove their machines;

- (d) Discriminated in price between different purchasers buying its said bars of like grade and quality through selling to certain chain drug and grocery stores and to syndicate stores at lower prices than to other retail customers competitively engaged therewith, in that, among other things, it sold its said bars to certain chain stores in the 60-count pack at \$1.35, while selling its 24-count pack at 64 cents to jobbers, drug stores, grocery stores, and some retailer-customers, or at a difference of 11 cents, using 24-count as a

base in favor of the chains; and sold its 24-count pack at 60 cents to certain syndicate stores, including Woolworth, Kresge, Grant, and a number of others, while selling it to their competitors at 64 cents;

With the result that such favored chain and syndicate stores had a substantial advantage in the sale of its said bars in competition with such other customers who were not thus favored or were obliged to pay the full 64-cent price for the 24-count, whether directly to it or to jobbers; said favored chain stores were thereby enabled to sell said bars to the public for prices as low as three for 10 cents, and said competitors were compelled either to sell at competitive prices and so reduce their possible profits by the amount of said discriminations, or attempt to sell at prices higher than those charged by the favored customers, with consequent inability to secure business and reduction in their sales volume; and potential sales of jobbers, through reduction in sales of retailers who competed with such favored customers and purchased from jobbers, were reduced;

(e) Discriminated in price between different purchasers buying its said bars of like grade and quality through a great variety of discount deals each of which involved a separate price discrimination granted some customers and not granted others; some of which were continuous in nature, such as offers to chain stores of 5 boxes free with every 100 ordered, but which usually were sales promotion projects, limited as to time, consisting of special combination offers, free goods offers, and some designed to be passed on to the consumer, in many instances limited to a particular area or city and not offered to customers located in other cities, etc., who competed across such arbitrary lines in the sale of its products; and which also included general deals, consisting of combination offers and special discounts, offered in contiguous territories from one to the next in a wave system, whereby jobbers benefiting were permitted to sell in adjacent areas not yet reached, with a competitive advantage over dealers there located; and

(f) Discriminated also in price as aforesaid through its salesmen's fall booking plan, offered to chain accounts whose buying policies allowed them to buy said corporation's assorted line and book future orders, and under which, at different times, there were granted bonuses or discounts on purchase of certain specified combinations, deliveries, and quantities; certain quantity discounts; and a series of increasing discounts on quantity orders consecutively placed within specified periods;

Result of which discriminatory prices above set forth, including the various discount deals, in connection with offer and sale of said 5-cent candy bars, in which a price differential of 1 cent per box was sufficient to affect unfavorably the candy sales of competing manufacturers, and one-half cent per box would divert business, was that—

- (1) Business of other manufacturers was affected by causing them either to meet the discriminatory prices or lose business;
- (2) Customers who received the benefit of the various discriminatory prices and discounts allowed by said corporation had a substantial advantage in competition with others who did not receive such benefits;
- (3) Favored customers, such as the chain stores and syndicate stores who received the benefit of such special low prices, could further their own business interests to the detriment of the small retailer who purchased from the jobber at the jobber's prices;

- (4) Said corporation's price to chain and syndicate stores had the effect of reducing jobbers' sales, in that, in some instances, it was cheaper for the retailer to purchase candy bars at the price of three for 10 cents at the chain or syndicate stores than to purchase from the jobber;
- (5) Jobbers' sales to regular retail outlets were reduced as such outlets were replaced by the vending machines, whose operators received their low prices direct from said corporation; and the jobber suffered further loss of business through the activities of the aforesaid operators who, by reason of their advantage in price, procured locations and took business away from the small operators, who ordinarily purchased from the jobber;
- (6) The jobber, in some instances, sold at his own cost price to retailer customers, depending for any profit entirely upon the 2-percent cash discount which he was allowed;
- (7) The jobber who received discount deals was benefited as against the jobber in the same or adjacent territory who did not receive the same discount; and, when there was a deal beneficial to a consumer which was effective in nearby territory, but which a particular jobber could not then himself take advantage of, suffered loss of business and corresponding loss of profit;
- (8) Vending-machine operators who did not get the low prices extended by said corporation to Confection, Automatic, and the Berlo companies suffered reduced profits and loss of machine locations, resulting in decreased sales; and favored vending-machine operators were enabled by said lower prices to earn more profits, provide more facilities and better services, and give more aid to their distributors and pay a higher rate of commission for preferred locations;

Held, That the effect of the discriminations in price above described, which were not shown as justified by reason of differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which said corporation's candy bars were sold or delivered to its various customers, might be substantially to lessen competition in the line of commerce in which the purchaser receiving the benefit of said discriminatory prices was engaged, and to injure, destroy, and prevent competition between those purchasers who received the benefit of said discriminatory prices, discounts, and rebates, and those to whom they were denied; and

That such discriminations, in connection with the sale of candy bars to vending-machine operators, syndicate stores, chain drug, and grocery stores, and other retailer customers, and the sale of its candy by means of various discount deals and fall booking plans, resulted in substantial injury to its competitors, and hindered, obstructed and tended to prevent competition with it in the sale of candy products; resulted in substantial injury to competition among purchasers of such products by affording material and unjustified advantages to preferred purchasers and not to others; and constituted a violation of subsection (a) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act; and

Where said corporation; through paying over in numerous separate transactions to various chain organizations, and to the largest vending-machine operator, special discounts, lump sums, and monthly payments, and large quantities of free samples and free products, and through assumption of specified newspaper-advertising costs, and the making of various contributions, etc., for specific newspaper, radio, circular, bulletin, poster, and other advertising,

on counters and on store fronts, and special displays, etc., and for store openings, demonstrators, display of its products at the San Francisco and New York Fairs, special sales and personnel efforts, advertising campaigns, etc.; by the particular recipient—

- (g) Contracted to pay and allow, and did pay and allow, certain amounts of money, rebates, and advertising allowances as compensation and in consideration for promotional services and facilities furnished by certain of its customers in connection with the sale of its candy products to them, without making such payments, rebates, and advertising allowances available, proportionally or otherwise to their competitors; and
- (h) Contracted to give and furnish, and did give and furnish, certain services and facilities to certain of its customers and not to purchasers who were competitively engaged therewith; either on similar or proportionally equal terms:

Held, That said paying and allowing of compensation for promotional services, etc., and such furnishing or contributing to the furnishing of advertising services, etc., to certain of its customers and not to their competitors upon proportionally equal terms or upon any terms whatsoever, constituted, respectively, violations of subsections (d) and (e) of section 2 of the Clayton Act as amended; and

Where said corporation, during the period from 1939 to 1942—

- (i) Entered into a large number of exclusive dealing contracts for the sale of its said bars through jobbers to persons having concessions in baseball, fair, and amusement parks, which provided that the concessionaire should purchase exclusively its 5-cent candy bars from the local candy jobber at the jobber's regular prevailing resale price, and use vending caps, coats, and metal signs furnished by the corporation, in consideration of which the corporation agreed to pay the concessionaire 10 percent of the jobber's resale price on his purchases at the end of each season; thereby entering into contracts on the condition, agreement, or understanding that the concessionaire would not use or deal in candy products of any competitor of said corporation;

Effect of which restrictive conditions, under the circumstances set forth, might be substantially to lessen competition in the sale of candy products in commerce:

Held, That said acts and practices, in entering into said contracts as above set forth, constituted a violation of the provisions of section 3 of the Clayton Act.

In a proceeding in which the Commission challenged as violations of subsection (a) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act, certain differences in prices offered by respondent manufacturer of 5-cent candy bars and other products to vending machine operators, chain stores and 5-and-10-cent stores, and other customer sellers at retail and at wholesale; and

In which the respondent sought to show that various price differences were justified by reason of differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which its candy bars were sold or delivered to its various customers, but in which it appeared, among other things, that under respondent's system of accounting, on the books

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many items were not broken down but were charged to a general account so that it was impossible to prorate or allocate costs and expenses or sales on an actual operative basis; that while respondents attempted to make a proration or allocation on the basis of dollar sales in the cost justification submitted, it had made no actual cost survey or study which would afford any basis for a determination that such allocation on the basis of dollar sales was an accurate or true method; and that in other respects respondent's steps, processes or assumptions were incorrect, incomplete, or subject to other criticism;

The Commission, after consideration of the testimony and other evidence submitted in support of its cost justification, was of the opinion, and found, that its said price differences, including various rebates and discounts, had not been shown as justified by reason of differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which its candy bars were sold or delivered to its various customers.

Before *Mr. John L. Hornor* and *Mr. J. Earl Cox*, trial examiners.
Mr. Philip R. Layton, *Mr. Frank Hier* and *Mr. Austin H. Forkner*
for the Commission.

Walker & Atwood, of Chicago, Ill., for respondent.

COMPLAINT IN DOCKET No. 4556

The Federal Trade Commission having reason to believe that the party 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 section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. title 15, sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, the Curtiss Candy Co., is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and has its office and principal place of business located in the Curtiss Building, 622 Diversey Parkway, Chicago, Ill.

PAR. 2. Respondent is now, and since June 19, 1936, has been, engaged in the business of manufacturing, distributing, and selling candy and confectionery products, principally 5-cent and 1-cent candy bars. Such products are manufactured by respondent in the State of Illinois and sold by it to purchasers located in the several States of the United States, and as a result thereof are shipped, and caused by respondent to be transported from the State of Illinois to such purchasers located in the State of Illinois and in other States.

PAR. 3. Respondent, in the course and conduct of its business, as aforesaid, is now and since June 19, 1936, has been, competitively engaged with other persons, firms, and corporations who similarly

manufacture, distribute and sell candy and confectionery products. Respondent, which was organized in 1923, has, however, grown until its distribution of such products is larger than any one of its competitors and the volume of its advertising is almost equal to all of its competitors.

PAR. 4. One of the principal ingredients in the candy and confectionery products manufactured by respondent and its competitors is corn sirup unmixed or glucose, which respondent has purchased from one or more of the several manufacturers thereof, among whom are Corn Products Refining Co. and Corn Products Sales Co., with manufacturing plants located at Kansas City, Mo., and Argo, Ill.; the Staley Manufacturing Co. and Staley Sales Corp., with a plant located at Decatur, Ill.; the Clinton Co. and the Clinton Sales Co., with a plant located at Clinton, Iowa; Penick & Ford, Ltd., Inc., with a plant located at Cedar Rapids, Iowa; and American Maize Products Co., with a plant located at Roby, Ind.

Such sirup, when purchased, is shipped and caused to be transported by said manufacturers from the State in which their respective plants are located to respondent's plant in the State of Illinois, to be used as an ingredient in its candy and confectionery products distributed and sold in interstate commerce, as aforesaid.

The corn sirup manufacturers above named together with others, also have sold such corn sirup in interstate commerce to competitors of respondent, who similarly use it as an ingredient in the manufacture of their respective candy and confectionery products.

Respondent's aggregate purchases of such corn sirup from all corn sirup manufacturers were approximately 13,000,000 pounds from September through 1936; 23,000,000 pounds in 1937; 25,000,000 pounds in 1938; 24,000,000 pounds in 1939; 24,000,000 pounds in 1940; and 7,000,000 pounds in the first quarter of 1941. In addition during this entire period, respondent increased its use of dextrose, a dry sugar refined from corn sirup, manufactured by some of said corn sirup manufacturers, from relatively inconsequential amounts to over 7,000,000 pounds annually.

PAR. 5. Respondent, while engaged in commerce, and in the course of such commerce since June 19, 1936, has knowingly induced some of said corn sirup manufacturers to discriminate in price in favor of respondent and has knowingly received the benefit of discriminations in price from some of said corn sirup manufacturers in concurrent sales by said manufacturers to respondent and some of its competitors of such corn sirup of like grade and quality purchased by them for

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use, consumption and resale within the several States of the United States and in the District of Columbia, in which concurrent sales either the sales to respondent or the sales to respondent's competitors, or both of such sales, were in interstate commerce.

PAR. 6. One method, among others, by which respondent knowingly received the benefit of discriminations in price, as alleged in paragraph 5, was that, after an increase in the price per hundredweight of such sirup, which increased price such sirup manufacturers charged to the trade generally, including respondent's competitors, some of said manufacturers continued to charge and invoice such sirup sold to respondent at the price per hundredweight prevailing before the increase.

Thus, for instance, during the month of November 1940, Corn Products Sales Co. sold and delivered to respondent 14 railroad tank cars of 43° corn sirup unmixed, each car containing approximately 95,000 pounds, at an invoice price of \$2.49 per hundredweight, f. o. b. Chicago, the last of said cars shipped being CCLX 664, on or about November 26, 1940, covered by Corn Products Sales Co. invoice dated November 26, 1940, and approved for payment by respondent's invoice No. 123302, on December 4, 1940, whereas Corn Products Sales Co. had not charged to, or received from, the trade generally, including respondent's competitors, as little as \$2.49 per hundredweight for 43° corn sirup unmixed f. o. b. Chicago, since on or about July 27, 1940, for delivery at that price until approximately August 22, 1940, but had, after on or about October 18, 1940, when it decreased its price for such sirup f. o. b. Chicago from \$2.64 per hundredweight to \$2.59, charged \$2.59 per hundredweight to and received said price from the trade generally, including respondent's competitors, for such sirup until on or about December 4, 1940. All of which respondent well knew.

PAR. 7. Another method, among others, by which respondent knowingly induced some of said corn sirup manufacturers to discriminate in price in favor of respondent, as alleged in paragraph 5, was by making unauthorized deductions from the invoice prices of some of said sirup manufacturers when remitting to them, and seeking to secure the concurrence of said sirup manufacturers in such action by informing them that competitive sirup manufacturers were then selling, or offering to sell, such sirup to respondent at the price resulting after respondent had made the deduction, when, in truth and in fact, such sales and such offers had not been made to respondent.

Thus, for instance, beginning on or about December 1, 1940, and continuing until on or about April 1, 1941, A. E. Staley Manufacturing

Co. sold and delivered approximately 23 tank cars of 43° corn sirup unmixed, f. o. b. Chicago, to respondent upon a standing order of approximately one tank car per week, each car containing approximately 95,000 pounds, and invoiced such sirup to respondent at \$2.59 per hundredweight, f. o. b. Chicago, which price was the price at which A. E. Staley Manufacturing Co. was concurrently selling such sirup to the trade generally, including respondent's competitors, and the price at which respondent was concurrently being charged, and invoiced for approximately 65 similar tank cars of such sirup purchased by respondent from competitors of A. E. Staley Manufacturing Co.

In remitting to A. E. Staley Manufacturing Co., the respondent deducted 10 cents per hundredweight from the invoice price of \$2.59 per hundredweight, or approximately \$95 per tank car from all except three, more or less, of such invoices; and when A. E. Staley Manufacturing Co. objected and protested such deductions being made, respondent informed the A. E. Staley Manufacturing Co. that respondent was then purchasing sirup of like grade and quality from Corn Products Sales Co. at \$2.49 per hundredweight and that the Hubinger Co., a corn sirup manufacturer with a plant located at Keokuk, Iowa, had currently offered to sell such sirup to respondent at \$2.49 per hundredweight, f. o. b. Chicago, which offer had not, in fact, been made; and the last shipment made to respondent by Corn Products Sales Co. at \$2.49 per hundredweight, f. o. b. Chicago, was that alleged in paragraph 6, namely, on or about November 26, 1940.

A. E. Staley Manufacturing Co. requested respondent to furnish to them a written statement of any sales and offers to sell, made to respondent by competitors at \$2.49 per hundredweight, but respondent refused, while continuing to restate orally that such sales and offers to sell had been made until on or about March 25, 1941, when respondent told the A. E. Staley Manufacturing Co. that the last of its competitors had withdrawn the \$2.49 per hundredweight price on or about March 21, 1941; but, nevertheless, respondent stated that it intended to make similar deductions on further shipments under the standing order, and upon refusal of the A. E. Staley Manufacturing Co., to authorize such deductions, respondent canceled said standing order for approximately one tank car per week.

By this method, in this one instance alone, respondent induced and received the benefit of price discriminations giving it an advantage over its competitors of 10 cents per hundredweight or approximately \$95 per car on approximately 20 tank cars of such sirup, amounting in the aggregate to approximately \$2,000. All of which respondent well knew.

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PAR. 8. The effect of said discriminations in price, knowingly induced and knowingly received by respondent in the manner and form hereinabove alleged, was to substantially lessen competition and tend to create a monopoly in some of said sirup manufacturers by causing respondent to purchase from them and not from their competitors the large requirements of respondent for corn sirup; and to lessen competition, tend to create a monopoly, as well as to injure, destroy, and prevent competition with respondent, who received the benefits of said discriminations, by decreasing the cost to it of one of the principal ingredients of its said products, which may give respondent a price advantage in the sale of said products, or some of them, and confer on respondent a financial power to further the sale of its said products by the advertising, hereinabove referred to, or by other forms of non-price competition.

PAR. 9. Each of said corn sirup manufacturers, during all the times mentioned herein, continuously and regularly informed respondent by mail, telephone, and personal visits of salesmen and brokers of the price at which each of them respectively was offering for sale and selling such corn sirup to the trade generally, including respondent's competitors.

Respondent also knew from the same sources the terms of sale of each of said manufacturers, particularly the trade practice of accepting orders from purchasers for 5 or 10 days after the announcement of a price increase and the old and lower price for such sirup to be delivered within a stated period after the announcement, usually 30 days.

The quality of corn sirup, as manufactured by said sirup manufacturers, is substantially the same, and candy manufacturers, including respondent and its competitors, purchase and use the corn sirup manufactured by each of said manufacturers interchangeably with the corn sirup manufactured by the others. As a result, the price of each of said manufacturers and their terms of sale are substantially the same. All of which respondent well knew.

Respondent for many years and since June 19, 1936, has employed a purchasing officer who has had charge of all of the purchases of corn sirup made by respondent and whose duty it is to keep and who has kept accurately and currently informed of the prices and terms of sale of such sirup; and all of the purchases of corn sirup herein referred to have been made by him or under his direction and with his knowledge.

PAR. 10. The foregoing alleged acts of said respondent, the Curtiss Candy Co., while engaged in interstate commerce, in knowingly induc-

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ing and in knowingly receiving in the course of such commerce, since June 19, 1936, discriminations in price prohibited by section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. title 15, sec. 13), are in violation of section 2 (f) of said act.

AMENDED AND SUPPLEMENTAL COMPLAINT IN DOCKET NO. 4673

The Federal Trade Commission having reason to believe that the party 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 section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. title 15, section 13), and section 3 of the Clayton Act (U. S. C. title 15, section 14), hereby issues its amended and supplemental complaint, stating its charges with respect thereto as follows:

Count I

PARAGRAPH 1. Respondent, the Curtiss Candy Co., is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and has its office and principal place of business located in the Curtiss Building, 622 Diversey Parkway, Chicago, Ill.

PAR. 2. Respondent is now, and has been since June 19, 1936, engaged in the business of manufacturing, distributing and selling confectionery products, principally candy bars sold in wrappers bearing the names Baby Ruth, Butterfinger, Jolly Jack, Ko ko Nut Roll, Curtiss Butter Toffey, Moon Spoon, and Nickaloaf for resale within the various States of the United States and in the District of Columbia. In the course and conduct of its said business respondent sells the aforesaid confections to purchasers located in the city of Chicago and in the various States of the United States and causes substantial quantities of said confections, when sold, to be shipped and transported from its place of business in the State of Illinois across State lines to the respective purchasers thereof in each of the several States of the United States and in the District of Columbia. Pursuant to an agreement between respondent and Automatic Canteen Co. of America, large quantities of such confections have been and are being delivered to Automatic Canteen Co. of America in Chicago, Ill., intended to be, and which are, distributed by Automatic Canteen Co. of America throughout the United States.

PAR. 3. Respondent, in the course and conduct of its business, as aforesaid, is now and since June 19, 1936, has been, competitively

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engaged with other persons, firms and corporations who similarly manufacture, distribute, and sell candy and confectionery products. Respondent, which was organized in 1923, has, however, grown until its distribution of such products is larger than any one of its competitors and the volume of its advertising is almost equal to the aggregate volume of all of its competitors.

PAR. 4. In the course and conduct of its business in said commerce, the respondent, since June 19, 1936, has sold candy bars of like grade, quality and weight at the same time to the following classifications of customers and to certain favored customers within each classification; which classifications of customers are, namely: vending machine distributors and operators, jobbers and wholesalers supplying vending machine operators and other retailers, syndicates, drug, grocery and chain outlets, concessionaires; all of whom are in competition with each other in the same trade areas, at different prices and in different size candy-count packages. The different count sizes in which candy was sold before the war, the different prices, the unit price per bar, and the percentage of difference in price between the 24-count selling at 64 cents and figured at 100 percent and the other prices and counts are as follows:

Count		Price		Unit price per bar		Percent lower than 24-count price
(1)	24	at	\$0.64	makes	\$0.0267	or 100% base
(2)	24	at	.60	makes	.0250	or 6.37% lower
(3)	60	at	1.35	makes	.0225	or 11.11% lower
(4)	60	at	1.50	makes	.0250	or 6.37% lower
(5)	60	at	1.20	makes	.0200	or 25.00% lower
(6)	100	at	2.50	makes	.0250	or 6.37% lower
(7)	100	at	1.98 f. o. b.	makes	.0198	or 25.80% lower
(8)	100	at	2.03 f. o. b.	makes	.0203	or 23.97% lower
(9)	100	at	2.10	makes	.0210	or 21.4 % lower

PAR. 5. Among those purchasers to whom respondent sells large quantities of candy bars are some who dispose of the candy bars which they buy from respondent through the medium of vending machines. Such machines are located largely in moving-picture houses, factories, oil stations, and offices. One such customer, the Automatic Canteen Co. of America, owned, before the beginning of the present war, approximately 100,000 such candy-vending machines, which in 1 year vended in excess of 200,000,000 candy bars, of which number several million were bars manufactured by the respondent. Such candy-vending machine distributors or operators are generally competitively engaged in commerce with each other in efforts to obtain locations for these machines and in the distribution of goods sold to each by re-

spondent. Competition for locations between these distributors and operators is intense and the locations are generally obtained by those whose rental bid for space is the highest, although frequently efforts by highly paid executives and salesmen have been an important factor.

PAR. 6. In the course and conduct of its business in said commerce, the respondent, since June 19, 1936, has sold candy bars of like grade, quality, and weight at different prices and candy-count sizes to various vending-machine distributors and operators mentioned in paragraph 5, and who were located in the same trade areas. Some such customers before the war, for example, were sold the 24-count package at 64 cents delivered, which makes a unit price of \$0.0267 per bar; other customers, such as the Automatic Sales Co., were sold the 60-count package at \$0.135 delivered, which makes a unit price per bar of \$0.0225; other customers, such as the Confection Cabinet Co., were sold the 60-count package at \$1.20 delivered, which makes a unit price of \$0.0200 per bar; other customers, such as the Automatic Canteen Co. of America, were sold the 100-count package at prices of \$1.98 and \$2.03 f. o. b. Chicago, which makes unit prices of \$0.0198 and \$0.0203 per bar; other customers were sold the 60-count at \$1.50 delivered and the 100-count at \$2.50 delivered, which makes a unit price of \$0.0250 per bar; that said price differentials, whether delivered or f. o. b. factory, were not the result of making due allowances for the costs or expense of delivery.

PAR. 7. In many factories and plants in which automatic vending machines dispense candy and confectionery products of the respondent are also located restaurants, factory canteens, candy counters, and candy wagons distributing like candy and confectionery products which compete with the distributors and operators of these automatic vending machines. Also in the same localities and in the same trade areas where there are automatic vending machines located in factories, plants, and theaters, as mentioned in paragraph 5 which dispense candy and confectionery products of the respondent, there are also located restaurants, retailers, and various candy counters distributing like candy and confectionery products in competition with the aforementioned distributors and operators of automatic vending machines.

PAR. 8. In the course and conduct of its business in said commerce since June 19, 1936, and while selling candy bars and confectionery products to the purchasers mentioned in paragraph 5 and at the prices and in the counts set forth therein in paragraph 6, the respondent was selling in the same trade areas candy and confectionery products of like grade, quality, or weight at a price of 64 cents for 24 bars to jobbers and wholesalers supplying candy to vending-machine operators and

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retailers, and also was selling direct to retailers, as mentioned, who were in competition with such favored candy and confectionery vending-machine operators and distributors as illustrated in paragraph 7.

PAR. 9. In the course and conduct of its business in said commerce the respondent, since June 19, 1936, has discriminated in price and in services and facilities furnished to certain classifications of customers as well as between customers within a classification who were in competition with each other as mentioned in paragraphs 4, 5, 6, and 7 by granting rebates, bonuses, or discounts, dependent upon the quantities of candy bars and confectionery products purchased by certain specified size shipments within specified periods of time. To illustrate: In 1939 on two shipments of 100 boxes of candy each to the same buyer, a 2 cents per-box rebate was granted on the second shipment; similarly, if the shipments contained 500 boxes each, a 4 cents per-box rebate was granted on the second shipment; similarly, if the shipments contained 1,000 boxes each, a 5 cents per-box rebate was granted on the second shipment.

PAR. 10. In the course and conduct of its said business in said commerce, the respondent, since June 19, 1936, has frequently discriminated in price and in services and facilities furnished in connection with the sale of its various candy bars and confectionery products through the use of so-called deals available to some but not all purchasers. Such deals have been variously designated; a few of which were designated as "2 for 1," "3 for 2½," and "Fall booking plans." At times and in some local areas only the respondent, since June 19, 1936, has sold, for instance, one Baby Ruth carton with one Butterfinger carton both for 85 cents, and another deal whereby one 24-count package of Baby Ruth candy, one package containing 16 Butterfinger bars and 8 Jolly Jack bars, and an additional small box containing 5 bars of Baby Ruth candy was billed at a price of \$1.28 per deal.

PAR. 11. The effect of the discriminations in price alleged in paragraphs 4, 6, 8, 9, and 10 has been and may be substantially to lessen competition in the line of commerce in which respondent is engaged and to injure competition with respondent and with such favored customers of respondent who receive the benefit of such discriminations.

Such discriminations in price by respondent between different purchasers or commodities of like grade and quality in interstate commerce in the manner and form aforesaid are in violation of the provisions of subsection (a) of section 2 of the act described in the preamble hereof.

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Count II

PARAGRAPH 1. Paragraphs 1, 2, 3, 4, 5, and 7 are hereby adopted and made a part of this count as fully as if herein set out verbatim.

PAR. 2. In the course and conduct of its business in commerce respondent, since June 19, 1936, has contracted to pay or allow, or has paid and allowed, certain amounts of money, rebates and advertising allowances as compensation and in consideration for promotional services and facilities furnished by certain customers in connection with the sale and offering for sale of candy bars and confectionery products manufactured and sold by it to such customers without making said payments, rebates and advertising allowances available on any terms or on proportionally equal terms to all other customers competing with such favored customers in the distribution of respondent's candy and confectionery products. To illustrate:

(a) The respondent has favored or is favoring certain of its larger customers, as aforesaid, such as the Walgreen Drug Co., the Cunningham Drug Co., the Peoples Drug Co., by paying or allowing an amount calculated at 5 percent of the dollar volume of such customers' purchases for counter display or for advertising facilities furnished by such customers without similarly according to or making the same available to all other competing customers on any terms or on proportionally equal terms.

(b) The respondent has favored or is favoring said customers, as aforesaid, such as the Cunningham Drug Stores, Inc., of Detroit, Michigan, by paying the following promotional allowances without similarly according to or making available the same payments or similar payments, to all other competing customers on any terms, or on proportionally equal terms:

During 1938:

Billboards	\$1, 000
Special dinner for store managers.....	150
Demonstrator salaries.....	30
Soda fountain newspaper campaign.....	300

During 1939:

Soda fountain newspaper campaign.....	700
Golden anniversary allowance.....	1, 000

Total.....	3, 180
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(c) The respondent has favored or is favoring certain of its customers, as aforesaid, such as the United Cigar Whelan Stores of New York City, by paying or allowing approximately \$650 monthly, calculated at the rate of \$2.50 per store, for advertising services or facili-

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ties in connection with an automatic self-advertising machine without similarly according to or making the same or similar payments available to all other competing customers on any terms or on proportionally equal terms.

(d) The respondent has favored or is favoring certain of its customers, as aforesaid, by paying or allowing hundreds of dollars for the purchase of radio time, newspaper space, and house organ advertising, all of which advertise Curtiss candy and confectionery products as being sold at these favored customers' stores, without similarly according to or making the same or similar payments available to all other competing customers on any terms or on proportionally equal terms.

PAR. 3. The respondent has favored or is favoring certain of its customers as aforesaid by engaging in making the payments and giving the discounts for services and facilities furnished as described in paragraphs 2 and 3 of count IV, which are hereby adopted and made a part of this count as if herein set out verbatim.

PAR. 4. The aforesaid acts of respondent are in violation of subsection (d) of section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. title 15, sec. 13).

Count III

PARAGRAPH 1. Paragraphs 1, 2, 3, 4, 5, and 7 of count I are hereby adopted and made a part of this count as fully as if herein set out verbatim.

PAR. 2. In the course and conduct of its business in commerce, respondent, since June 19, 1936, has been and now is discriminating in favor of certain of its customers and purchasers and against its other customers or purchasers of its said products, by contracting to give and furnish, and by giving and furnishing, certain services and facilities in connection with the sale, or offering for sale, of its said products so purchased by its customers, and which are not accorded to or made available to all such purchasers who are competitively engaged with the favored purchasers on the same or similar terms or on proportionally equal terms. To illustrate:

(a) The respondent has favored or is favoring certain purchasers of its candy and confectionery products, as aforesaid, such as the Independent Grocers Alliance of America, by paying the sum of \$470 each 28-day period, or a total of \$6,110 annually as compensation for services which the latter renders to Independent Grocers Alliance jobber members in promoting the resale of respondent's candy and confectionery

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products purchased by such jobber members from the respondent, without similarly according or making available the same privilege, service or facility to all other competing purchasers on any terms, or on proportionally equal terms. Such promotional service furnished was in the form of suggested handbills, window posters, store displays and other promotional methods in the retail stores sponsored by the Independent Grocers Alliance.

(b) The respondent has favored or is favoring certain purchasers of its candy and confectionery products, as aforesaid, by contracting to furnish, or by furnishing, candy bars packed in 60-count packages and in 100-count packages, without similarly according or making available the same privilege, service or facility of said 60- and 100-count packages, with the resulting net saving, to all other competing purchasers on any terms or on proportionally equal terms.

(c) Respondent has favored or is favoring certain purchasers of its candy and confectionery products, as aforesaid, by permitting or allowing such orders for candy and confectionery products to be sent in by mail or by telephone at its main office, and then allowing such purchasers a discount equal to that saved by eliminating the necessity or expense of respondent paying a regular salesman's commission, without similarly according or making available the same privilege, service or facility, with the resulting net saving, to all other competing purchasers on any terms or on proportionally equal terms.

(d) Respondent has favored or is favoring certain purchasers of its candy and confectionery products, as aforesaid, by permitting them to buy f. o. b. factory and thus eliminate the necessity of paying a standardized delivered price, without similarly according or making available the same privilege, service or facility, with the resulting net saving, to all other purchasers on any terms or on proportionally equal terms.

(e) Respondent has favored or is favoring certain purchasers of its candy and confectionery products, as aforesaid, by allowing them to eliminate and to deduct the estimated savings resulting from no returns for damaged, stale, or unsalable goods, without similarly according or making available the same privileges, services or facilities, with the resulting net savings, to all other purchasers on any terms or on proportionally equal terms.

(f) Respondent has favored or is favoring certain purchasers of its candy and confectionery products, as aforesaid, by permitting and allowing them a definite advertising allowance or discount for prominent counter or vending machine display and distribution, without similarly according or making available the same privilege, service,

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or facility to all other purchasers on any terms, or on proportionally equal terms.

(g) The respondent has favored or is favoring certain purchasers of their candy and confectionery products, as aforesaid, by contracting to furnish, or by furnishing, free, thousands of 5 cent candy bars to be given away to the customers of such purchasers, without similarly according or making available the same privilege, service or facility to all other purchasers on any terms or on proportionally equal terms.

(h) The respondent has favored or is favoring certain purchasers of its candy and confectionery products, as aforesaid, by contracting to furnish, or by furnishing, and printing, special labels on its candy wrappers, without similarly according or making available the same privilege, service or facility to all other purchasers on any terms or on proportionally equal terms.

PAR. 3. The respondent has favored or is favoring certain purchasers of its candy and confectionery products, as aforesaid, by engaging in the practices described in paragraphs 9 and 10 of count I, which are hereby adopted and made a part of this count as fully as if herein set out verbatim.

PAR. 4. The above described acts and practices of the respondent are in violation of section 2 (e) and/or section 2 (d) of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. title 15, sec. 13).

Count IV

The Federal Trade Commission, having reason to believe that said respondent, the Curtiss Candy Co., has violated and is now violating, the provisions of section 3 of the act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, commonly known as the Clayton Act, hereby issues this, its complaint, against respondent and states its charges in respect thereto as follows:

PARAGRAPH 1. Paragraphs 1, 2, 3, 4, 5, and 7 of count I are hereby adopted and made a part of this count as if herein set out verbatim.

PAR. 2. The respondent, in the course and conduct of its said business hereinabove described has sold and contracted to sell candy bars to various customers, including retail drug customers such as the Cunningham Drug Stores, Inc., and the Walgreen Drug Co., for resale between and among the several States of the United States and in the District of Columbia, with a discount of 5 percent of the dollar volume of purchases of respondent's candy bars and confectionery products on the condition, agreement, or understanding that the purchasers thereof would not deal in the commodities of a competitor

of the respondent and would give prominent display to respondent's candy and confectionery products.

PAR. 3. The respondent, in the course and conduct of its said business hereinabove described, has sold and contracted to sell candy bars, gum, and peanut products in commerce for resale between and among the several States of the United States and in the District of Columbia to certain concessionaires such as the Central States Concessionaires of Chicago, Ill., and the Cleveland Concession Co. of Cleveland, Ohio, on condition, agreement, and understanding that the purchasers thereof would not deal in nor advertise the candy, gum, or peanut products of any other supplier or of any other competitor of the respondent and would give prominent display and advertise the candy, gum and peanut products sold to them by the respondent. That further, said understanding and agreement provided that the respondent would grant certain substantial discounts or allowances to said concessionaires below the prevailing prices of candy, gum, and peanut products, such as 10 cents per candy box of 24-count, and would grant certain additional rebates, payments, or discounts, depending on the volume of annual purchases, ranging in amount from a few dollars to \$5,000 or more annually.

PAR. 4. The purchasers with whom respondent agreed, as set forth in paragraphs 2 and 3 above, ceased to deal in the products of other suppliers of candy, gum, and peanut products, and ceased to deal in the products of competitors of the respondent as long as such agreements were in effect. The effect of the agreement set forth in paragraphs 2 and 3 hereof may be substantially to lessen competition or tend to create a monopoly in respondent and in the purchasers with whom respondent entered into such contracts in the sale of candy bars, gum, and peanut products in commerce between and among the several States of the United States and in the District of Columbia.

PAR. 5. The aforesaid acts of respondent constitute a violation of the provisions of section 3 of the hereinabove mentioned act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914, and commonly known as the Clayton Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an act of Congress approved June 19, 1936 (Robinson-Patman Act), and by virtue of the authority vested in the

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Federal Trade Commission by the aforesaid act, the Federal Trade Commission on August 5, 1941, issued and subsequently served its complaint in docket 4556 of this proceeding upon the respondent, the Curtiss Candy Co., a corporation, charging it with the violation of subsection (f) of section 2 of the Clayton Act as amended by the Robinson-Patman Act. After the issuance of said complaint and the filing of the answer of the respondent thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a trial 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.

On January 21, 1942, the Commission issued and thereafter served upon said respondent its second complaint, in docket 4673, of this proceeding, charging the respondent with the violation of subsections (a), (d), and (e) of section 2 of the aforesaid Clayton Act as amended and with the violation of section 3 of the aforesaid Clayton Act. On July 13, 1944, the Commission issued and thereafter served upon said respondent an amended complaint in docket 4673 of this proceeding, charging more fully and specifically violation of the aforesaid subsections (a), (d), and (e) of section 2 and section 3. After the issuance of said amended complaint and the filing of respondent's answer thereto, dockets 4556 and 4673 were, on October 11, 1944, consolidated by the Commission, and thereafter testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a trial examiner of the Commission theretofore duly designated by it and said testimony and other evidence taken pursuant to both complaints were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint filed in docket 4556 and answer thereto, amended and supplemental complaint filed in docket 4673 and answer thereto, consolidated testimony and other evidence, report of the trial examiner upon the evidence and exceptions filed thereto, briefs filed in support of and in opposition to the complaints, and oral argument of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom :

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, the Curtiss Candy Co., is a corporation organized and existing under the laws of the State of Illinois, with its

principal place of business located at 1101 Belmont Avenue, Chicago, Ill.

PAR. 2. Respondent is now, and since June 19, 1936, has been, engaged in the manufacture, sale, and distribution of many kinds of candy and confectionary products. The principal items manufactured and sold by respondent were candy bars, which retailed for 5 cents. These candy bars were sold under various brand names, the main ones being "Baby Ruth," "Butterfinger," "Jolly Jack," "Man O'War," and "Kokonut Roll." The respondent's gross sales in 1940 were approximately \$14,000,000, of which amount over \$8,000,000 was from the sale of the 5-cent bars.

PAR. 3. Respondent sold said products to jobbers, chain drug and chain grocery stores, syndicate stores, and vending-machine operators. Respondent caused said products, when sold, to be transported from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business the respondent is now, and since June 19, 1936, has been, engaged in competition with other concerns who sell candy and confectionary products in commerce among and between the various States of the United States. Among such competitors are the following: E. J. Brach & Co., Mars, Inc., Peter Paul, Inc., Bunte Bros., Williamson Candy Co., D. L. Clark Co., Schutter Candy Co., Paul F. Beich Co., the Euclid Candy Co., and Hollywood Candy Co.

I

PAR. 5. One of the principal ingredients in candy and confectionary products manufactured and distributed by respondent and its competitors is unmixed corn sirup, or glucose, which respondent has purchased from the various manufacturers thereof, among whom were Corn Products Refining Co. and Corn Products Sales Co., with manufacturing plants located at Kansas City, Mo., and Argo, Ill.; A. E. Staley Manufacturing Co. and Staley Sales Corp., with a plant located at Decatur, Ill.; Clinton Co. and Clinton Sales Co., with a plant located at Clinton, Iowa; Penick & Ford, Ltd., Inc., with a plant located at Cedar Rapids, Iowa; and American Maize Products Co., with a plant located at Roby, Ind. Other refiners of corn sirup who sold respondent or its competitors were the Hubinger Co. and Union Starch & Refining Co.

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Such corn sirup, when purchased, was shipped by said manufacturers or refiners from the State in which their respective plants were located to respondent's plant in the State of Illinois, to be used as an ingredient in its candy and confectionary products distributed and sold in interstate commerce. Said manufacturers and others have also sold such corn sirup in interstate commerce to competitors of respondent who similarly use it as an ingredient in the manufacture of their respective candy and confectionary products.

PAR. 6. Corn sirup was procured by the respondent from one or more of the manufacturers hereinbefore named, usually in railroad tank-car loads of approximately 95,000 pounds each. In the year 1940 it purchased and used approximately 25,000,000 pounds of corn sirup at a cost of \$566,000.

Prices of corn sirup were at all times quite uniform throughout the industry. It was customary to send announcements of price changes to the trade, including respondent, just prior to or at the time such changes became effective. It was also customary in the trade to permit corn-sirup users to place orders at the old and lower prices for periods of from 5 to 10 days after an advance in price became effective, for delivery within an additional period of 30 days.

PAR. 7. In the course and conduct of its business since June 19, 1936, in connection with the purchase of corn sirup for use in the manufacture of its candy and confectionary products the respondent has knowingly induced and knowingly received favorable discriminatory prices on corn sirup purchased by it from at least three corn-sirup manufacturers: A. E. Staley Manufacturing Co., Corn Products Co., and Clinton Co., and, in addition, knowingly had the benefit, through delayed shipments, of price advantage on corn sirup received from these same three companies and from two others: American Maize Products Co. and Penick & Ford.

(1) In November 1940, at a time when the market price of A. E. Staley Manufacturing Co. for corn sirup was \$2.59 per hundredweight, the respondent entered into an arrangement with A. E. Staley Manufacturing Co., whereby respondent was permitted to deduct 10 cents per hundredweight from the invoice price. By this means, the respondent procured from A. E. Staley Manufacturing Co. 19 cars of corn sirup over a period extended from December 2, 1940, to April 4, 1941, which were invoiced at \$2.59 per hundredweight, the current price to Staley customers, from which respondent deducted 10 cents per hundredweight, thus reducing its cost price to \$2.49 per hundredweight and effecting a saving per car of from \$95.04 to \$96.50.

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(2) In October 1940, at a time when the current price of Corn Products Sales Co. for corn sirup was \$2.59 per hundredweight to its customers, respondent procured 15 cars of corn sirup from the Corn Products Sales Co. over a period from October 19, 1940, to November 29, 1940, at \$2.49 per hundredweight.

(3) After the current price for corn sirup of \$2.29 per hundredweight was discontinued by the Clinton Co. on March 25, 1940, respondent purchased 5 cars from that company on July 12, 1940, and 10 cars on July 30, 1940, at the price of \$2.29 per hundredweight. At that time the published price of Clinton Co. for corn sirup to its customers was \$2.49 per hundredweight.

(4) Respondent also knowingly induced and received price discriminations by means of booking practices and obtained extensions in shipping dates beyond the 30 days customarily allowed, which were granted the respondent by five manufacturers during 1940 and 1941: Corn Products, Clinton, American Maize, Penick & Ford, and Staley Manufacturing Co. The record shows the following extensions on orders booked with these manufacturers:

Orders dated	Deliveries made	Number of cars	Days after order date
Mar. 25, 1940.....	May 16, 1940, to July 24, 1940.....	14	52 to 121
May 27, 1940.....	July 13, 1940, to Sept. 19, 1940.....	26	47 to 115
July 22, 1940.....	Sept. 11, 1940, to Nov. 26, 1940.....	44	51 to 127
Nov. 29, 1940.....	Dec. 5, 1940, to Apr. 14, 1940.....	174	6 to 136

1 Of these 74 only 5 were delivered within 30 days following the order date.

During all the times herein mentioned and for many years prior thereto, respondent employed a purchasing officer, who had charge of all the purchases of corn sirup made by respondent and whose duty it was to keep, and who did keep, accurately and currently informed of the prices and terms of sale of such sirup, and all the purchases of corn sirup herein referred to were made through such officer or under his direction and with his knowledge.

PAR. 8. The amount of saving which respondent procured by these various methods was substantial. Respondent's representative estimated it to be about \$10,000, of which \$8,500 was in 1940 and \$1,500 in 1941. This was exclusive of the saving that accrued because of the sirup deliveries at the lower price level after and beyond the 30-day customary delivery period. The Commission finds that the 10 cents per hundredweight, or \$95 per tank car, or the price differences resulting from the extension of delivery dates of respondent's booking

practices are sufficient to cause a candy manufacturer to divert the largest proportion of its business to the corn-sirup manufacturer granting such favored price and that the saving in one of the principal ingredients in candy gives respondent a proportionate price advantage, and 10 cents per hundredweight on corn-sirup purchases would materially affect the profits of any such candy manufacturer and would constitute a direct advantage to said manufacturer.

PAR. 9. The Commission finds that the discriminations in price knowingly induced and knowingly received by the respondent, as hereinabove described, were price discriminations prohibited by section 2 of the Clayton Act and had the effect of substantially lessening competition by causing respondent to purchase from the corn-sirup manufacturers granting the discrimination in preference to purchasing from their competitors. Said discriminations in price also had the effect of lessening competition and injuring, destroying, and preventing competition between other candy manufacturers and the respondent, who received the benefits of said discriminations by decreasing the cost to it of one of the principal ingredients of its candy products, and gave respondent a price advantage in the sale of said products. By this means there was conferred on respondent a financial power to further the sale of its products through the use of the increased saving by which the respondent alone benefited.

II

PAR. 10. In the sale and distribution of its 5-cent candy bars to retailers and to jobbers for resale to retailers, the respondent's usual method of packaging was to place 24 bars in a display box which carried its own advertising and could be used on the counters in the retail outlets. This package was known as the 24-count size. Prior to 1937 the respondent also sold its 5-cent candy bars in a 100-count carton. This package bore no advertising and was designed for use by the vending-machine trade. Because of the large size of this package, it was not acceptable to the vending-machine trade generally, and in August 1937 a 60-count vending-machine pack was introduced by the respondent and the 100-count discontinued except as to the Automatic Canteen Co. of America, which continued to purchase 5-cent candy bars from the respondent in the 100-count pack. Originally the 60-count pack was sold only to vending-machine operators. Subsequently it was sold to such jobbers as resold to the vending-machine trade, and, in addition, it was sold to certain chain organizations.

PAR. 11. Respondent sold its products to jobbers, chain drug and chain grocery stores, syndicate stores, and vending-machine operators. These sales accounts were divided into two classifications: "house accounts" and "salesmen's accounts." The "house accounts" were comprised of the syndicate stores (5-and-10-cent stores), the larger chain stores, and the larger vending-machine operators, all of whom were sold direct by the factory. The remainder of the sales accounts fall within the "salesmen's accounts" division. For sales purposes the entire United States was divided into six territories, over each of which was a divisional sales manager, under whom the individual salesmen worked.

PAR. 12. Based upon the testimony and other evidence, the Commission finds that the respondent maintained a general price scheme in which there were some differences made between classes of customers. These may be divided into (1) general sales, which include jobbers, small chains, small vending-machine operators, or all to whom sales were made through respondent's salesmen; (2) syndicate stores; and (3) individual large purchasers, such as Confection Cabinet Co., Sanitary Automatic, Berlo, and Automatic Canteen Co. of America. Of the latter, the Automatic Canteen Co. of America is the largest single purchaser of respondent's candy bars. Prior to 1942, the Automatic Canteen Co. owned approximately 100,000 candy vending machines, located in the various cities of the United States, which in one year vended in excess of 200,000,000 candy bars, of which several million were bars manufactured by the respondent. The various prices allowed by the respondent under its price schedule for the years 1938 to 1942 were as follows:

CURTISS PRICE SCHEDULE

	1938	1939	1940	1941	1942
24-count:					
General sales.....	\$0.64	\$0.64	\$0.64	\$0.64	\$0.64
Syndicate stores.....	.60	.60	.60	.60	.60
Confection Cabinet Co.....	(0.64 less 0.16)		1.492	1.492	0.57, .68
Sanitary Automatic & Berlo.....	(0.64 less 0.16)				
60-count:					
General sales.....	1.35	1.35	{ Jan. 1.45 Mar. 1.50 Sept. 1.35 }	1.50	1.60
Confection Cabinet Co.....	(1.35 less 0.15)		1.23	1.23	1.42, 1.60
Sanitary Automatic & Berlo.....	(1.35 less 0.15)			1.50	1.60
100-count:					
Automatic Canteen.....	2.10	1.98	2.10	2.10	2.15
	2.03	2.10		2.03	2.32
	1.98	2.10			2.36

NOTE.—On the 100-count all prices are f. o. b. Chicago, except as noted.

¹ F. o. b. Chicago.

² Freight prepaid.

³ F. o. b. Chicago less 7 cents per carton.

⁴ F. o. b. Chicago less 5 cents per carton to Nov. 30 and then less 7 cents per carton to Dec. 31.

Using the 24-count carton selling at 64 cents as 100 percent, or base, the various prices listed in the foregoing schedule show the percentages of price differential from the base, or 24-count, price.

Count size		Price		Unit price per bar	Percent lower than 24-count price
(1)	24	at	\$0.64	makes \$0.0267	or 100 % base
(2)	24	at	.60	makes .0250	or 6.37 % lower
(3)	60	at	1.35	makes .0225	or 15.73 % lower
(4)	60	at	1.50	makes .0250	or 6.37 % lower
(5)	60	at	1.20	makes .0200	or 25.09 % lower
(6)	100	at	1.98 f. o. b.	makes .0198	or 25.80 % lower
(7)	100	at	2.03 f. o. b.	makes .0203	or 23.97 % lower
(8)	100	at	2.10	makes .0210	or 21.34 % lower

PAR. 13. In the course and conduct of its business since June 19, 1936, in connection with the sale and distribution of its 5-cent candy bars, the respondent has discriminated in price between different purchasers buying such candy bars of like grade and quality by selling its candy bars to certain large vending-machine operators or distributors at prices lower than it sold candy bars of like grade and quality to other of its customers who were competitively engaged with the former in the sale of such candy bars within the United States. Among the general practices pursued by the respondent in discriminating in price were the following:

(1) Respondent has discriminated in price by selling its 5-cent candy bars to the Automatic Canteen Co. of America in the 100-count package at \$1.98 f. o. b. Chicago or \$2.10 delivered, during the years 1938 to 1941, inclusive, while at the same time it was selling other vending-machine operators its 24-count package at the price of 64 cents or its 60-count package at the price of \$1.35 during 1938 and 1939, and \$1.50 during 1940 and 1941. Using the 64-cent price for the 24-count package as a base for determining price differences, the price of \$2.10 delivered would be equal to a price of 50½ cents on a 24-count carton, or a price differential of 13½ cents per 24-count; the 60-count package at \$1.35 would be equal to a 24-count at 53 cents, or a price differential of 11 cents per 24-count; and the 60-count at \$1.50 would be equal to the 24-count at 60 cents, or a price differential of 4 cents per 24-count. The price differential between the 100-count at \$2.10 delivered and the 60-count at \$1.35 and at \$1.50, figured on the basis of the 24-count, would make a price differential of 2½ cents on the \$1.35 price and 7 cents on the \$1.50 price.

(2) Respondent discriminated in price by selling its 5-cent candy bars to Confection Cabinet Co., Sanitary Automatic Corp., and Berlo Vending Machine Corp. at 48 cents for 24-count pack during 1938

and 1939 and for 49.2 cents for 24-count pack during 1940 and 1941 and at \$1.20 for the 60-count pack during 1938 and 1939 and at \$1.23 during 1940 and part of 1941, while at the same time it was selling vending-machine operators the 24-count package at the price of 64 cents or its 60-count package at the price of \$1.35 during 1938 and 1939 and at \$1.50 during 1940 and 1941.

The Commission finds that the price differences allowed by the respondent in the sale of its 5-cent candy bars to vending-machine operators or distributors as hereinabove described constituted discriminations in price between purchasers of commodities of like grade and quality who were competitively engaged with each other in the sale and distribution of such commodities. The price discrimination allowed by the respondent in favor of said Automatic Canteen Co., Confection Cabinet Co., Sanitary Automatic Co., and Berlo Vending Machine Corp. adversely affected the other vending-machine operators who did not obtain the lower price allowed to said favored customers.

The principal basis of competition by the vending-machine operators is the obtaining of locations in which to place their machines. By means of the additional profit which was being obtained by the Automatic Canteen Co. and the other favored customers as hereinabove described, because of discrimination in price in their favor, they were enabled to offer larger commissions to obtain locations for their machines which other vending-machine operators were either unable to meet or which they were forced to meet at a definite decrease in profit. The ordinary commission granted for location was usually 10 percent. In the case of Automatic Canteen and the other favored customers, however, commissions as high as 15 to 20 percent were granted for the purpose of obtaining competitive locations, and in many instances vending-machine operators were forced to remove their machines from various locations as result of the higher commission allowed by said favored customers.

PAR. 14. In the course and conduct of its business since June 19, 1936, in connection with the sale of its 5-cent candy bars, the respondent has also discriminated in price between different purchasers buying such candy bars of like grade and quality by selling its candy bars to certain chain drug and grocery stores and syndicate stores (5-and-10-cent stores) at prices lower than it sold candy bars of like grade and quality to other retailer customers who were competitively engaged with the former in the sale of such candy bars within the United States. Among the general practices pursued by the respondent in so discriminating in price were the following:

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(1) Respondent discriminated in price by selling its 5-cent candy bars to certain chain stores in the 60-count pack at \$1.35, while at the same time it was selling its 24-count pack of like grade and quality at 64 cents to jobbers, drug stores, grocery stores, and some retailer-customers. A 60-count pack at \$1.35 would be equal to a 24-count pack at 53 cents, making a price difference of 11 cents, using 24-count as a base.

(2) Respondent discriminated in price by selling its 5-cent candy bars in the 24-count pack at 60 cents to certain syndicate stores, including F. W. Woolworth Co., S. S. Kresge Co., W. T. Grant Co., S. H. Kress & Co., J. J. Newberry Co., Charles Stores Co., M. H. Fishman Co., H. L. Green Co., McCrory Stores Corp., and McLellan Stores Co., while at the same time it was selling other of its customers who were competing with said syndicate stores at the price of 64 cents for the 24-count pack.

The Commission finds that the price differences allowed by respondent to certain chain stores and syndicate stores as hereinabove described constituted discriminations in price between purchasers of commodities of like grade and quality. Such favored chain and syndicate stores who received the benefit of the various discriminatory prices granted by the respondent had a substantial advantage in selling respondent's 5-cent candy bars in competition with other customers of the respondent who did not receive the benefit of such discriminatory prices or who were obliged to pay the full 64-cent price for the 24-count, either directly to the respondent or to jobbers selling said candy products.

By means of such lower prices, such favored chain stores were enabled to, and did, sell respondent's candy bars to the public for prices as low as three bars for 10 cents. In order to sell respondent's candy bars in competition with such favored customers of the respondent who received the benefit of respondent's discrimination in price, competitors of favored customers who were denied the lower prices herein described must either sell at competitive prices and in so doing reduce their possible profits by the amount of the discriminations against them or attempt to sell at prices higher than those which the favored customers of respondent charge for the same product, with the result of inability to secure business and reduction in their volume of sales. Furthermore, the reduction in sales of those retailers competing with such favored customers who purchased their supplies of candy from jobbers had the effect of reducing the potential sales of such jobbers.

PAR. 15. In the course and conduct of its business since June 19, 1936, in connection with the sale of its 5-cent candy bars, the respondent has also discriminated in price between different purchasers

buying such candy bars of like grade and quality by selling its candy bars to some of its customers at prices lower than it sells products of like grade and quality to other of its customers who were competitively engaged with the former in the sale of such products within the United States by the use of certain discount deals and the so-called fall booking plan.

The discount deals involved various price concessions to the customers to whom offered. These deals were very numerous and diversified. In 1939 there were at least 40 of these special offers or deals; in 1940, at least 49; and in 1941, at least 35. Each deal constituted a separate price discrimination granted some customers of the respondent and not granted to other of its customers who were in competition with each other. Some of these discount deals were continuous in nature, such as the offer to chain stores of 5 boxes free with every 100 boxes ordered. Generally, however, the discount deals were sales promotional projects and limited as to time. These consisted of special combination offers, free goods offers, and deals designed to be passed on to the consumer. With the exception of the consumer deals, the discounts and free goods deals were for the benefit of the customer, whether that customer be a jobber or a retailer. In many instances, the discount deals were limited to a particular area or city. Typical of the various discount deals offered by the respondent were the following:

(1) Consumer deals in which the net saving of either free goods or discounts was passed on to the ultimate consumer. An example of such consumer deal was deal 2-4-1, in which two boxes of 24-count candy were sold at the price of one, or 64 cents, instead of \$1.28, with provisions to have such bars offered to the ultimate consumer at two bars for the price of one. Another such deal was the 2-4-6 deal, or 1-cent sale, wherein two boxes of 5-cent candy bars, one each of Baby Ruth and Butterfinger bars, were sold at the price of 85 cents instead of \$1.28, for resale to the ultimate consumer at the price of two bars for 6 cents, or one Baby Ruth bar for 5 cents and a Butterfinger bar for 1 cent.

(2) Deals limited as to territory, such as deal 1062, offered on April 3, 1939, to jobber customers in New York City, allowing 5 boxes free with each purchase of 80 boxes Baby Ruth and 20 boxes Butterfinger bars; deal 1063, offered March 27, 1939, limited to customers in Boston, allowing a special discount of \$1.28 on each purchase amounting to \$32; deal 1053, limited to Troy, N. Y., allowing special discount of \$3.20 on each \$67.20 order; deal 14, offered on September 26, 1939, limited to Minneapolis and St. Paul, allowing a 32-cent discount on each purchase of two boxes Baby Ruth, two boxes Butterfinger, and one box Jolly

Jack bars. There were other deals limited to States, parts of States, or sections which were not offered to customers located in other sections, States, parts of States, or cities who competed across these arbitrary lines in the sale of respondent's products.

(3) Deals general in nature: These deals were combination offers and special discounts which were offered in contiguous territories like a wave system so that when the offering was completed in one territory or area it proceeded to be offered in the next territory or area. The effect of such deals in many instances was to permit jobbers receiving the discount in one area to sell in adjacent areas where the deal had not as yet been offered in accordance with respondent's plan, with a competitive advantage over the jobber in the area who had not as yet received the deal.

The fall booking plan was a salesman's proposition and was offered only to those chain accounts whose buying policies allowed them to buy respondent's assorted line and book future orders. This plan was offered in the fall of each year and all premium deals and special discounts were off as the salesman reached a town and contacted a jobber or other customer on the fall booking plan. The fall booking plan of 1937 provided for a bonus, discount, or rebate on the purchase of certain specified combinations of candy in three deliveries. In 1938 the fall booking plan discontinued the combination-purchase requirement and based discount on quantity purchased. In this plan a \$30 bonus was allowed for purchase of 1,500 boxes over a period of three deliveries and a \$12 bonus on purchase of 750 boxes. To those jobbers or customers purchasing in excess of 1,500 boxes, discount of 2 cents per box was allowed on the excess. The booking plan of 1939 was substantially the same except as to difference in amount of bonus allowed and the requirement of two deliveries instead of three. The booking plan of 1940 allowed a discount on each box increasing with each purchase, with no maximum limitation. This plan allowed 11½-cents discount per box on first order, 2 cents per box on second, 2½ cents per box on third order, and 3 cents per box on fourth order, each order to be placed within 2 weeks of each other.

The Commission finds that the price differences allowed by the respondent in its various discount deals and fall booking plan constitute discriminations in price between purchasers of commodities of like grade and quality. Customers of respondent who received the benefit of various discriminatory prices and discounts allowed by the respondent in the use of such deals and booking plan had a substantial advantage in selling respondent's candy bars in competition with

other customers of the respondent who did not receive the benefit of such discriminatory prices or discounts or who were obliged to pay respondent's full price for said candy bars.

PAR. 16. The respondent, during the course of the hearings, offered testimony and other evidence in an attempt to justify its price differentials to various customers. Respondent's system of accounting provides for the distribution of sales, costs, and expenses of eight classes of products. On the books of the company many of the items were not broken down but were charged to a general account so that it was impossible to prorate or allocate the costs and expenses or the sales on an actual operative basis. Consequently, the respondent attempted to make a proration or allocation on the basis of dollar sales in the cost justification submitted. The respondent had made no actual cost survey or study which would afford any basis for a determination that such allocation on the basis of dollar sales was an accurate or true method. The allocation or proration so made could, and did, amount to nothing more than an estimation on the part of respondent's accountant.

In its schedule of comparative operating costs and practices, the respondent attempted to justify its special or discriminatory prices to Automatic Canteen, Confection Cabinet, and other vending purchasers, grouping all the rest of its various classes of customers into a single group which it labeled "regular." An examination of the attempted cost justification shows that approximately 95 percent of all of the respondent's sales of 5-cent candy bars was made to the customers of the group labeled "regular," 2.7 percent to the group labeled "canteen," 0.9 percent to the group labeled "cabinet," and 1.3 percent to the group labeled "other vending."

In the group labeled "regular" were the following groups of purchasers: Chain grocery stores, syndicate stores, jobbers, and concessionaires—in fact, practically all of respondent's customers except vending-machine operators. In this "regular" classification are included those who received the benefits of the fall booking plan, discount deals, various discounts, free goods, and other price advantages hereinabove referred to. There was no attempt made by the respondent to justify the special price discriminations or advantages that existed between the various customers who are grouped in the classification "regular."

The prices used in respondent's cost justification were largely a matter of computation. For 1940 the selling price of the 5-cent candy bars to the members of the group classified as "regular" is given as \$26.69. This amount was arrived at by dividing computed dollar sales

by computed production figures. No account was taken of the variation in prices received by the different members of this group, and the price of \$26.69 does not represent the actual selling price of respondent's product. For the same year, 1940, respondent has given as its price per thousand for candy bars to the purchasers grouped in the classification "other vendors," the amount of \$24.17. This again is not an actual selling price but was obtained by respondent's accountant from respondent's assistant sales manager, who indicated that the selling price to this group of purchasers in 1940 was \$1.45 per box of 60-count bars, or \$24.17 per thousand. The facts show that in 1940 the 60-count package was sold to purchasers of this group at three different prices: \$1.35, \$1.45, and \$1.50. No computation was made of actual sales to determine that the \$1.45 price was the average price, and it cannot be assumed to be such.

The Commission, after consideration of the testimony and other evidence submitted in support of respondent's cost justification, is of the opinion, and so finds, that respondent's price differences, including the rebates and discounts hereinabove mentioned, have not been shown to be justified by reason of differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which respondent's candy bars were sold or delivered to its various customers.

PAR. 17. The Commission finds that the effect of the discriminations in price described herein may be substantially to lessen competition in the line of commerce in which the purchaser receiving the benefit of said discriminatory price is engaged and to injure, destroy, and prevent competition between those purchasers receiving the benefit of said discriminatory prices, discounts, and rebates and those to whom they were denied.

Based upon the testimony and other evidence in the record, the Commission finds that a price differential of 1 cent per box of 5-cent candy bars was sufficient to affect unfavorably the candy sales of competing manufacturers and that one-half cent per box would divert business. The discriminatory prices, including the various discount deals, affected the business of other manufacturers by causing such other manufacturers to either meet the discriminatory price or lose business.

Within the same general sales areas, which frequently differed from the sales areas as outlined for its own purposes by the respondent's executives, candy jobbers compete with each other and to some extent with the chain and syndicate stores and with the vending-machine operators, all of whom in turn compete with each other and with

every other retail outlet in the sale of candy. Such customers who received the benefit of the various discriminatory prices and discounts allowed by the respondent had a substantial advantage in selling respondent's candy bars in competition with other customers of the respondent who did not receive the benefit of such discriminatory prices or discounts or who were obliged to pay respondent's full or higher price for said candy bars.

These favored customers, such as the chain stores and syndicate stores, who received the benefit of the special low prices allowed by the respondent could further their own business interests to the detriment of the small retailer who purchased from the jobber at the jobber's prices. In the same manner jobbers suffered loss in business in consequence of the loss of business on the part of retailers. In some instances it was cheaper for the retailer to purchase candy bars at the price of three for 10 cents from the chain or syndicate stores than to purchase from the jobbers, and as a result respondent's price to the chain and syndicate stores had the effect of reducing jobbers' sales.

The jobber could not sell the large vending-machine operators who received the low prices direct from respondent and as vending machines replaced the regular retail outlets, jobbers' sales to those outlets were reduced. Furthermore, because of their advantage in price the larger vending-machine operators procured locations and took business away from the small operators, who ordinarily purchased from the jobbers, and again there was a loss of jobber business.

In other instances, the jobber sold at his own cost price to retailer-customers, depending for any profit entirely upon the 2-percent cash discount which he was allowed. As to the discount deals the jobber who received the deals was benefited as against the jobber in the same or adjacent territory who did not receive the same discount. When there was a deal beneficial to a consumer which was effective in an adjacent or nearby territory but which the particular jobber could not himself take advantage of there was a loss of business and a corresponding loss of profit.

Vending-machine operators who did not get the low prices extended by the respondent to Confection Cabinet Co., Automatic Canteen, and Berlo Vending Co. suffered reduced profits and loss of machine locations in several instances, resulting in decreased sales. The lower price to the favored vending-machine operators enabled them to earn more profits, provide more facilities and better services, give more aid to their distributors, and pay a higher rate of commission for preferred locations.

III

PAR. 18. In the course and conduct of its business in commerce the respondent since June 19, 1936, contracted to pay and allow, and did pay and allow, certain amounts of money, rebates, and advertising allowances as compensation and in consideration for promotional services and facilities furnished by certain of its customers in connection with the sale and offering for sale of candy products manufactured and sold by the respondent to such customers without making such payments, rebates, and advertising allowances available on any terms or on proportionately equal terms to all other customers competing with such favored customers in the distribution of respondent's candy products. In addition thereto, the respondent has discriminated in favor of certain of its customers and against certain of its other customers on purchase of respondent's candy products by contracting to give and furnish, and by giving and furnishing, certain services and facilities in connection with the sale and offering for sale of said candy products so purchased by its customers and which were not accorded to, or made available to, all such purchasers who were competitively engaged with the favored customers on the same or similar terms or on proportionately equal terms.

Among and typical of the practices pursued by the respondent in paying and allowing rebates and advertising allowances for promotional services and facilities and in giving and furnishing services and facilities in connection with the sale of its candy products by its customers and purchasers are the following:

(1) Respondent paid the United Cigar-Whelan Stores Corp. \$2.50 per machine per month for advertising respondent's products on posters exhibited in automatic self-advertising machines known as "Selvertisers." In the years 1938, 1939, and 1940 there were 315 of these machines located in 210 United Cigar Stores and 105 Whelan Drug Stores. In 1940 and 1941 there were 84 machines located in 42 United Cigar Stores and 42 Whelan Drug Stores. The products of the respondent so advertised were being sold by the United Cigar-Whelan Stores Corp., and the payments so made by the respondent constituted allowances for advertising and promotional services.

(2) On or about May 17, 1938, respondent agreed to allow, and subsequent thereto did allow, the Walgreen Drug Co., of Chicago, Ill., a 5-percent sales service discount on net candy purchases on the condition that Walgreen would display only respondent's candy products on display racks, with the right to carry other candies in stock. In

addition thereto, the respondent allowed an additional 5-percent discount to said Walgreen Co. for displaying small trade-mark statue known as "N R G Boy" in a prominent place upon its counters.

(3) On April 27, 1939, the respondent agreed to allow, and subsequent thereto did allow, the Liggett Drug Co., Inc., 2 Park Avenue, New York, a 5-percent sales service discount on net purchases, effective May 15, 1939, for prominently displaying in their various stores five of respondent's candy bars, namely, Baby Ruth, Butterfinger, Jolly Jack, Kokonut Roll, and Curtiss Butter Toffee.

(4) On April 15, 1938, the respondent agreed to allow, and subsequent thereto did allow, the Cunningham Drug Stores, Inc., of Detroit, Mich., a 5-percent discount on net purchases for carrying five Curtiss 5-cent candy bars in complete distribution in every store, with as good display as possible. In addition thereto, respondent allowed a 5-percent discount on purchases for displaying on each soda fountain in their entire chain of stores, in an unobstructed position, one Curtiss (energy) "N R G" candy figure. Respondent further agreed to furnish 10,000 samples of its products free for each new store, not to exceed 12 during the ensuing year, added to the Cunningham chain for distribution during the opening week and to pay, during said opening week, \$10 toward the salary of a girl demonstrator to hand out the candy samples.

Respondent also agreed to take no less than 40 nor more than 50 boards, all in advantageous locations in the city of Detroit, for the month of June at a cost of \$1,000, Cunningham to furnish the paper for these boards containing respondent's copy printed on it by Cunningham at Cunningham's expense. Respondent also agreed to contribute the sum of \$150 to cover cost of a banquet of various of Cunningham's soda fountain officials, store officials, etc.

(5) On May 27, 1939, respondent entered into a contract with the Katz Drug Co., of Kansas City, Mo., to pay the sum of \$1,800, in monthly installments of \$150 each, in consideration for which the Katz Drug Co., was to print, at its own expense, soda-fountain and lunchroom checks, in the minimum amount of 100,000 bearing advertisement of respondent's products; hold 10-day concentrated advertising campaigns at which respondent's products would be featured chain-wide; prominently display and feature in their candy department, store windows, and on store exteriors Baby Ruth, Butterfinger, and Jolly Jack bars; and issue sales bulletins giving selling hints on respondent's candy bars and promoting the sales of respondent's candy products.

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(6) In December 1939 respondent entered into an agreement with the Katz Drug Co. of Kansas City, Mo., to reimburse the Katz Drug Co., in the amount of \$1,000 on a \$2,730 radio advertising program.

(7) In 1940 the respondent entered into a contract with Service Stores, Inc., to pay \$300 per month for a period of 13 weeks to cover participation in radio, newspaper, circular, bull's-eyes, bulletins, and concentrated efforts of salesmen and order takers in connection with the sale of respondent's candy products. Respondent also entered into a similar contract with said Service Stores, Inc., on March 1, 1941, covering payment of \$350 per month for a period of 3 months.

(8) On October 8, 1938, respondent agreed with the Cunningham Drug Stores, Inc., of Detroit, Mich., to participate in cooperative newspaper advertising featuring Baby Ruth Sundae in 10 issues of the Free Press, starting November 1, 1938, at the rate of \$5 an inch, with two ads in color at a cost of \$200 extra.

(9) Respondent entered into an agreement with Cunningham Drug Stores to pay \$187.50 monthly, beginning December 1, 1938, for the period from November 1, 1938, to October 31, 1939, for multiposter type advertising of respondent's products and other poster advertising in the stores operated by the Cunningham Drug Stores.

(10) On February 21, 1940, respondent agreed to participate in a radio program of 91 broadcasts sponsored by Cunningham Drug Stores at a total cost of \$2,047.50 and also on May 9, 1940, entered into an agreement for participation in a news radio program sponsored by Cunningham Drug Stores at a cost of \$1,462.50 and also on November 15, 1940, entered into an agreement for participation in news radio program sponsored by Cunningham at a cost of \$1,462.50.

(11) Union News Co. of New York City received from respondent a discount of 10 percent in consideration for compulsory display of respondent's candy in all its retail outlets.

(12) From June to November 1939 the respondent delivered to Automatic Canteen Co. each month 300 cartons of 100 bars each on a no-charge basis, for which the Canteen Co. was to keep at least one Curtiss item on display at all times in all of its vending machines at the San Francisco and New York fairs.

All of the above payments, allowances, and discounts were made only to the customers named and were not made available on proportionally equal terms to other customers of the respondent.

IV

PAR. 19. During the period from 1939 to 1942 respondent entered into a large number of so-called exclusive dealing contracts with con-

cessionaires having concessions in baseball, fair, and amusement parks. The usual form contract used by the respondent provided that the concessionaire should purchase exclusively the 5-cent candy bars of the respondent from the local candy jobber at the jobber's regular prevailing resale price and should use vending caps, coats, and metal signs furnished by the respondent, and in consideration of the faithful performance of said contract the respondent agreed to pay the concessionaire 10 percent of the jobber's regular prevailing resale price at the end of each season on purchases made by the concessionaire.

The Commission finds that respondent's exclusive-dealing contracts with the various concessionaires constituted a contract for the sale of its 5-cent candy bars through jobbers to said concessionaires on the condition, agreement, or understanding that said concessionaire or purchaser would not use or deal in candy products sold or distributed by any competitor of the respondent. The Commission further finds that the effect of such restrictive conditions under the circumstances set forth herein may be to substantially lessen competition in the sale of candy products in commerce between and among the several States of the United States.

CONCLUSION

The acts and practices of the respondent in knowingly inducing and receiving discriminations in price on corn sirup purchased by it from various corn-sirup manufacturers, including A. E. Staley Manufacturing Co., Corn Products Co., Clinton Co., American Maize Products Co., and Penick & Ford, constituted a violation of the provisions of section 2 (f) of an act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, as amended by an act of Congress approved June 19, 1936 (Robinson-Patman Act).

Discriminations in price by the respondent as hereinbefore described in connection with the sale of candy bars to vending-machine operators, syndicate stores, chain drug, and grocery stores, and other retailer customers and the sale of its candy by means of various discount deals and fall booking plans have resulted in substantial injury to respondent's competitors and hinder, obstruct, and tend to suppress competition with respondent in the sale of candy products and have resulted in substantial injury to competition among purchasers of such candy products by affording material and unjustified price advantages to preferred purchasers and not to others and constitute a

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violation of subsection (a) of section 2 of an act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by the act of June 19, 1936 (Robinson-Patman Act).

The acts and practices of the respondent as hereinabove found in paying and allowing certain amounts of money, rebates, and advertising allowance as compensation and in consideration for promotional services and facilities furnished by certain of its customers in connection with the sale and offering for sale of candy products manufactured and sold by the respondent to such customers, without making such payments, rebates, and advertising allowances available on proportionally equal terms to all other customers competing with such favored customers in the distribution of respondent's products, and the acts and practices of the respondent in furnishing, or contributing to the furnishing of, advertising service and facilities to certain of its customers in the resale of respondent's candy products and not to competing customers purchasing said candy products, upon proportionally equal terms, or upon any terms whatsoever, constitute violations of subsection (d) and subsection (e) of section 2 of said Clayton Act as amended.

The acts and practices of the respondent as hereinabove found of entering into contracts with various concessionaires for the sale of goods through local jobbers on the condition and with the agreement and understanding that such concessionaires or purchasers should not use or deal in candy products manufactured and sold by respondent's competitors constituted a violation of the provisions of section 3 of the act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act.

Commissioner Mason requesting that he be shown as not participating.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and answer of the respondent filed in docket 4556 and upon the amended and supplemental complaint of the Commission and answer of the respondent filed in docket 4673 (which proceedings were consolidated by the Commission on October 11, 1944), testimony and other evidence in support of and in opposition to the allegations of said complaints taken before a trial examiner of the Commission theretofore duly

designated by it, report of the trial examiner upon the evidence and exceptions filed thereto, briefs filed in support of the complaints and in opposition thereto, and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of section 3 of that certain act of Congress of the United States entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, commonly known as the Clayton Act, and subsections (a), (d), (e), and (f) of section 2 of said Clayton Act as amended by an act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act:

I. *It is ordered*, That the respondent, the Curtiss Candy Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the purchase of corn syrup or glucose or other candy ingredients in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from—

1. Knowingly receiving or accepting from any seller, or knowingly inducing any seller to grant, any discrimination in price set forth and described in Paragraph Seven of the findings as to the facts herein or any discrimination in price substantially similar thereto.

2. Knowingly receiving or accepting from any seller, or knowingly inducing any seller to grant, any discrimination in price prohibited by section 2 of the Clayton Act, either directly or by means of any discount or allowance made by means of any booking practice, extension of time of delivery, or otherwise.

II. *It is further ordered*, That the respondent, the Curtiss Candy Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in the sale of candy bars or other candy products in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among purchasers when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered:

1. By selling such products to some vending-machine operators at prices different from the prices charged other vending-machine operators who in fact compete in the sale and distribution of such products, provided, however, that this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not

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tend to lessen, injure, or destroy competition among such vending-machine operators or between respondent and its competitors.

2. By selling such products to some wholesalers or jobbers thereof at prices different from the prices charged other wholesalers or jobbers who in fact compete in the sale and distribution of such products, provided, however, that this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not tend to lessen, injure, or destroy competition among such wholesalers or jobbers or between respondent and its competitors.

3. By selling such products to some retailers thereof at prices different from prices charged other retailers who in fact compete in the sale and distribution of such products, provided, however, that this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not tend to lessen, injure, or destroy competition among such retailers or between respondent and its competitors.

4. By selling such products to some purchasers thereof at prices different from the prices charged other purchasers who in fact compete in the sale and distribution of such products, either directly or by means of discount deals, fall booking practices, or other similar plans, provided, however, that this shall not prevent price differences of less than one-half cent per case, based upon the 24-count, which do not tend to lessen, injure, or destroy competition among such purchasers or between respondent and its competitors.

5. By selling such products to any retailer at prices lower than prices charged wholesalers or jobbers whose customers compete with such retailer.

For the purposes of comparison, the term "price" as used in this order takes into account discounts, rebates, allowances, and other terms and conditions of sale.

III. *It is further ordered*, That the respondent, the Curtiss Candy Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the sale or offering for sale of candy bars or other candy products in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Paying or contracting to pay anything of value to, or for the benefit of, any purchaser for advertising services or facilities furnished by such purchaser unless such payment or consideration is available to all other competing purchasers on proportionally equal terms.

2. Paying or contracting to pay anything of value to any purchaser, either directly or by granting allowances or discounts upon purchases

made, upon the condition that such purchaser prominently display respondent's candy products in said purchaser's place of business or display only respondent's candy or candy products on said purchaser's display racks or display any advertising designs, insignia, or posters advertising respondent's products in said purchaser's place of business or for any other similar advertising service or facility where such payments, discounts, or allowances are not made available to all other competing purchasers of respondent's candy bars or candy products on proportionally equal terms.

IV. *It is further ordered*, That the respondent, the Curtiss Candy Co., and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the sale of candy or other candy products in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Discriminating, directly or indirectly, among competing purchasers of respondent's candy or candy products by furnishing, or contributing to the furnishing of, demonstrator services to any retailer purchasing respondent's products when such services are not accorded on proportionally equal terms to other retailer-purchasers located in the same city or other retailer-purchasers who in fact resell such products in competition with retailers who receive such services.

2. Discriminating, directly or indirectly, among competing purchasers of respondent's candy or candy products by furnishing, or contributing to the furnishing of, any newspaper, billboard, radio, or other advertising to any purchaser in connection with the sale or offering for sale of products purchased from respondent when such services or facilities are not accorded to competing purchasers upon proportionally equal terms.

3. Discriminating in favor of one purchaser against another purchaser or purchasers of respondent's candy or candy products bought for resale by contracting to furnishing or furnishing any services or facilities in connection with the offering for sale or sale of such candy or candy products so purchased upon terms not accorded to all purchasers on proportionally equal terms.

V. *It is further ordered*, That the respondent, the Curtiss Candy Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the sale, or making any contract for the sale of, respondent's candy or candy products in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling, or making any contract for the sale of, respondent's candy products on the condition, agreement, or understanding that the pur-

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chaser thereof shall not use or deal in candy or candy products supplied by any competitor of the respondent.

2. Enforcing or continuing in operation or effect any condition, agreement, or understanding in or in connection with any existing contract of sale which condition, agreement, or understanding is to the effect that the purchaser of respondent's candy or candy products will deal in and sell only candy and candy products supplied by the respondent.

VI. *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.

Commissioner Mason requesting that he be shown as not participating.

Complaint

IN THE MATTER OF

HAMMACHER SCHLEMMER & CO., INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914

Docket 5410. Complaint, Dec. 27, 1945—Decision, Nov. 28, 1947

Where a corporation engaged in the interstate sale and distribution of its "Gasconomy" device, designed to be clamped on the end of the exhaust pipe of automobiles and trucks, and, after discontinuing the sale thereof, in the sale and distribution of a similar exhaust pipe attachment which it called "Vacudex"; through advertisements in New York newspapers circulated generally among the purchasing public—

- (a) Falsely represented that its said device, when attached to the exhaust pipe, would save gasoline and oil and increase the mileage obtained from a gallon of gasoline 10 to 20 percent, and even more in some instances; and would cause the motor to have quicker acceleration and to give better performance; and
- (b) Represented that the device had been installed upon hundreds of New York City official cars after exhaustive tests had proven its worth; when in fact no such tests had been conducted by the city or any department thereof, nor use thereof authorized or directed upon any official cars of the city;

With capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that such representations were true and into the consequent purchase of substantial quantities of said device:

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

Mr. Joseph Callaway for the Commission.

Mr. Irving D. Lipkowitz, of New York City, 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 Hammacher Schlemmer & Co., Inc., a corporation, trading and doing business as Hammacher Schlemmer, 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 public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Hammacher Schlemmer & Co., Inc., is a corporation, organized, existing and doing business under and by virtue of the laws