

Syllabus

IN THE MATTER OF
GLADE CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2848. Complaint, June 12, 1936—Decision, June 17, 1937*

Where a corporation engaged in manufacture and sale of "straight" goods candy, and also of so-called "break and take," "draw," or "deal" assortments, sale and distribution of which type candy, in constant demand and affording, in connection with sale thereof to public, means or opportunity of obtaining a prize or becoming a winner by lot or chance, and providing an easy means of disposing of such products, teaches and encourages gambling among children, constituting substantial number of the purchasers and consumers of such type, and particularly of candy-bar assortments with push card, and sale and distribution of which type in the markets of many manufacturers who sell their "straight" goods in interstate commerce in competition with the other, has been followed by a marked decrease in sales of such "straight" goods, due to gambling or lottery feature connected with said "break and take," "draw," or "deal" candy, preferred by consumers because of gambling feature connected therewith, and sale of which candy, so packed and assembled as to enable retail dealers, without alteration, addition, or rearrangement, to resell same to consuming public by lot or chance, is contrary to public policy,—

Sold, to jobbers and retailers, certain assortments of candy which were so packed and assembled as to involve, or were designed to involve, use of a lottery scheme when sold and distributed to consumers thereof, and several of which consisted of (a) a number of candy bars, together with push card, for sale and distribution to consuming public under a plan, and in accordance with said card's explanatory legend, by which purchaser received, for five cents paid, one or more additional bars of candy, depending upon particular number or legend pushed by chance, and last push on card also received specified number of additional bars, and (b) number of packages of candy of varying size, together with punch board, for sale and distribution to consuming public under a plan, and in accordance with said board's explanatory legend, by which purchaser received, for five cents paid, one of said packages, in accordance with number punched by chance, or nothing other than privilege of a punch; so assembled and packed that they were designed to be, and were, exposed and used by retail dealer purchasers thereof for distribution and resale to purchasing public by lot or chance, without alteration or rearrangement, and with knowledge and intent that such candy should thus be resold to public by lot or chance by said retail dealers, in competition with many who regard such sale and distribution as morally bad and as encouraging gambling, and especially among children, and as injurious to the candy industry through resulting in the merchandising of a chance or lottery instead of candy, and as providing retail merchants with a means of violating the laws of the several States, and some of whom, for such reasons, refuse to sell candy so packed and assembled that it can be resold to public by lot or chance;

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With result that such competitors were put to a disadvantage in competing, retailers, finding candy more salable by "break and take," "draw," or "deal" method, bought from it and others employing same methods of sale, trade was diverted to it and others using similar method from said competitors, who could compete on even terms only by giving similar devices to retailers, and sales of their "straight" candy, in their unwillingness so to do, showed a marked decrease, some competitors began sale and distribution of candy by lot or chance in order to meet competition of manufacturers who thus sold and distributed such products, and trade was diverted to it from its said competitors, and there was a restraint upon and a detriment to the freedom of fair and legitimate competition in the industry involved; to the prejudice and injury of the public and competitors:

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

Before *Mr. Charles P. Vicini* and *Mr. Henry M. White*, trial examiners.

Mr. P. C. Kolinski and *Mr. Henry C. Lank* for the Commission.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Glade Candy Company, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Glade Candy Company, is a corporation organized and operating under the laws of the State of Utah, with its principal office and place of business located at 232 South Fifth East Street, Salt Lake City, Utah. Respondent is now, and for several years last past has been, engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States, and causes and has caused its said products, when so sold, to be transported from its principal place of business in Salt Lake City, Utah to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for several years last past, a course of trade and commerce by said respondent in such candy between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other corporations and

with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale and retail dealers packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

(a) One of said assortments, manufactured and distributed by the respondent, is composed of a number of boxes of assorted chocolate candies, together with a device commonly called a "punch-board." The said boxes of candy are distributed to the consuming public by means of said punchboard in the following manner: The sales by means of said punchboard are 5 cents each, and when a punch is made from said board a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears a statement or statements informing the prospective customer as to which numbers receive a box of candy. The purchasers of the last punch on each of three sections of the board each receive a box of chocolate candy. On a so-called two hundred hole board fourteen numbers call for a prize box of candy. A purchaser who does not qualify by obtaining one of the numbers calling for one of the boxes of candy or by punching the last number on the board receives nothing for his money other than the privilege of punching a number from the board. The boxes of candy are worth more than 5 cents each, and a purchaser who obtains one of the numbers calling for a box of candy receives the same for the price of 5 cents. The numbers on said board are effectively concealed from the purchasers or prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The boxes of candy in said assortment are thus distributed to purchasers of punches from said board wholly by lot or chance.

(b) Another of said assortments is designated and described by respondent as "Play Ball," and consists of a number of candy bars together with a device commonly called a push card. The candy contained in said assortment is distributed to purchasers in the following manner:

The push card has a number of partially perforated discs, and when a push is made and the disc separated from the card, a legend is disclosed. Sales are 5 cents each, and the card bears statements informing customers and prospective customers as follows:

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ALL WINNERS		NO BLANKS	
HOME RUN-----		Receives 5 candy bars	
3 Base Hit-----		Receives 4 candy bars	
2 Base Hit-----		Receives 3 candy bars	
1 Base Hit-----		Receives 2 candy bars	
Base on Balls-----		Receives 1 candy bar	
Foul Ball-----		Receives 1 candy bar	
Out-----		Receives 1 candy bar	
Last sale receives 6 Candy Bars			

The legends on the discs or pushes are effectively concealed from the purchaser and prospective purchaser until a selection has been made and the disc separated from the card. The fact as to whether a purchaser receives one candy bar, two candy bars, four candy bars, five candy bars or six candy bars for the price of 5 cents is thus determined wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments, resells said assortments to retail dealers, and said retail dealers, and the retail dealers to whom respondent sells direct expose said assortments for sale and sell said candy to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its product in accordance with the sales plans hereinabove set forth, and said sales plans have the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure a box of candy.

The use by respondent of said method in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said method, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy; and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has the dangerous tendency unduly to hinder competition or create monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the branch of the candy trade involved in this proceeding competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme.

Many persons, firms and corporations who make and sell candy in competition with the respondent, as above alleged, are unwilling to offer for sale or sell candy so packed and assembled as above

alleged, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said method and manner of packing said candy, and by the element of chance involved in the sale thereof in the manner above described and are thereby induced to purchase said candy so packed and sold by respondent in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by the respondent has the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or an equivalent method.

PAR. 6. Many of said competitors of respondent are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance or any other method that is contrary to public policy.

PAR. 7. The aforementioned method, acts and practices of the respondent are all to the prejudice of the public and of respondent's competitors, as hereinabove alleged. Said method, acts and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on June 19, 1936, issued and served a complaint upon the respondent, Glade Candy Company, a corporation, charging that respondent had been and was using unfair methods of

competition in commerce, as "commerce" is defined in said act of Congress.

After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of the complaint were introduced by P. C. Kolinski, attorney for the Commission, and in opposition to the allegations of the complaint by H. L. Mulliner, attorney for the respondent, before Charles P. Vicini and Henry M. White, examiners of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, the proceeding regularly came on for final hearing before the Commission on said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral argument of Henry C. Lank, counsel for the Commission, the respondent not being represented although duly notified of the time and place of such hearing; and the Commission, having duly considered the same and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Glade Candy Company, is a corporation organized under the laws of the State of Utah, with its principal office and place of business located at 232 South 5th East Street in Salt Lake City, Utah. Respondent is now, and for several years last past has been, engaged in the manufacture of candy in Salt Lake City and in the sale and distribution thereof to retail dealers and jobbers located in the State of Utah and in the States of Nevada, Wyoming, Idaho, and Colorado. It causes said candy when sold to be shipped or transported from its principal place of business in the State of Utah to purchasers thereof in Utah and in the other States of the United States as mentioned above. In so carrying on said business, respondent is and has been engaged in interstate commerce, and is and has been engaged in active competition with other corporations and with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to jobbers and retail dealers certain assortments of candy so packed and assembled as to involve, or which are designed to involve, the use of a lottery scheme when sold and distributed to the consumers thereof.

Several of such assortments manufactured, sold, and distributed by respondent are composed of a number of bars of candy, together with a device commonly called a "push card." The said bars of candy are distributed to the consuming public by means of said push card in the following manner: The push card has a number of partially perforated discs, and when a push is made and the disc separated from the card a number or legend is disclosed. Sales are 5¢ each, and the card bears a statement or statements informing customers and prospective customers that all the numbers or legends pushed from said card receive one bar of candy, but that certain specified numbers or legends receive one or more additional bars of candy. The push card also bears a legend stating that the last push on the card receives a specified number of additional bars of candy. All purchasers receive one bar of candy, but purchasers obtaining the specified numbers or legends receive additional bars of candy of the same size and quality. The numbers or legends on said card are effectively concealed from the purchaser or prospective purchaser until a push or sale has been made and the particular push separated from the card. The additional bars of candy in said assortment are thus distributed to purchasers of pushes from said card wholly by lot or chance.

Respondent also distributes several assortments composed of a number of packages of candy of varying size, together with a device commonly called a "punchboard." The said packages of candy are distributed to the consuming public by means of said punchboard in the following manner: The punchboard has a number of holes in which slips of paper bearing numbers are secreted. The slips of paper and the numbers thereon are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the particular slip of paper separated from the board. The punchboard has printed at the top thereof various statements or legends informing purchasers and prospective purchasers that certain numbers receive specified packages of candy. Sales are 5¢ each, and the packages of candy contained in said assortment are distributed to the consuming public in accordance with the legends at the top of said punchboard. The fact as to whether a purchaser receives one of the packages of candy or nothing other than the privilege of punching a number from said board for the price of 5¢ is thus determined wholly by lot or chance.

PAR. 3. The candy assortments involving the lot or chance feature, as above described, are generally referred to in the candy trade or industry as "draw" or "deal" assortments. Assortments of candy without lot or chance features in connection with their resale to the public are generally referred to in the candy trade or industry as

"straight" goods. These terms will be used hereafter in these findings to distinguish these separate types of assortments.

PAR. 4. The wholesale dealers or jobbers to whom respondent sells its assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale and sell said candy to the purchasing public in accordance with the sales plans as described above.

PAR. 5. All sales made by respondent, whether to wholesale dealers and jobbers or to retail dealers, are absolute sales and respondent retains no control over said assortments after they are delivered to the wholesale dealer or jobber or retail dealer. The assortments are assembled and packed in such manner that they are designed to be used and are used by the retail dealer for distribution to the purchasing public by lot or chance without alteration or rearrangement. In the sale and distribution to jobbers and wholesale dealers for resale to retail dealers and to retail dealers direct of the assortments of candy described in paragraph 2, respondent has knowledge that said candy will be resold to the purchasing public by retail dealers by lot or chance, and it packs such candy in the way and manner described so that without alteration, addition or rearrangement thereof it may be resold to the public by lot or chance by said retail dealers.

PAR. 6. There are in the United States many manufacturers of candy, competing with respondent in the territory served by respondent, who do not manufacture and sell "draw" or "deal" assortments of candy and who sell their "straight" goods in interstate commerce in competition with the "draw" or "deal" candy, and manufacturers of "straight" goods have noted a marked decrease in the sales of their products whenever or wherever the "draw" or "deal" assortments have appeared in their markets. This decrease in the sale of "straight" candy is due to the gambling or lottery feature connected with the "draw" or "deal" candy. Witnesses from several branches of the candy industry testified in this proceeding to the effect that consumers preferred to purchase the "draw" or "deal" candy because of the gambling feature connected with its sale. The sale and distribution of "draw" or "deal" packages or assortments of candy, or of candy which has connected with its sale to the public the means or opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children who comprise a substantial number of the purchasers and consumers of this type of candy, particularly the assortments of candy bars with a pushcard.

PAR. 7. The sale and distribution of candy by the retailers by the methods described herein is the sale and distribution of candy by lot or chance and constitutes a lottery or gaming device. The Com-

mission finds that many competitors regard such sale and distribution as morally bad and as encouraging gambling, especially among children; as injurious to the candy industry because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with a means of violating the laws of the several States. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. The retailers, finding that they can dispose of more candy by the "draw" or "deal" method, buy from respondent and others employing the same methods of sale, and thereby trade is diverted to respondent and others using similar methods from said competitors. Such competitors can compete on even terms only by giving the same or similar devices to retailers. This they are unwilling to do, and their sales of "straight" candy show a marked decrease. The sale and distribution of candy by lot or chance provides an easy means of disposing of such products. There is a constant demand for candy which is sold by lot or chance, and in order to meet the competition of manufacturers who sell and distribute candy which is sold by such methods some competitors have begun the sale and distribution of candy to the public by lot or chance. The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 8. Respondent sells its merchandise in the States of Utah, Idaho, Montana, and Colorado. The majority of its candy is sold as "straight" merchandise, but its sales of "draw" or "deal" assortments are substantial.

PAR. 9. The Commission further finds that the sale and distribution in interstate commerce of assortments or packages of candy so packed and assembled as to enable retail dealers, without alteration, addition or rearrangement, to resell the same to the consuming public by lot or chance, is contrary to public policy.

CONCLUSION

The aforesaid acts and practices of respondent, Glade Candy Company, a corporation, under the conditions and circumstances set forth in the foregoing findings of fact, are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning

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of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and other evidence taken before Charles P. Vicini and Henry M. White, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and the oral argument of Henry C. Lank, counsel for the Commission, the respondent not being represented although duly notified of the time and place of such hearing; and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is hereby ordered, That the respondent, Glade Candy Company, a corporation, its officers, directors, agents, representatives, and employees, in the offering for sale, sale and distribution in interstate commerce of candy, do cease and desist from:

1. Selling and distributing to wholesale dealers and jobbers, for resale to retail dealers and to retail dealers direct, candy so packed and assembled that sales of said candy to the general public are to be made, or may be made, by means of a lottery, gaming device, or gift enterprise.

2. Supplying to or placing in the hands of retail and wholesale dealers and jobbers packages or assortments of candy which are used, or may be used, without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy contained in said assortments to the public.

3. Supplying to or placing in the hands of retail and wholesale dealers and jobbers assortments of candy, together with a device commonly called a "push card," or a device commonly called a "punchboard," for use, or which may be used, in distributing or selling said candy to the public at retail.

4. Furnishing to retail and wholesale dealers and jobbers a device commonly called a "push card," or a device commonly called a "punchboard," either with packages or assortments of candy or separately, bearing a legend or legends or statements informing the

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purchasing public that the candy is being sold to the public by lot or chance, or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

It is further ordered, That the respondent, Glade Candy Company, a corporation, shall, within 30 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 the order to cease and desist hereinabove set forth.

IN THE MATTER OF
WOODY CANDY COMPANY

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

Docket 2697. Complaint, Jan. 31, 1936—Decision, June 19, 1937

Where a corporation engaged in manufacture and sale of candy, including certain assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and which included assortments such as (1) number of small candy bars, number of medium-sized bars, and number of larger bars, together with push cards, for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser received, for five cents paid, one of the majority of small bars, one of the medium-sized, or one of the large bars, in accordance with particular number pushed by chance, and purchaser of last push was entitled, without charge, to one of said large pieces; and (2) number of pieces of candy, number of bars of candy, and one still larger bar, together with push card, for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser received, for penny paid, one of the small pieces composing majority of said assortment, or one of the large bars, in accordance with particular number pushed by chance, and purchaser of last push was entitled to receive, without charge, the still larger bar—

Sold, to wholesalers and retailers for display and resale to purchasing public by the retailer-vendee, in accordance with aforesaid plan, such assortments, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of said products, in accordance with such plans, contrary to the established public policy of the several States and of the United States Government, and contrary, in many States, to local criminal statutes, and in competition with many who, unwilling to offer and sell candy so packed and assembled, or otherwise arranged and packed for sale to purchasing public, as to involve a game of chance or sale therewith of a chance to procure larger pieces, refrain therefrom, and in competition with many who are unwilling to adopt and use said or any method involving game of chance or sale of a chance to win by chance, as contrary to public policy or criminal statutes as aforesaid, or as detrimental to public morals and to morals of the purchasers of such products;

With result that many dealers in and ultimate purchasers of candy were attracted by said methods and manner of packing such product, and by element of chance involved in sale thereof as above set forth, and thereby induced to purchase same, thus packed and sold by it, in preference to that offered and sold by said competitors who do not use such or equivalent methods, many dealers were induced to purchase the candy thus offered and sold by it in preference to all others, by reason of preference given thereto by ultimate purchaser on account of such game of chance involved therein, and with tendency and capacity, because of said game of chance alone, unfairly to divert to it trade and custom from its said competitors