

IN THE MATTER OF
OSTLER CANDY COMPANY

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

Docket 2837. Complaint, June 8, 1936—Decision, Aug. 4, 1938

Where a corporation engaged in manufacture and sale of "straight" candy and also of so-called "break and take," "draw," "deal," or "chance" candy, purchase of which latter type is preferred by many consumers because of gambling feature connected with sale thereof, and sale of which, with opportunity of obtaining a prize or becoming a winner, teaches and encourages gambling among children, who constitute substantial number of purchasers and consumers of such type where penny a sale, and use of which type, considerable proportion of which, along with straight candy, is sold in service stations, drug and cigar stores, cafes, pool halls, and taverns, is injurious to industry involved and, in penny-candy trade, diverts business from concerns who do not use such assortments and operates to prejudice of public—

Sold, to wholesalers and to retailers, various assortments of candy which were so packed and assembled as to involve, or were designed to or might involve, use of a lottery scheme when sold and distributed to consumers thereof, and which assortments consisted of (1) candy bars and push cards for distribution to consuming public under plan by which 5-cent purchaser received, in accordance with numbers or legends pushed from card by chance and explanatory statement contained thereon, one, or more bars, with purchaser of last push also receiving additional bars, as specified; (2) assortments involving same principle or sales plan, where unit was 1 cent, rather than 5 cents, and in some of which larger, instead of additional, pieces of candy were given as prizes, and in others of which articles of merchandise were thus furnished; and (3) a number of wrapped penny pieces of uniform size and shape, together with some larger pieces to be given as prizes to those purchasers of such uniform pieces, the color of which differed from that of the majority;

Assembled and packed in such manner that they were designed to be used and were used and resold, with its knowledge and intent, without alteration or rearrangement, to the purchasing public by lot or chance by retailers thereof, contrary to public policy and in competition with many manufacturers who offer and sell their "straight" goods candy in the territory served by it in competition with the "straight" and "chance" candy of it and others selling similar or like assortments, and in competition with many who regard such sale and distribution as contrary to public policy, as morally bad, and as encouraging gambling, and especially among children, and as injurious to the industry in resulting in the merchandising of a chance or lottery instead of candy, and as providing retailers with means of violating the public policy and 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 the public by lot or chance;

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With result that retailers, finding more salable such candy, bought from it and others employing such methods of sale as to said "chance" candy, their entire candy, and including "straight" merchandise, requirements, trade in both "straight" and "chance" candy was diverted to it and such others from competitors who did not follow such practices, and who could compete on even terms in the sale of "straight" candy only by likewise furnishing to retailers candy which might be sold by use of same or similar devices, and sales of which "straight" candy competitors, in their unwillingness to do so, showed a marked decrease, and with result that public and competitors were prejudiced and injured and there was a restraint upon and a detriment to the freedom of fair and legitimate competition in industry involved:

Held, That such acts and practices 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 Ostler Candy Co., 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, Ostler Candy Co., is a corporation organized and operating under the laws of the State of Utah, with its principal place of business located at 143 South State Street, Salt Lake City, Utah. Respondent is now, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution of such products and in the sale and distribution of the products of other candy manufacturers to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States, and causes and has caused all of 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 more than 1 year 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 its said

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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 certain 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) Several of said assortments manufactured, sold, and distributed by the 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 cents 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.

(b) The respondent distributes several other assortments involving the same principle or sales plan, where the unit of sale is 1 cent, rather than 5 cents. These several assortments vary only in detail from the assortments described above in paragraph (a). In some of said assortments larger pieces of candy instead of additional pieces of candy are to be given as prizes and in other of the assortments, articles of merchandise other than candy are furnished and are to be given as prizes to purchasers from said assortments. The larger or additional pieces of candy and the other articles of merchandise are distributed to the ultimate consumer wholly by lot or chance.

(c) Certain other assortments manufactured, sold, and distributed by respondent are composed of a number of pieces of candy of uniform size and shape, together with a number of larger pieces of candy and a small box of candy, which larger pieces of candy and the small box

of candy are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner. The majority of said pieces of candy of uniform size and shape are of the same color or have centers of the same color, but a small number of said pieces of candy are of different color or have centers of different color. The said pieces of uniform size and shape retail at a price of 1 cent each, but the purchaser who procures one of said candies colored differently or having a center colored differently from the majority, is entitled to receive and is to be given, free of charge, one of the said larger pieces of candy heretofore referred to. The purchaser of the last piece of candy of uniform size and shape in said assortments is entitled to receive and is to be given, free of charge, the small box of candy. The color of the said pieces of candy or the color of the centers of the said pieces of candy in said assortments is effectively concealed from the purchaser and prospective purchaser until a selection has been made and the wrapper removed or the piece of candy broken open. The aforesaid purchasers of said candies who procure a candy colored differently or having a center colored differently from the majority of said pieces of candy of uniform size and shape in said assortment, thus procure one of the said larger pieces of candy or the small box of candy wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortment, 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 aforesaid sales plans. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sales of its products, 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 additional or larger bars of candy or small boxes of candy or other articles of merchandise.

The use by respondent of said methods in the sale of candy and the sale of candy by and through the use thereof, and by the aid of said methods, 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 methods has a 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

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branch of the candy trade involved in this proceeding competitors who do not adopt and use the same methods or equivalent or similar methods involving the same or equivalent or similar elements of chance or lottery schemes.

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 methods 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 candies 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 methods by respondent has the tendency and capacity because of said games of chance to divert to respondent trade and custom from its said competitors who do not use the same or equivalent methods; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or equivalent methods 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 equivalent method and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said methods 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 methods or equivalent methods.

PAR. 6. Many of said competitors of respondent are unwilling to adopt and use said methods 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 methods, acts, and practices of respondent are all to the prejudice of the public and respondent's competitors as hereinabove alleged. Said methods, 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 the Federal Trade Commission Act, the Federal Trade Commission, on June 8, 1936, issued and thereafter served its complaint in this proceeding upon the respondent, Ostler Candy Co., a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, 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 and F. W. James, attorneys 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 was not represented, although duly notified of the time and place of such hearing; and the Commission, after duly considering the matter, and being fully advised in the premises, on June 17, 1937, issued and thereafter served upon the respondent its findings as to the facts and its conclusion drawn therefrom, and its order to cease and desist from the practices complained of.

On May 10, 1938, the respondent, by its attorney, Walter G. Moyle, filed a motion to vacate the findings as to the facts and the order to cease and desist theretofore entered by the Commission on June 17, 1937; and further moved the Commission for leave to file and to argue orally motion to modify the said findings as to the facts and order to cease and desist; and the Commission, after duly considering said motions and the record, and being fully advised in the premises, issued its order dated May 16, 1938, vacating the findings as to the facts and the order to cease and desist previously issued on June 17, 1937; and further, on May 16, 1938, entered and issued its order granting respondent leave to argue orally and file brief in support of its said motion to modify on or before June 15, 1938, and setting the matter for oral argument for June 28, 1938, at 2:00 o'clock p. m., in the Commission's main hearing room in Washington, D. C., all of which action the Commission caused immediate notice to be given to the respondent.

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Respondent filed no brief and did not appear for argument of aforesaid motion on June 28, 1938. On May 31, 1938, attorney Walter G. Moyle withdrew his appearance as counsel for respondent. On July 5, 1938, the Commission ordered hearing for oral argument on the merits reset for July 18, 1938, at 2:00 o'clock p. m. in the main hearing room, Federal Trade Commission Building, Washington, D. C., and gave due notice thereof to respondent and its counsel of record, H. L. Mulliner. On July 15, 1938, said H. L. Mulliner withdrew his appearance as counsel for respondent. Thereafter, the proceeding regularly came on for hearing before the Commission on July 18, 1938, at 2:00 o'clock p. m. (brief of respondent not having been filed on June 15, 1938, or subsequent thereto, and respondent making no appearance at said hearing on July 18, 1938), and the Commission, having considered the matter on the said complaint, the answer thereto, the record, testimony and other evidence, 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, Ostler Candy Co., is a corporation organized under the laws of the State of Utah, with its principal office and place of business located at 143 South State Street, in Salt Lake City, Utah. Respondent is now, and since 1919 has been, engaged in the manufacture of candy in Salt Lake City, Utah, and in the sale and distribution thereof to retail dealers and wholesalers located in the State of Utah and in the States of Nevada, Wyoming, Idaho, and Montana. 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 hereinabove mentioned. 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.

Manufacturers and distributors of candy who are located in the eastern and midwestern portions of the United States offer for sale and sell their products in competition with respondent in the same territory in which respondent offers for sale and sells its "straight" and "chance" candies.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to retail dealers and

wholesalers certain assortments of candy so packed and assembled as to involve, or which are designed to or may 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 cents 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 has distributed, and does distribute, several other assortments involving the same principle or sales plan as that described above where the unit of sale is 1 cent rather than 5 cents. These several assortments vary only in detail from the assortment described immediately above. In some of said assortments larger pieces of candy, instead of additional pieces of candy, are to be given as prizes, and in other assortments articles of merchandise other than candy are furnished by respondent and are to be given as prizes to purchasers from said assortments. The larger or additional pieces of candy, or the other articles of merchandise, are distributed to the ultimate consumers wholly by lot or chance.

Respondent has also distributed, and does distribute, an assortment composed of a number of pieces of candy of uniform size and shape, together with a number of larger pieces of candy, which larger pieces of candy are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner: The majority of said pieces of candy of uniform size and shape are of the same color, but a small number of said pieces of candy are of a different color. The said pieces of candy of uniform size and shape retail at a price of 1 cent each, but the purchaser who procures one

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of said candies colored differently from the majority is entitled to receive, and is to be given free of charge one of the said larger pieces of candy heretofore referred to. The color of the said pieces of candy in said assortment is effectively concealed from the purchaser and prospective purchaser until a selection has been made and the piece of candy unwrapped. The aforesaid purchasers of said candies who procure a candy colored differently from the majority of said pieces of candy of uniform size and shape in said assortment thus procure one of the said larger pieces of candy 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 "break and take," "draw," or "deal" assortments, and may be designated as "chance" candy. Assortments of candy without the "chance" feature 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 to whom respondent sells its assortments resell the same to retail dealers. Respondent sells most of its said assortments direct to retail dealers. Numerous retail dealers purchase the assortments described in paragraph 2 hereinabove either from respondent or from wholesale dealers who, in turn, have purchased said assortments from respondent, and such retail dealers display said assortments for sale to the public as packed by respondent, and the candy contained in said assortments is generally sold and distributed to the consuming public in accordance with respondent's sales plan, as above described.

The evidence discloses, and the Commission finds, that as a result of complaints and orders to cease and desist issued by it, several large manufacturers and distributors of candy have discontinued their interstate shipment of "break and take," "draw," or "deal" assortments (otherwise designated as "chance" candy), and such manufacturers and distributors have allowed their local representatives to procure push cards, punchboards, and candies separately by interstate shipment, and thus to assemble "break and take," "draw," or "deal" assortments (otherwise designated as "chance" candy) and to use and dispose of such assortments in intrastate commerce so as to avoid the distribution of such assortments in interstate commerce.

The majority of the candy sold and distributed by respondent is sold as "straight" merchandise, only a small part of its sales being assortments with which a push card is furnished, or which is so packed and assembled as to involve a lot or chance feature when resold to the consuming public.

An officer of the respondent testified that its annual volume of business was a little more than \$50,000.

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

PAR. 6. There are in the United States many manufacturers of candy selling and offering for sale candy in the territory served by this respondent, who do not manufacture and sell "break and take," "draw," or "deal" assortments (otherwise designated as "chance" candy) and who offer for sale and sell their "straight" goods in interstate commerce in competition with the "straight" and "chance" candy of respondent and others selling similar or like assortments, with the result that trade and custom are unfairly diverted to respondent and others offering similar assortments from such competitors because of the gambling or lottery feature connected with the "break and take," "draw," or "deal" (otherwise designated as "chance") assortments as hereinabove described. The record shows that the use of "break and take" assortments is injurious to the candy industry, and in the penny candy trade diverts business in volume from concerns who do not use it; and is to the prejudice of the public. Witnesses from several branches of the candy industry testified in this proceeding, and the Commission finds that consumers prefer to purchase said "chance" candy because of the gambling feature connected with its sale. The sale and distribution of said "chance" candy, which has connected with its sale the means or opportunity of obtaining a prize, teaches and encourages gambling among children, who comprise a substantial portion of the purchasers and consumers of this type of candy, where the unit of sale is 1 cent.

A considerable proportion of said "chance" candy is sold in automobile service stations, drug and cigar stores, cafes, pool halls, and taverns; the evidence in the record, however, is to the effect that said retailers offer for sale and sell to the consuming public not only said "chance" candy, but "straight" candy as well.

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PAR. 7. The sale and distribution of candy by 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 Commission finds that many competitors regard such sale and distribution as contrary to public policy, 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 public policy and the laws of the several states. For 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 thereby compete at a disadvantage. Retailers, finding that they can dispose of more candy by the "break and take," "draw," or "deal" method, buy all their requirements, including "straight" candy, from respondent and others employing the same methods of sale as to said "chance" candy, and thereby trade in both "straight" and "chance" candy is diverted to respondent and others using similar methods from said competitors not following similar practices. Such competitors can compete on even terms in the sale of "straight" candy only by likewise furnishing to retailers candy which may be sold by the use of the same or similar devices. This they are unwilling to do, and their sales of "straight" candy show a marked decrease. 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 is a restraint upon, and a detriment to, the freedom of fair and legitimate competition in the candy industry.

PAR. 8. 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 are all to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of 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, and briefs filed herein; and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is now ordered, That the respondent, Ostler Candy Co., a corporation, its officers, 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 jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed and assembled that sales of such 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 wholesale dealers and jobbers or retail dealers packages or assortments of candy which are used, or which 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 packages or assortments to the public.

3. Packing or assembling in the same package or assortment of candy for sale to the public at retail bars of candy, together with a device commonly called a "push card," which push card is for use, or which may be or is designed to be used, in distributing or selling said candy to the public at retail.

4. Packing or assembling in the same package or assortment of candy for sale to the public at retail pieces of candy of uniform size and shape of different colors or having centers of a different color, together with larger pieces of candy or other articles of merchandise, which said larger pieces of candy or other articles of merchandise are to be given as prizes to the purchaser procuring a piece of candy of a particular color or having a center of a particular color.

5. Furnishing to retail and wholesale dealers and jobbers a device commonly called a "push card," either with packages or assortments of candy or separately, bearing a legend or legends or statements informing the 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 respondent, Ostler Candy Co., a corporation, within 30 days after service upon it of this order, shall 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
GLADE CANDY COMPANY

COMPLAINT, 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 19, 1936—Decision, Aug. 4, 1938

Where a corporation engaged in manufacture and sale of "straight" candy, and also of so-called "break and take," "draw," "deal," or "chance" candy, purchase of which latter type is preferred by many consumers because of gambling feature connected with sale thereof, and sale and distribution of which, with opportunity of obtaining a prize or becoming a winner, teaches and encourages gambling, and large portion of which, along with "straight" candy, where unit of sale is 5 cents, is sold in service stations, pool halls, drug stores, cigar stands, taverns, and cafes—

Sold, to jobbers and retailers, certain assortments of candy which were so packed and assembled as to involve, or were designed to or might involve, use of a lottery scheme when sold and distributed to consumers thereof, and which assortments consisted of (1) candy bars with push cards for distribution to consuming public under plan by which 5-cent purchaser received, in accordance with particular number or legend pushed from card by chance, one or more than one bar, with last push on card also securing additional bars; and (2) number of packages of candy of varying size, with punchboards for distribution to consuming public under plan by which specified packages, or nothing other than privilege of a punch, were secured by the 5-cent purchasers, in accordance with the particular numbers punched by chance, and as announced on the board's explanatory legend;

Assembled and packed in such a manner that they were designed to be used and were used and resold, with its knowledge and intent, without alteration or rearrangement, to the purchasing public by lot or chance by retailers thereof, contrary to public policy and in competition with many manufacturers who offer and sell their "straight" goods candy in the territory served by it in competition with the "chance" and "straight" candy of it and others selling similar and like assortments, and in competition with many who regard such sale and distribution as contrary to public policy, as morally bad, and as encouraging gambling, and as injurious to the industry in resulting in the merchandising of a chance or lottery instead of candy, and as providing retailers with a means of violating the public policy and 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 the public by lot or chance;

With result that retailers, finding more saleable such candy, bought from it and others employing such methods of sale, trade in both "straight" and "chance" candy was diverted to it and others using similar methods from said competitors who did not follow such practices, sales of exclusive "straight" candy competitors, who could compete on even terms in the sale of their products only by furnishing to retailers candy to be sold by use of same or similar devices, showed a marked decrease in their unwillingness to do so, public and competitors were prejudiced and injured, and there was a restraint