

IN THE MATTER OF

B. M. BENNETT, TRADING AS EMPIRE STATE CANDY
COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4400. Complaint, Dec. 5, 1940—Decision, Feb. 10, 1941*

Where an individual engaged in manufacture of candy and in interstate sale and distribution of various assortments thereof which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and included (1) number of bars of candy, together with two-section push card, for use in sale and distribution of said bars, all of which had retail value greater than 1 cent, under plan in accordance with which purchaser paid 1 cent, 2 cents, 3 cents, 4 cents, or 5 cents, in accordance with legend or figure revealed and secured by disk punched and selected, and purchaser of last punch in each section received two bars free, and (2) various assortments involving lot or chance feature and sales plans or methods similar to that above described, from which they varied in detail only—

Sold such assortments and cards to dealers and retailers, by whom, as direct or indirect purchasers thereof, they were exposed and sold to purchasing public in accordance with aforesaid sales plans or methods, involving game of chance or sale of a chance to procure bars of candy at prices much less than normal retail prices thereof, and thereby supplied to and placed in the hands of others means of conducting lotteries in sale of his products, in accordance with said sales plans or methods, contrary to an established public policy of the United States Government and in violation of the criminal laws, and in competition with many who make and sell candy and who are unwilling to offer or sell their products so packed and assembled as above set forth, or otherwise arranged and packed for sale to purchasing public so as to involve game of chance or any other method contrary to public policy and refrain therefrom;

With tendency and capacity to induce purchasers of his said candy to purchase same in preference to that offered and sold by his competitors, and with result that many dealers in and ultimate consumers of candy were attracted by said method and manner of packing same and by element of chance involved in sale thereof, as above set forth, and were thereby induced to purchase such candy, thus packed and sold by him, in preference to that offered and sold by his competitors, who do not use same or equivalent methods, and with tendency and capacity, through use of said methods and because of said game of chance, to unfairly divert trade to him from his competitors who do not use such methods, exclude from candy trade all competitors who are unwilling to and do not use same or equivalent methods as unlawful, lessen competition therein, and create monopoly thereof in him and in such other distributors of candy as use same or equivalent methods, and deprive purchasing public of benefit of free competition and to eliminate from trade in

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question all actual, and exclude therefrom all potential, competitors who do not adopt and use same or equivalent methods:

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

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

Erwin & Nix, of Athens, Ga., 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 B. M. Bennett, individually and trading under the name of Empire State Candy Co., hereinafter referred to as respondent, has violated the provisions of the 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. The respondent, B. M. Bennett, is an individual doing business under the trade name of Empire State Candy Co., with his principal office and place of business located at 883 College Avenue, Athens, Ga. Respondent is now and for more than 1 year last past has been engaged in the manufacture of candy and in the sale and distribution thereof to dealers. Respondent causes and has caused the said candy when sold to be shipped or transported from his aforesaid place of business in the State of Georgia to purchasers thereof at their respective points of location in various States of the United States other than the State of Georgia and in the District of Columbia. There is now and for more than 1 year last past has been a course of trade by said respondent in such candy in commerce between and among the various States of the United States and in the District of Columbia.

In the course and conduct of his business respondent is in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of candy in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course of conduct of his business as described in paragraph 1 hereof, respondent sells and has sold to dealers various assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to consumers thereof. One of said assortments is sold and distributed to the purchasing

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public in the following manner: This assortment consists of a number of bars of candy together with a device called a push card. The card contains a number of partially perforated discs with the word "push" appearing on the face of each of said discs and printed within each of said disks is either 1, 2, 3, 4, or 5 cents. The push card is divided into two sections. Each purchaser is entitled to push one number from said card. Each purchaser is entitled to and receives one bar of candy and pays therefor the amount indicated within the disk removed from said card, and the purchaser of the last punch on each section receives two bars of candy free. All of said bars have a retail value greater than 1 cent. The said amounts are effectively concealed from the purchasers and prospective purchasers until a push or selection has been made and the selected disk removed or separated from the card. Thus the amount to be paid by each customer for a bar of candy is determined wholly by lot or chance.

The respondent manufactures, sells, and distributes various assortments of candy, involving a lot or chance feature, and such assortments and the sales plans or methods by which said assortments are distributed are similar to the one hereinabove described varying only in detail.

PAR. 3. Retail dealers who purchase respondent's assortments of candy directly or indirectly expose and sell the same to the purchasing public in accordance with the aforesaid sales plans or methods. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of his products in accordance with the sales plans or methods hereinabove set forth. Said sales plans or methods have a tendency and capacity to induce purchasers of said candy to purchase respondent's candy in preference to candy offered for sale and sold by his competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure bars of candy at prices much less than the normal retail prices thereof. The use by respondent of said methods in the sale of his candy and the sale of such candy by and through the use thereof and by the aid of said methods is a practice of the sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws. The use by respondent of said methods has a tendency unduly to hinder competition or to create a monopoly in that the use thereof has a tendency and capacity to exclude from the candy trade competitors who do not use and adopt the same or equivalent methods involving the same or equivalent element of chance or lottery. Many

persons, firms, and corporations who make and sell candy in competition with respondent as above alleged are unwilling to offer for sale or to sell their products so packed and assembled as above described or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance or any other method which is contrary to public policy and such competitors refrain therefrom.

PAR. 5. Many dealers in, and ultimate consumers 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 methods by respondent has a tendency and capacity, because of said game of chance, to unfairly divert to respondent trade from his competitors who do not use the same or equivalent methods; to exclude from the candy trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are unlawful; to lessen competition in the candy trade; to create a monopoly of said candy trade in respondent and in such other distributors of candy as use the same or equivalent methods and to deprive the purchasing public of the benefit of free competition. The use of said methods by 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 the same or equivalent methods.

PAR. 6. The aforesaid acts and practices of respondent as herein alleged are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 5, 1940, issued and on December 6, 1940, served its complaint in this proceeding upon respondent, B. M. Bennett, individually and trading under the name of Empire State Candy Co., charging him with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act.

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On December 27, 1940, the respondent filed his answer, in which answer he admitted all the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearing as to the said facts. Thereafter, the proceeding regularly came on for final hearing before the Commission upon the said complaint and the answer thereto, and the Commission having duly considered the matter 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 conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, B. M. Bennett, is an individual doing business under the trade name of Empire State Candy Co., with his principal office and place of business located at 883 College Avenue, Athens, Ga. Respondent is now and for more than 1 year last past has been engaged in the manufacture of candy and in the sale and distribution thereof to dealers. Respondent causes and has caused the said candy when sold to be shipped or transported from his aforesaid place of business in the State of Georgia to purchasers thereof at their respective points of location in various States of the United States other than the State of Georgia and in the District of Columbia. There is now and for more than 1 year last past has been a course of trade by said respondent in such candy in commerce between and among the various States of the United States and in the District of Columbia.

In the course and conduct of his business respondent is in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of candy in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business as described in paragraph 1 hereof, respondent sells and has sold to dealers various assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to consumers thereof. One of said assortments is sold and distributed to the purchasing public in the following manner: This assortment consists of a number of bars of candy together with a device called a push card. The card contains a number of partially perforated disks with the word "push" appearing on the face of each of said disks and printed within each of said disks is either 1, 2, 3, 4, or 5 cents. The push card is divided into two sections. Each purchaser is entitled to push one number from said card. Each purchaser is entitled to and receives one

bar of candy and pays therefor the amount indicated within the disk removed from said card, and the purchaser of the last punch on each section receives two bars of candy free. All of said bars have a retail value greater than 1 cent. The said amounts are effectively concealed from the purchasers and prospective purchasers until a push or selection has been made and the selected disk removed or separated from the card. Thus the amount to be paid by each customer for a bar of candy is determined wholly by lot or chance.

The respondent manufactures, sells, and distributes various assortments of candy, involving a lot or chance feature, and such assortments and the sales plans or methods by which said assortments are distributed are similar to the one hereinabove described varying only in detail.

PAR. 3. Retail dealers who purchase respondent's assortments of candy directly or indirectly expose and sell the same to the purchasing public in accordance with the aforesaid sales plans or methods. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of his products in accordance with the sales plans or methods hereinabove set forth. Said sales plans or methods have a tendency and capacity to induce purchasers of said candy to purchase respondent's candy in preference to candy offered for sale and sold by his competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure bars of candy at prices much less than the normal retail prices thereof. The use by respondent of said methods in the sale of his candy and the sale of such candy by and through the use thereof and by the aid of said methods is a practice of the sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws. The use by respondent of said methods has a tendency unduly to hinder competition or to create a monopoly in that the use thereof has a tendency and capacity to exclude from the candy trade competitors who do not use and adopt the same or equivalent methods involving the same or equivalent elements of chance or lottery. Many persons, firms, and corporations who make and sell candy in competition with respondent as above found are unwilling to offer for sale or to sell their products so packed and assembled as above described or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance or any other method which is contrary to public policy and such competitors refrain therefrom.

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PAR. 5. Many dealers in, and ultimate consumers 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 methods by respondent has a tendency and capacity, because of said game of chance, to unfairly divert to respondent trade from his competitors who do not use the same or equivalent methods; to exclude from the candy trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are unlawful; to lessen competition in the candy trade; to create a monopoly of said candy trade in respondent and in such other distributors of candy as use the same or equivalent methods and to deprive the purchasing public of the benefit of free competition. The use of said methods by respondents 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 the same or equivalent methods.

CONCLUSION

The aforesaid acts and practices of respondent as herein found are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that he waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondent, B. M. Bennett, individually and trading as Empire State Candy Co., or trading under any other name or names, his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of candy or any other mer-

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chandise in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Selling or distributing candy or any merchandise so packed and assembled that sales of such candy or other merchandise to the general public are to be made, or may be made, by means of a game of chance, gift enterprise, or lottery scheme.

(2) Supplying to or placing in the hands of others push or pull cards, punchboards, or other lottery devices, either with assortments of candy or other merchandise or separately, which said push or pull cards, punchboards, or other lottery devices are to be used, or may be used, in selling or distributing such candy or other merchandise to the public.

(3) Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the respondent shall, within 60 days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

PAUL BOTWIN AND EAULA LOUISE BOTWIN, DOING
BUSINESS AS EAULA CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914*Docket 3249. Complaint, Oct. 21, 1937—Decision, Feb. 11, 1941*

Where two partners engaged in sale and distribution of candy and other merchandise to operators of and concessionaires with moving picture and burlesque theatres and tent shows, and to other persons at different points in various States, and including, in the course and conduct of their said business, certain assortments which consisted of number of packages or boxes of candy, each of which contained another article of merchandise or prize of varying value, and in the case of some of such prizes, having normal retail values in excess of the retail prices of the packages or boxes in question, prices of which were uniform and not dependent upon cost of merchandise or prize contained or to be contained therein, as case might be, and ascertainment of which was impossible for prospective purchaser until after package in question had been purchased and contents removed therefrom—

Sold and distributed such packages or boxes of candy, containing articles of merchandise to be secured as prizes, as aforesaid, directly to consuming public at points in other States through partner member to whom same were shipped for such sale, and through and to retailers by whom said assortments were resold to purchasing public in accordance with aforesaid sales plan or method, which constituted game of chance or sale of a chance to procure article of merchandise at price much less than normal retail price thereof, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale and distribution of their merchandise in accordance with such sales plan or method, contrary to an established public policy of the United States Government and in violation of criminal laws, and in competition with others who sell and distribute like or similar merchandise in commerce among the various States, but who are unwilling to use said or any other sales plan or method involving game of chance or sale of a chance to win something thereby, or any other sales plan or method which is contrary to public policy, and refrain therefrom;

With the result that many persons, because of said element of chance involved in said sales plan or method, were induced to buy and sell their said merchandise in preference to that offered and sold by said competitors, and with consequence, through use of said sales plan or method, of unfairly diverting substantial trade to them from their said competitors; to their substantial injury:

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