

Complaint.

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IN THE MATTER OF
THE NUGRAPE COMPANY OF AMERICA.

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

Docket 1199—March 23, 1925.

SYLLABUS.

Where a corporation engaged in the manufacture of a sirup which contained only a very small proportion of product of the grape and derived its purple color from artificial coloring matter and its characteristic flavor simulating that of grape juice, from sources other than the small amount of said product therein contained, and in the sale thereof to bottling plants;

- (a) Used and featured the word "NuGrape" in advertising its aforesaid products and upon the bottles authorized for use by its bottlers, together with a conspicuous cluster of grapes, without any adequate notice, if any, that said sirup was not made from said product; and
- (b) Made such statements in its advertising as "NuGrape is made from the purest of pure Concord grapes," together with pictorial representations of clusters of grapes and of vineyards, and made numerous other statements directly or impliedly representing that grape juice was the principal or only ingredient of "NuGrape" and only inadequately advised the reader, when at all, as to its true composition;

With the effect of misleading the latter in reference to the composition thereof; *Held*, That such practices, under the circumstances set forth, constituted unfair methods of competition.

Mr. H. A. Cox for the Commission.

Candler, Thomson & Hirsch of Atlanta, Ga., and *Browne & Phelps* of Washington, D. C., for respondent.

COMPLAINT.

Acting in the public interest, 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 charges that The NuGrape Company of America, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, issues this its complaint and states its charges in that respect as follows:

PARAGRAPH 1. Respondent, The NuGrape Company of America, is a corporation organized under the laws of the State of Georgia, November 5, 1921, existing and doing business under and by virtue of the laws of said State, and with its principal or executive offices

and manufacturing plant located in the city of Atlanta, State of Georgia, and with other manufacturing plants owned or operated by it in the cities of Baltimore, Md., and Dallas, Tex. It is now and has been for more than two years last past, engaged in the manufacture of a concentrate or syrup known as "NuGrape" and in the sale of the same in interstate commerce to numerous bottling plants throughout various States of the United States for the purpose of manufacturing a beverage also known, advertised and sold in interstate commerce under its trade name or brand "NuGrape," causing its said concentrate or syrup when so sold to be transported from the point of manufacture in one State to purchasers thereof located in other States of the United States. In the course and conduct of its said business, respondent was at all times hereinafter mentioned, and still is, in competition with other individuals, firms, partnerships and corporations likewise engaged in interstate commerce.

PAR. 2. That respondent, The NuGrape Company of America, in the course and conduct of its said business as described in paragraph 1 hereof, for more than two years last past as a means of inducing the public to purchase its product has caused advertisements to be inserted in publications having general circulation throughout various States of the United States and by means of other advertising matter circulated in interstate commerce has published and represented to the purchasing public its product known and sold under its trade name or brand "NuGrape" in such a way and with such qualifying statements used in the advertisement thereof and in connection therewith so as to import to a substantial part of the purchasing public that the said product was the juice of the grape, and the use by said respondent in its advertising matter of pictures or designs of grape vineyards, bunches of grapes and similar pictorial representations along with the following qualifying statements: "NuGrape has a way about it—makes you forget the heat and humidity, and remember only those luxuriant days when Concord grapes ripen on the vine and all the air is honey-sweet," "It's just that sort of flavor, a mysterious something, born of plump Concord grapes and sunshine," "All the flavor of the Vineyards in this bottle," "NuGrape is as full o'Health as the rich, full-flavored joy of the grapes from which it is made," "You can't be too extravagant in praise of this sparkling, grape-spliced beverage," "It is in no sense 'just a grape drink.' It is more," and "NuGrape is made from the purest of pure Concord grapes," and with numerous other and similar statements used in said advertisements in connection or conjunction with the said trade name or brand of its product tend to and do directly assert or clearly import and imply to a substantial

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part of the purchasing public that said product is composed in whole or in part of the juice of the grape, when in truth and in fact said produce is not made of the juice from the grape or the fruit of the same.

PAR. 3. That respondent, The NuGrape Company of America, in the course and conduct of its said business as described in paragraph 1 hereof, for more than two years last past has marketed and sold or caused its product to be marketed and sold in interstate commerce in bottles with molded labels featuring prominently a pictorial representation of a bunch of grapes together with its trade name or brand "NuGrape"; that the use by said respondent of a bunch of grapes as a bottle mold or label, or its trade name or brand "NuGrape," either independently or in connection or conjunction each with the other, especially when said product is colored to simulate the juice of the grape in appearance, tends to and does directly assert or clearly import and imply to a substantial part of the purchasing public that the said product is composed of the pure juice of the grape, when in truth and in fact said product is not made of the juice of the grape or the fruit of the same; that the use by the said respondent of its trade name or brand "NuGrape" in connection with its product, without additional words of explanation—to the effect that the said product is not made of the juice of the grape or the fruit of the same—has the capacity and tendency to mislead or deceive the purchasing public into the erroneous belief that such product is made of the juice of the grape or the fruit of the same and that said purchasing public buys respondent's product on the strength of such misleading and deceptive trade name or brand.

PAR. 4. That respondent's said advertising matter, its said bottle mold or labels and its said trade name or brand, either used independently or in connection or conjunction each with the other, as more particularly described in paragraphs 1, 2, and 3 hereof, are calculated to and have the effect of stifling and suppressing competition in the sale of beverages made in whole or in part from the juice of the grape or the fruit of the same, and further in diverting trade from truthfully marked goods.

PAR. 5. That there are a considerable number of competitors of respondent who are engaged in the manufacture and sale of beverages composed in whole or in part of the juice of the grape or the fruit of the same, which said products are sold in competition with the product of respondent.

PAR. 6. That the above alleged 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

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Findings.

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, the Federal Trade Commission issued and served its complaint upon the respondent, The NuGrape Company of America, charging it with the use of unfair methods of competition in commerce, in violation of the provisions of said act.

Respondent having entered its appearance and filed its answer and amended answer, hearings were had and evidence introduced in support of the complaint and in opposition thereto. A stipulation was then entered upon between counsel for the Commission and the respondent and its counsel to supplement the facts shown by the record and to avoid the expense and trouble of taking additional testimony. In the stipulation it was agreed that the Federal Trade Commission may proceed upon the entire record, including the testimony and the stipulation to make its report in said proceeding, stating its findings as to the facts and conclusion and enter its order disposing of the proceeding; and the Commission being fully advised in the premises, makes this its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. The respondent, The NuGrape Company of America, is a corporation which was organized under the laws of the State of Delaware in the latter part of the year 1924, and which at that time took over the business, assets, liabilities, etc., of the corporation of the same name which was organized under the laws of the State of Georgia in 1921, and against which the complaint in this case was originally directed. The respondent has the same officers and directors it had under its Georgia charter and has entirely ceased to operate under the Georgia charter. The abandonment of the Georgia charter and the beginning of operations under the Delaware charter occurred after part of the testimony had been taken in this case, but the Delaware corporation entered its appearance by the same attorney which represented it under its Georgia charter, and agreed that the testimony theretofore taken might be regarded by the Commission as equally applicable to both the Georgia and Delaware corporations. The word respondent, as used herein, means The NuGrape Company of America in active charge of the business

at the time when the particular acts referred to transpired, whether before or after the substitution of the Delaware charter for the Georgia charter. The principal place of business and the executive offices of the respondent have always been in Atlanta, Georgia, and it has a manufacturing plant there. It has other manufacturing plants at Baltimore, Maryland, Dallas, Texas, and Jacksonville, Florida. It is now and was for more than two years prior to the filing of the complaint, engaged in the manufacture of a syrup known as "NuGrape" and in the sale of the same in interstate commerce to numerous bottling plants located in various States of the United States. The syrup sold to said bottlers is shipped from the various manufacturing plants of the respondent, in most instances across State lines to the bottlers located in other States of the United States than the one in which the respective plant making shipment is located. There are several hundred of such bottlers scattered through nineteen States, mostly through southern and eastern portions of the United States. These bottlers prepare a beverage from the syrup according to the instructions from the respondent, which beverage is put into bottles by them and sold under the name of "NuGrape."

Most of the bottlers do little or no interstate business in the bottled beverage, but a few of them regularly ship or deliver some of the bottled beverage across State lines to retail dealers in other States.

Both the syrup "NuGrape" and the bottled beverage "NuGrape," are in competition with grape juice and other grape products, and imitation grape products sold by other individuals, firms, partnerships and corporations in interstate commerce.

PAR. 2. The syrup "NuGrape" which the respondent sells to the bottling plants contains grape juice or other grape product in an amount not exceeding 7 per cent of its total volume, the remaining 93 per cent being principally sugar syrup; and the bottled beverage "NuGrape" contains grape juice or other grape product in amount not exceeding 2 per cent, and probably not exceeding 1 per cent of its total volume, the remainder being principally sugar syrup and carbonated water. The syrup and beverage are given a purple color by the addition of artificial coloring matter by the respondent, and the beverage does not derive its characteristic flavor, which simulates the flavor of grape juice, from the small percentage of grape products which it contains, but said flavor is due principally to other and artificial sources.

PAR. 3. During the year 1922 and until July or August, 1923, the advertising matter which respondent inserted or caused to be inserted in a number of newspapers, some of which had an interstate

circulation, in the Southern and Eastern States, contained pictorial representations of clusters of grapes and of grape vineyards displayed thereon in connection with the statement that "NuGrape is made from the purest of pure Concord grapes," that "NuGrape is as full of health as the rich full-flavored joy of the grapes from which it is made," and many other expressions which either directly or by clear implication represented that "NuGrape" was grape juice, or that grape juice was its principal ingredient. Many of such statements were literally untrue, and others not literally untrue were clearly misleading and deceptive.

During the latter part of July or the first part of August, 1923, respondent removed from its newspaper advertisements all pictorial representations of grapes and grape vineyards, and all direct statements that "NuGrape" was made from grapes. Since that time its newspaper advertisements have borne the name or brand of the beverage "NuGrape" very prominently displayed in large letters sometimes in connection with such expressions as "Test after test has proven its purity" and "Doctors conscientiously recommend it because 'NuGrape' is pure." There also appeared on these newspaper advertisements and on the signs, wall hangers and other advertising matter used by respondent and distributed by it to the various bottlers bottling the "NuGrape" beverage the following legend in very small and inconspicuous type: "A compound with grape solids and color reinforced." This legend was so small and inconspicuous in comparison with the name "NuGrape" which usually preceded it and in comparison with the other featured portions of the advertising matter in which it appeared that it would not ordinarily attract the attention of a reader. Besides the legend itself was not truly descriptive of the beverage and was misleading as to its character.

These advertisements as a whole clearly tended to create in the minds of those who read them the impression that "NuGrape" is made entirely, or in large part, of grape juice. The name "NuGrape" itself tends to and does create that impression and unless accompanied in every instance by an explanation that "NuGrape" is an imitation grape beverage and is not grape juice, will continue so to do.

In order to be effective in preventing deception, such explanation should be in letters sufficiently large and prominent to insure its being read easily and at the same time as the word "NuGrape" which it accompanies. Such letters should be at least one-half as high and one-half as wide as the letters in the word "NuGrape" accompanying them, and of heaviness of color and style of lettering which will render them at least equally as conspicuous in proportion to their height and width as the letters in the word "NuGrape."

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PAR. 4. Prior to the latter part of the summer of 1923 the bottles authorized by the respondent and used by some of its bottlers for bottling and selling the beverage "NuGrape." contained the name "NuGrape" and a conspicuous cluster of grapes with no explanation that "NuGrape" was not made from grapes or from grape juice. In the summer of 1923 the design of the respondent's bottles was changed so as to eliminate the clusters of grapes, but the word "NuGrape" remained in conspicuous letters blown into the bottle which contained no explanation that NuGrape was not made from grapes or grape juice. The cap of the new bottles bore the words "Imitation grape artificially colored and flavored," but in letters much less conspicuous than those in which the word "NuGrape" appeared on the cap.

The caps were customarily removed by the retail dealer before serving the bottled beverage to the customer and the customer seldom saw the explanation on the cap. Both types of bottles had the capacity and tendency to cause and did cause prospective purchasers to believe that "NuGrape" was made in whole or in large part from grape juice. This effect was emphasized by reason of the purple color of the beverage contained in the bottles.

The word "NuGrape" was duly registered by respondent as a trade-mark on February 13, 1923.

CONCLUSION.

The practices of the said respondent, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in interstate commerce and constitute a violation of the 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 and the amended answer of the respondent, the testimony in support of the complaint and in opposition thereto, the stipulation as to the facts agreed upon between counsel for the Commission and the respondent and its counsel, and the Commission having made findings as to the facts and its conclusion that the 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 now ordered, That the respondent, The NuGrape Company of America, its officers, agents, representatives, servants and employees, do immediately cease and desist from directly or indirectly—

(1) Using or authorizing the use in connection with the sale in commerce of NuGrape syrup or NuGrape beverage of any pictorial representation of grapes or grape vineyards, or any words, pictures or symbols stating or suggesting that NuGrape is made from grapes or grape juice, in any advertising matter, whether newspaper advertisements, posters, signs, wall hangers or otherwise.

(2) Shipping or authorizing the shipment of such advertising matter in commerce to bottlers or dealers handling NuGrape syrup or beverage or to any other person whomsoever, or at all.

(3) Using or authorizing the use on bottles or other containers of NuGrape beverage of words, pictures or symbols of the character described in paragraph (1) hereof.

(4) Using or authorizing the use of the name "NuGrape," whether on advertising matter relating to the syrup or beverage NuGrape or on bottles or other containers of the beverage NuGrape, without accompanying the said name "NuGrape" in every instance with an explanation in close proximity to the word "NuGrape" and in letters at least one-half as high and one-half as wide as the letters used in the accompanying word "NuGrape," and of heaviness of color and style of lettering which will render them at least equally as conspicuous in proportion to their height and width as the letters in the accompanying word "NuGrape," which explanation shall contain the statement that NuGrape is an imitation and is not grape juice. The following may be used for this explanation: "Imitation grape—not grape juice."

It is further ordered, That respondent shall within sixty days after the 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 hereinbefore set forth.

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IN THE MATTER OF
J. W. MURPHY.

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

Docket 1239—March 24, 1925.

SYLLABUS.

Where a corporation engaged in the publication of a high class and very popular weekly periodical, which for many years had been named "The Saturday Evening Post," and as such had come to be associated by the subscribing, purchasing, and reading public throughout the United States exclusively with the weekly periodical published by such corporation; and thereafter an individual engaged in a certain State in the publication of a weekly periodical, designated the same "The Saturday Evening Post" and sought subscriptions by means of advertisements and by personal solicitation of his agents without disclosing the identity of his publication, with the result that the public was misled and persons subscribed believing they were taking the periodical of the aforesaid corporation:

Held, That such appropriation and use of the trade name of a competitor's product, under the circumstances set forth, constituted an unfair method of competition.

Mr. L. B. Perkins for the Commission.

COMPLAINT.

Acting in the public interest 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 charges that J. W. Murphy, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is an individual with his place of business in the city of Burlington, State of Iowa. He is now, and at all times hereinafter mentioned has been engaged in the publication at said point of a weekly periodical named, and published under the name, "The Saturday Evening Post," and the sale of said periodical to subscribers therefor and to purchasers thereof located at points in Iowa and in other States of the United States. He causes the weekly issues of said periodical, upon their publication, to be transported from his said place of business in the city of Burlington, Iowa, into and through other States of the United States to said