

Syllabus

IN THE MATTER OF

BOWEY'S, INCORPORATED

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

Docket 1533. Complaint, July 21, 1928—Decision, June 29, 1929

Where a corporation engaged in the manufacture and/or sale of true fruits, true fruit flavors, and imitation fruit flavors made from aldehydes and esters, with acids and aniline colors, for compounding drinks simulating the color and taste of those made with the juices of the grape, cherry, and raspberry, respectively, sold under the names "Cherry Flip", "Raspberry Flip", and "Grape Flip", along with its true fruit "Lemon Flip" and "Orange Flip", to jobbers and operators of pool rooms and soda fountains,

(a) Conspicuously labeled the containers of its said imitation fruit flavors, "Grape Flip", "Cherry Flip", or "Raspberry Flip", as the case might be, together with the word "imitation" in relatively inconspicuous letters, and supplied and sold to customers coolers containing the words "Bowey's Fruity Flips, Chicago, U. S. A.", together with labels to be pasted upon the bottom thereof, exposed to view upon the inverting of the cooler or bottle, containing the words "Grape Flip", "Cherry Flip", or "Raspberry Flip", and with the word "imitation" in much smaller letters; and

(b) Advertised its said "Grape Flip" in a trade periodical of nation-wide circulation among dealers and dispensers of soft drinks, under the afore-said name, and characterized the same, along with two other true fruit flips, as "dripping with the full, ripe, luscious flavor of the ripe fresh fruit", without indicating the imitation character of said first named product, and in its "Wholesale Price List of Crushed Fruit, Concentrated Fruit Stocks, Fudges, Hot Chocolate Powder, For the Soda Fountain", sent to customers, represented that its "Fruit Stocks and Concentrated Fruit Syrups are of Highest Quality and our Low Temperature Method of Packing Preserves in Full, Rich Flavor of Fresh Fruit", and described its fruitless imitation flavors as "Grape Flip, Cherry Flip, and Raspberry Flip", without disclosing that said flips were not made from true fruits;

With the capacity and tendency to mislead immediate buyers of its said imitation grape, cherry, and raspberry flavors into the belief that the same were made in whole or in part of the juice or fruit so designated, and to mislead and deceive ultimate purchasers of beverages made therefrom into believing the same to be composed in whole or in part of the fruit or juice designated:

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

Mr. E. J. Hornibrook for the Commission.

Lannen & Hickey, of Chicago, Ill., for respondent.

Complaint

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SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, an Illinois corporation engaged in the manufacture of flavoring extracts, concentrates and syrups not containing any fruit or fruit juices, and in the sale thereof to purchasers in various States for use in compounding soft drinks, and with principal office and place of business in Chicago, with naming product misleadingly, misbranding or mislabeling and advertising falsely or misleadingly in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, engaged as above set forth, brands, labels, describes, and sells its said product as "Bowey's Fruity Flips," "Grape Flip," "Cherry Flip," "Strawberry Flip," and "Raspberry Flip," and advertises said products thus labeled, branded, and described, in newspapers, magazines, periodicals, pamphlets, and other publications of general circulation throughout the various States with such representations as "Bowey's fruit stocks are concentrated syrups of the highest quality prepared at low temperature to preserve the delicious flavor of the fresh fruit," "Our low temperature method of packing, preserves the full rich flavor of the fresh fruit," "Highly concentrated flavors of the richest, truest aroma of the fresh fruit," "Dripping with the full, rich, luscious flavor of the ripe, fresh fruit," "Equal in flavor to the juice of the fresh squeezed fruit," and supplies its said extracts thus branded, labeled, described, and represented as regards the nature and character thereof, to dispensers of soft drink beverages, for display and by whom they are thus displayed to the public in the sale of beverages compounded therefrom.

Respondent's said brands, trade names, labels, descriptions, and representations of its said product, as charged, "have the capacity and tendency to, and do, mislead purchasers of said flavoring extracts, concentrates, and syrups and the beverages made therefrom into the belief that said flavoring extracts, concentrates, syrups, and beverages are composed, in whole or in part, of the fruits or the juice of the fruits, as represented and described, and the said advertising matter supplied to the dispensers and distributors of said flavoring extracts, concentrates, syrups, and beverages, and said trade names, brands, and labels furnish them with the means of deceiving and defrauding the consuming public," and respondent's said acts and practices, as above set forth, tend to and do divert business from and otherwise injure and prejudice competitors, among whom there are individuals and concerns dealing in pure fruit juices or extracts,

truthfully marked and advertised by them; all to the prejudice of the public and of respondent's competitors.

Upon the foregoing complaint, the Commission made the following

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 a complaint upon the respondent, Bowey's, Inc., charging it with the use of unfair methods of competition in commerce, in violation of the provisions of section 5 of said act.

Respondent having entered its appearance and filed its answer to said complaint, hearings were had before a trial examiner, theretofore duly appointed, and testimony was heard and evidence received in support of the charges stated in the complaint, and in opposition thereto. Thereafter, this proceeding came on regularly for decision, and the Commission having duly considered the record, and being now fully advised in the premises, makes this its report, stating its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. Respondent, Bowey's, Inc., is an Illinois corporation with its principal place of business in the city of Chicago. It was incorporated in the year 1908. It is engaged in the manufacturing and selling to jobbers and operators of pool rooms and soda fountains located in the several States of the Union, true fruits, true fruit flavors and imitation fruit flavors for use in compounding soft drinks. These fruits and flavors are named and called by respondent, Bowey's Lemon Flip, Bowey's Orange Flip, Bowey's Cherry Flip, Bowey's Raspberry Flip and Bowey's Grape Flip. The first two named flips are made from true fruit. The last three named flips are imitation fruit flips, artificially flavored and colored, and are entirely free of any fruit or the juice of any fruit. These three imitation fruit flavors are made from aldehydes and esters with acids and aniline colors for compounding drinks which simulate the color and taste of drinks made with the juices of the grape, cherry and raspberry, respectively.

PAR. 2. Respondent causes its products, when so sold, to be shipped from said place of manufacture through and into other States of the United States to the purchasers thereof, and in the course and conduct of its said business is in competition with other corporations, partnerships, and individuals making and/or selling true fruit juices and flavors and imitation fruit flavors in commerce.

Findings

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PAR. 3. Respondent's sales of the said imitation fruit flips are approximately \$1,000 per year. These said imitation fruit flips sell for \$7 per gallon. Respondent began the manufacture and sale of these imitation flips in the year 1924 and has continued the same up to the present time.

PAR. 4. Prior to March, 1928, respondent placed upon the bottles shipped to its customers, which bottles contained said imitation flips, labels upon which were printed in very conspicuous red letters the words "Grape Flip," "Cherry Flip," and "Raspberry Flip," as the flavor might be, and on each label the word "imitation" appeared printed in much smaller, dark and less conspicuous letters. Respondent discontinued the use of the labels last described in March, 1928. Since then it has labeled its imitation products as—

IMITATION GRAPE FLAVOR, ARTIFICIALLY COLORED

or

IMITATION CHERRY FLAVOR, ARTIFICIALLY COLORED

or

IMITATION RASPBERRY FLAVOR, ARTIFICIALLY COLORED

For over two years prior to March, 1928, coolers to be used in the dispensing of true fruit flavors and these imitation flavors were sold by respondent to its customers in various States of the United States. These coolers bore the legend in large letters:

BOWEY'S FRUITY FLIPS

CHICAGO

U. S. A.

In March, 1928, the following label was substituted for the label described last above:

BOWEY'S FLAVORED FLIPS

5 CENTS A GLASS

These coolers were sold by respondent to its said customers and about 400 of them have been disposed of. Prior to March, 1928, respondent also supplied its said customers, to whom it had sold these said coolers, with labels to be pasted upon the bottom of the bottles containing the imitation fruit juices, which labels contained the words "Grape Flip" or "Cherry Flip" or "Raspberry Flip" followed, in each instance, by the word "imitation" in letters much smaller than those used to designate the name of the flip. This label, when the bottle was inverted for use in this cooler, was in full view.

In March, 1928, respondent changed the wording of the labels which it supplied dealers to be affixed to said inverted bottles to read:

IMITATION GRAPE FLAVOR AND COLOR,
IMITATION CHERRY FLAVOR AND COLOR, and
IMITATION RASPBERRY FLAVOR AND COLOR

as the case might be. In these labels, described last above, the word "imitation" is printed in as conspicuous letters as the other words appearing thereupon.

In June, 1926, the respondent advertised "Grape Flip" in the "Soda Fountain", a publication of nation-wide circulation among dealers and dispensers of soft drinks as "Grape Flip" without indicating that the same was an imitation, and therein characterized grape flip and two other flips which were of true fruit as "dripping with the full, ripe, luscious flavor of the ripe fresh fruit." Respondent has not so advertised in a magazine since June, 1926.

For a year or more following September 1, 1926, respondent issued and sent to its customers what it styled its "Wholesale Price List of Crushed Fruit, Concentrated Fruit Stocks, Fudges, Hot Chocolate Powder, For the Soda Fountain". In this publication, respondent made the statement:

Bowey's Fruit Stocks and Concentrated Fruit Syrups are of Highest Quality and our Low Temperature Method of Packing Preserves in Full, Rich Flavor of Fresh Fruit.

and described its fruitless imitation as

Grape flip, Cherry flip, and Raspberry flip.

without explanation that these flips were not made of true fruit. This price list has not been used since March, 1928, and has only been distributed to its salesmen and jobber customers.

PAR. 5. The said representations made by respondent in the publication "Soda Fountain" and the said representations made by respondent prior to March, 1928, on labels and brands as set forth in the foregoing findings of fact have the capacity and tendency to mislead immediate buyers of respondent's imitation grape, cherry and raspberry flavors into the belief that same are made in whole or in part of the juice or fruit so designated, and have the capacity and tendency to mislead and deceive ultimate purchasers of beverages made from said imitation flavors into the belief that said beverages are composed in whole or in part of the juice or fruit so designated.

Order

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CONCLUSION

The practices of the said respondent, under the conditions and circumstances described in the foregoing findings are to the prejudice of the public and respondent's competitors, and are unfair methods of competition in commerce and constitute a violation 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, the testimony and evidence received by a trial examiner heretofore duly appointed by the Commission and the briefs filed herein, and the Commission having made its 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, Bowey's Inc., its representatives, agents, servants, employees and successors, cease and desist from using in connection with the sale in interstate commerce of any beverage flavor, the words "Cherry", "Raspberry", or "Grape" or either of them, or any other word or letter or pictorial illustration signifying a fruit or fruit juice as a trade brand, label or designation of a product not composed of the fruit or fruit juice indicated, unless the said words designating the product be immediately preceded by the word "Imitation" and followed by the word "Flavor" and by the words "Artificially Colored", all printed in type as conspicuous as that in which the other words designating the product are printed.

It is further ordered, That the respondent, Bowey's, Inc., shall within 60 days after the service upon it of a copy 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.

Syllabus

IN THE MATTER OF
SETHNESS COMPANY

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

Docket 1541. Complaint, Oct. 18, 1928—Decision, June 29, 1929

Where a corporation engaged in the manufacture of extracts, concentrates and flavors neither made from the juice or fruit of the grape, cherry, or other fruits concerned, nor containing the same in such substantial quantity as to be properly referred to by the names thereof or by such words as "Grapette", "Cherryette", etc., and in the sale of said products through traveling salesmen primarily to jobbers, manufacturers, and/or bottlers to serve as a basis for soft drinks bottled and sold by them to the retail and other trade in the various States,

- (a) Made such statements in advertising said products in trade journals and other publications circulating among the various States as "'The Best Grape we have ever used' is the unanimous testimony of bottlers everywhere who have tried Sethness famous Concord Grape. 'Best Grape' means a grape of the true fruit character, a profit maker, and a prestige builder";
- (b) Described its said products in certain advertising booklets issued by it periodically as "Grape Catawba White", "Grape Concord true", "Grapette", "Cherryette, clear", "Bananaette, clear", "Lemonette, cloudy", "Lymette, cloudy", "Limonette", "Oranette", "Peachette", "Raspberryette", and "Strawberryette", and labeled certain of its said products with the words "Catawba Grape White", "Cherryette", "Concord Grape", "Grapette", and other such names as immediately above set forth; and
- (c) Stated on placards and tin signs furnished to its bottler customers for distribution by them among the retail trade "Drink Peachette, a refreshing carbonated beverage", or "Drink Concord Grape Soda", or "The real drink. 'The taste tells—try it' with Concord Grape Soda", and in connection therewith displayed a representation of a bottle and glass filled with a purple liquid to simulate the color of grape juice;

With the result of thereby asserting and clearly importing and implying to a substantial part of the purchasing public that beverages made from its said products were composed in whole or in part from natural fruit or the juice thereof and of thus supplying to jobbers and bottlers of said flavoring extracts, concentrates, and sirups, and retail dispensers of beverages made therefrom the means of deceiving and defrauding the consuming public, and with the capacity and tendency to mislead and deceive purchasers of said beverages as to the composition thereof, as above set forth, and to suppress competition in the sale of truthfully marketed extracts, sirups, concentrates, and beverages made therefrom, whether artificially colored and flavored and not made from the product of any fruit or juice thereof, or so made in whole or in part, and of diverting trade therefrom: