

IN THE MATTER OF
NUGRAPE COMPANY OF AMERICA

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

Docket 1576. Complaint, Feb. 27, 1929¹—Decision, May 19, 1931

Where a corporation engaged in manufacture and sale of a sirup so made through removal of certain ingredients from and addition of alcohol and others to, a California grape juice concentrate upon which was based the "Merchandise No. 25" used by it, that there resulted a grape extract, containing no more than 20 per cent of grape juice, depending chiefly on addition of artificial coloring and tartaric acid for flavor and color, as did the carbonated beverage made therefrom in accordance with its directions by its very numerous bottler vendees, and others,

- (a) Displayed its corporate name including word "Nugrape" in advertisement, offer, and sale of aforesaid product and represented, designated, and referred to its aforesaid concentrate and beverage as "NuGrape", and, in smaller letters, as a "flavor you can't forget", in advertising matter, posters, tacking signs, and magazine and newspaper advertisements displaying persons reaching for the bottled beverage, and the slogan "reach for NuGrape";

¹ Complaint amended, after argument, to charge respondent as a Delaware instead of a Georgia corporation, by the following order:

"In the complaint issued on the 27th day of February, 1929, against the NuGrape Company, respondent herein, it is alleged in paragraph 1 that the respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia. This complaint was served upon the respondent on March 1, 1929, and respondent, in its answer filed March 28, 1929, denied that it was a corporation by virtue of the laws of the State of Georgia, but answered fully in all other respects and submitted itself to the jurisdiction of the Commission. Thereafter, in the course of taking testimony, it developed that respondent is a corporation under the laws of the State of Delaware, and that it is the successor of the NuGrape Company of America, a Georgia corporation, and that all the property and assets of the Georgia corporation had been transferred to the Delaware corporation, under an agreement in writing dated December 19, 1924. At the time of the said transfer, the officers, directors and stockholders of the NuGrape Company of America, a Georgia corporation, were identically the same as the officers, directors, and stockholders of the NuGrape Company of America, the Delaware corporation. Since the said transfer, no business has been carried on by the NuGrape Company of America, the Georgia corporation, although it has not been dissolved. In the brief in support of the complaint filed herein on February 24, 1931, and served upon respondent on February 26, 1931, counsel for the Commission stated that 'the Commission, at or before the time for final argument, will be asked to amend the complaint herein by striking out the word "Georgia" in line 3 of paragraph 1 and inserting in lieu thereof the word "Delaware."' At the final argument before the Commission on April 15, 1931, in accordance with the above quoted declaration contained in the brief in support of the complaint, counsel for the Commission moved the Commission that the amendment stated be made in conformity with the proof contained in the record, now, therefore,

"It is ordered, That the complaint herein be and the same is hereby amended by striking out the word 'Georgia' in line 3 of paragraph 1 and inserting in lieu thereof the word 'Delaware.'"

(b) Displayed or caused to be displayed its corporate name as above set forth and name NuGrape upon barrels in which it shipped to bottler and jobber vendees its said concentrate or sirup, upon labels prepared by it for bottled sirup for drug store and fountain use, and upon bottles made under license by it for the aforesaid beverage, together with slogan "A flavor you can't forget", and, excepting beverage bottles, some such statement as "prepared from grape juice, tartaric acid, cane sugar and artificial certified color", and/or "added" "fruit acid" or "part grape", and upon crown or bottle caps of beverage bottles, ordinarily removed before serving consumer, the words "artificial color NUGRAPE * * * SODA, containing in addition to grape juice, simple sirup tartaric acid and water;"

With tendency and capacity to mislead and deceive ultimate purchaser into believing that he was buying a beverage, the flavor and color of which were derived chiefly from the fruit and juice of the grape, and with effect of diverting trade from competitors dealing in grape juice and other grape, and imitation grape, products, and truthfully advertising and branding their products, and with tendency so to do;

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

Mr. Richard P. Whiteley for the Commission.

Mr. Harold Hirsch, Mr. John P. Stewart, Mr. Thomas J. Long, and Mr. Wellborn B. Cody, of Atlanta, Ga., and *Mr. W. Parker Jones*, of Washington, D. C., for respondent.

SYNOPSIS OF COMPLAINT²

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, a Delaware corporation engaged in the manufacture of a concentrate or sirup, and in the sale thereof throughout the various States of the United States for manufacture into a beverage, and with principal office and place of business, and manufacturing and/or bottling plants in Atlanta, and other plants in other cities, 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, names the concentrate and beverage made and dealt in by it, as above set forth, not made wholly or in substantial quantity of the juice of the grape or fruit thereof, though so made as to simulate the same in appearance, odor, and flavor, "NuGrape", and so advertises and refers thereto, and brands and labels the bottles or other containers thereof as to import or imply

²As amended.

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that the product in question is composed of the juice or fruit of the grape, or is so composed in substantial quantity.

The use by respondent, as alleged, of the "trade name, brand, or designation 'NuGrape' in connection with respondent's said product and/or the use of the word 'grape' in connection with respondent's said product has the capacity and tendency to mislead or deceive the purchasing public into the erroneous belief that its said products are made wholly and/or in substantial quantity of the juice of the grape, or the fruit of the same", and respondent's "said trade name, brand, or designation 'NuGrape' and/or the word 'Grape,' either used independently or in connection or conjunction with the word or syllable 'Nu' have the capacity and tendency to mislead and do mislead the purchasing public into the belief that respondent's said product is composed of the juice of the grape, or the fruit of the same, and thereby divert trade from truthfully marked products"; 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. The NuGrape Company of America, a corporation, 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 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 final hearing before the Federal Trade Commission, and the Commission having considered the record, and 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. Respondent NuGrape Company of America has been for several years last past and now is a corporation organized under and by virtue of the laws of the State of Delaware, with its principal office in the city of Wilmington in said State, and with its executive offices and principal manufacturing plant in the city of Atlanta, State of Georgia. Respondent, NuGrape Company of America, a Delaware corporation, is a successor to NuGrape Company of America, a Georgia corporation. Said Georgia corpora-

tion was engaged in business in the several States of the United States, with its principal office and place of business in the city of Atlanta, State of Georgia, up to December 19, 1924, when by action of its stockholders, it was decided that the company be reorganized as a Delaware corporation under the same name. Under date of December 19, 1924, an agreement in writing was entered into between NuGrape Company of America, the Georgia corporation, and NuGrape Company of America, the Delaware corporation, whereby all of the property, real, personal, and mixed, tangible and intangible, including goodwill, the trade-mark "NuGrape", No. 164168 and Patent Design Bottle, No. 54682, and all of the business of the said Georgia corporation was transferred to NuGrape Company of America, the Delaware corporation. At the time of the said transfer the officers, directors, and stockholders of NuGrape Company of America, the Georgia corporation, were identically the same as the officers, directors, and stockholders of NuGrape Company of America, the Delaware corporation. Since the said transfer no business has been carried on by NuGrape Company of America, the Georgia corporation, although it has not been dissolved.

PAR. 2. Respondent is, and has been, engaged for more than two years last past in business in the manufacture and sale of a concentrate or sirup, called by it "NuGrape" and in the sale of the same in interstate commerce to numerous bottling plants and jobbers located in various States of the United States, for the purpose of having manufactured therefrom a beverage also known, advertised, and sold in interstate commerce under the name "NuGrape", causing its said concentrate or sirup when so sold to be transported from the place of manufacture in one State to purchasers thereof located in other States of the United States. In the sale of its said "NuGrape" sirup in the various States of the United States, respondent at all times hereinafter mentioned has been, and still is, in competition with other corporations, individuals, firms, and partnerships likewise engaged in interstate commerce in the sale of sirups or concentrates to be used in the making of beverages, and in the sale of grape juices and other grape products and imitation grape products and beverages made therefrom. Respondent manufactures its "NuGrape" sirup in plants located at Atlanta, Ga., Dallas, Tex., Baltimore, Md., and Chicago, Ill., and has also had plants for the manufacture of said sirup at Little Rock, Ark., Jacksonville, Fla., Kansas City, Mo., and Los Angeles, Calif. The sirup has been and is shipped by respondent in 30 and 50 gallon barrels to some four or five hundred bottling plants located in various States of the United States, and to jobbers. Not more than 1 per cent of said sirup is sold to jobbers, who in turn

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sell the same to drug stores or soda fountains. The sirup so sold and distributed is used both by the soda fountain and the bottler in preparing the "NuGrape" beverage in the proportion of 1 ounce of said sirup to 5 ounces of carbonated water, and the beverage thus prepared retails for 5 cents a bottle. During the calendar year 1928 the respondent manufactured and sold slightly in excess of 200,000 gallons of "NuGrape" sirup and in 1929 about 105,000 to 110,000 gallons of said sirup.

PAR. 3. Since May, 1928, the NuGrape sirup manufactured and sold as above indicated by respondent has been prepared as follows:

In the manufacture of 40 gallons of said NuGrape sirup respondent uses 1 gallon of Merchandise No. 25, the remaining 39 gallons consisting of water, sugar, tartaric acid, and certified coloring matter. Merchandise No. 25 which is purchased by respondent from Fritzsche Bros., Brooklyn, N. Y., and which is also designated by its manufacturers as "Fritsboro True Grape Aromatics, New Process", has for its base a concentrate of grape juice obtained from California, which concentrated grape juice is produced from pure grape juice by a vacuum process in which about 4 or 4½ gallons of said grape juice are concentrated to 1 gallon. The sugar or solid content of the grape prevents further concentration, if the product is to remain in liquid form. This concentrated grape juice so produced in California is put through a further process by Fritzsche Bros., which process is described by them as follows: "In order to bring about this strength that we sell it at we add aromatic grape concentrate made from grapes by our own secret process. The grapes we use are Concord and other grapes in that concentrate which are used to bring it up to 8 to 1." A production specialist of said Fritzsche Bros. refused to give any further information about their so-called secret process on the ground that it would be disclosing trade secrets. Analyses of said Merchandise No. 25 by chemists of the Food, Drug and Insecticide Administration of the Department of Agriculture of the United States made in the spring of 1930 showed that it contained from 72 to 74 per cent of solids, also tartaric acid, malic acid and citric acid, and 13.85 per cent of alcohol. Unfermented grape juice contains only negligible quantities of alcohol, less than one-half of 1 per cent, usually, and the product sold the Fritzsche Bros. by its California producers contains no alcohol. Alcohol is added to the California concentrated grape juice, in addition to the so-called aromatic grape concentrate, to produce Merchandise No. 25. The addition of alcohol and of the aromatic grape concentrate to the California concentrated grape juice indicates in certain respects a grape juice concentrate of 8 to 1, but which contains only the sugar contents to be expected in a

concentrate of 4 or 5 to 1. Exhaustive analyses made by chemists of the United States Department of Agriculture of Merchandise No. 25, NuGrape sirup and NuGrape beverage, show that said Merchandise No. 25 is so changed by the removal of certain solids, such as fruit sugars and the removal of certain true fruit acids, and by the addition of a substantial amount of alcohol that it has ceased to be a pure concentrated grape juice and has become a grape extract and that NuGrape sirup is an artificially colored invert sugar sirup containing added acid, principally tartaric, and not more than 20 per cent of grape juice, and that the NuGrape beverage, made from respondent's NuGrape sirup, is an artificially colored beverage sweetened with invert sugar and acidulated with said added acid and containing no more than 4 per cent of grape juice. Respondent's product NuGrape sirup does not contain the natural fruit or juice of the grape in quantity sufficient to give it its color or flavor. The color of said NuGrape sirup is derived from the added certified coloring matter, or artificial coloring, and the flavor of said NuGrape sirup is derived chiefly from the added tartaric acid. The carbonated beverage NuGrape, produced by bottlers and soda water dispensers according to respondent's directions from NuGrape sirup, derives both its color and its flavor chiefly and substantially from the certified or artificial coloring matter and tartaric acid, both of said ingredients being added by respondent to Merchandise No. 25 in the production of its NuGrape sirup. The tartaric acid so added is not found as such in grapes or grape juices but is obtained from crude argols, commonly called wine lees, by-products, or precipitates, obtained in the treatment of grape juice or the manufacture of wine.

PAR. 4. Respondent corporation in the course and conduct of its said business as herein before described, during the years 1928, 1929, and 1930, as an inducement to customers and prospective customers in the sale of its products in the several States of the United States, has caused advertising matter to be prepared, published, and circulated in and among the various States of the United States in which it has represented, designated, and referred to its products as "NuGrape" followed by the slogan "A flavor you can't forget" and by means of posters, tacking signs, and magazine and newspaper advertisements displaying persons reaching for beverage bottles with the slogan "Reach for a NuGrape" prominently displayed. On the beverage bottles displayed in the above described advertising matter are the words NuGrape and Soda. Typical of this advertising matter is a poster, designed for 42 inches of space, which shows a tennis player reaching for a bottle labeled—

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NuGrape, a flavor you cant forget and also Soda

It makes this remark,

When you were never so thirsty in your life!

Reach for NuGrape.

The product is priced at 5 cents and at the bottom of the advertisement appears the words:

NuGrape—a flavor you cant forget

The words "A flavor you can't forget" are in much smaller letters than the word "NuGrape".

The labels affixed by respondent to the barrels in which its NuGrape sirup is shipped to bottlers and jobbers contain the words—

NUGRAPE

A flavor you can't forget

Reg. U. S. Pat. Off.

PART GRAPE

Prepared from grape juice, tartaric acid, cane sugar,
and artificial certified color

Manufactured by

NUGRAPE COMPANY OF AMERICA

ATLANTA, GA.

The labels prepared by respondent to be affixed to the bottles of NuGrape sirup used in drug stores and soda fountains contain the following words:

Fount Sirup

NUGRAPE

A flavor you can't forget

Reg. U. S. Pat. Off.

Contains less than 1-100 of 1 per cent Benzoate of Soda

Prepared from pure concentrated grape

juice and pure cane sugar. Added

fruit acid and certified color.

Manufactured by

NUGRAPE COMPANY OF AMERICA

ATLANTA, GA.

On the bottles in which the NuGrape beverage is sold the following words appear:

NUGRAPE

A flavor you can't forget

SODA

Trade-Mark Registered

Min. contents 6 fluid ounces

The bottles containing the NuGrape beverage are made and distributed by persons licensed to do so by respondent from patterns patented or copyrighted by respondent and bearing, blown in the bottles, words and letters furnished or dictated by said respondent.

Before July, 1928, the beverage bottles so manufactured in accordance with respondent's directions contained the words "Imitation grape" "Not grape juice" below the word "NuGrape." After respondent began to purchase Merchandise No. 25 from Fritzsche Bros. in 1928 and to use said Merchandise No. 25 in the manufacture of its NuGrape sirup as above described, it ceased using the words "Imitation grape", "Not grape juice", and instead used and has continued to use down to the present time the word "soda" without making it known that the said soda is an imitation, artificially colored and flavored. Respondent also furnishes the designs for the crowns or bottle caps to be placed upon the bottles in which the beverage NuGrape is sold to the consuming public, and caps being used in 1930 upon the said bottles contained the following lettering:

Artificial color

NUGRAPE

Reg. U. S. Pat. Off.

SODA

Containing in addition to grape juice

Simple sirup, tartaric acid, and water.

The words "artificial color", "NuGrape", and "soda" upon said crowns or bottle caps are quite prominent and legible but the custom of the trade in serving beverages of this nature is to remove the cap or crown and serve the drink in a glass or bottle. The cap or crown is not usually seen by the consumer.

PAR. 5. Both the NuGrape sirup and the bottled beverage, NuGrape, are sold in competition with grape juices and other grape products and imitation grape products sold by other corporations, individuals, firms, and partnerships in interstate commerce. Respondent's advertising, as aforesaid, and the wording of labels, crowns, bottles, posters, and signs, the name NuGrape and the coloration of the beverage are misleading and deceptive and the aforesaid use of the same has the tendency and capacity to mislead and deceive the ultimate purchaser of NuGrape beverage into the belief that he is buying a beverage or soda the flavor and color of which is derived chiefly from the juice or fruit of the grape, and tends to and does divert trade from competitors who truthfully advertise and brand their products.

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CONCLUSION

The practices of said respondent, under the conditions and circumstances described in the foregoing findings, are to the injury and prejudice of the public and respondent's competitors and are unfair methods of competition in 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 of the respondent, the testimony in support of the complaint and in opposition thereto, and on briefs and argument of counsel, and the Commission having made its findings as to the facts with 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 ordered, That the respondent, NuGrape Company of America, its officers, representatives, agents, servants and employees, cease and desist from—

(1) Using or authorizing the use by others, in interstate commerce of "NuGrape" or the word "grape" either alone or in conjunction or combination with any other word or words, letter or letters, as a trade name, brand, or designation in advertising, or on labels or bottles or barrels or other containers, or on the caps, crowns, or stoppers thereof, in connection with the sale or distribution of a product which is not composed wholly of the natural fruit or juice of grapes, except and unless such product is composed in such substantial part of the natural fruit or juice of grapes as to derive therefrom its color and flavor, and "NuGrape" or the word "grape", wherever used as above described, is accompanied with a word or words, equally conspicuous with it in character or type, clearly indicating that such product is composed in part of material or materials other than the natural juice or fruit of grapes, or if the beverage produced from respondent's sirup is not composed in such substantial part of the natural fruit or juice of grapes as to derive therefrom its color and flavor that respondent, its officers, representatives, agents, servants, and employees shall cease altogether from the use of the words "NuGrape" or "grape" in the connection indicated in this paragraph, except and unless, in the same con-

nection, it is made prominently to appear that the product is an imitation, artificially colored and flavored.

(2) Using or authorizing the use by others, in interstate commerce, in advertising, or on bottles, barrels or other containers or on labels, crowns, stoppers, or otherwise, of any word or words falsely representing or suggesting that a product is made from the natural juice or fruit of grapes or contains the natural juice or fruit of grapes in such substantial quantity as to derive therefrom its color and flavor.

And it is further ordered, That the respondent, The NuGrape Company of America, within 60 days after the date of 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 hereinbefore set forth.

Complaint

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IN THE MATTER OF

WILLIAM A. HIGGINS & COMPANY, INCORPORATED

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

Docket 1910. Complaint, Feb. 4, 1931—Decision, May 25, 1931.¹

Consent order requiring respondent to cease and desist from branding, labeling, or naming sacks or other containers of almond nuts, with or advertising same under, names or letters "Nonpareil", "I. X. L.", "Ne Plus", "Peerless", or "Drake" unless the nuts are grown in California and the names in question are used to designate the true varieties thereof; as in said order set forth.

Mr. E. J. Hornibrook for the Commission.

Crane, Inness & Arnold, of New York City, 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 William A. Higgins & Co., Inc., hereinafter referred to as the respondent, has been and is using unfair methods of competition in commerce, in violation of the provisions of section 5 of said act, and states its charges in that respect as follows:

PARAGRAPH 1. The respondent is a corporation organized and doing business under the laws of the State of New York, with its principal place of business in the City of New York. Its business for the last five years has been and now is the importing of nuts from Italy and France, especially almonds and walnuts, and the sale and distribution of nuts, including sales and shipments to purchasers in other States from its headquarters in New York City, N. Y.

PAR. 2. An organization of growers of almonds in California, known as California Almond Growers' Exchange, has in the past ten years regulated the grading and branding of the almonds grown by its members, and has adopted certain names or brands indicating the quality and grade of the product of members handled by the association. Said association has used the following names of brands: First quality, "Nonpareil"; second quality, "I X L" and "Ne Plus"; third quality, "Peerless" and "Drake". By adoption and long use, these names and brands have come to be applied exclusively to California products, and as such are well known and accepted in the trade as indicating nuts of superior quality and well graded types.

¹ As modified. Original order made as of March 25, 1931.