

Complaint

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IN THE MATTER OF
FEDERAL DISTILLED PRODUCTS

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 3
OF TITLE I OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933

Docket 2413. Complaint, May 24, 1935—Decision, Mar. 24, 1936

Where a corporation engaged as rectifier and wholesaler of liquors—
Featured its corporate name including words "Distilled Products" and "Federal" with phrases "Prepared by" or "Bottled by", in smaller type on labels and together with smaller type legends "Rectifiers and Blenders" on stationery and "Manufacturing Rectifiers", on price lists, and set forth words "A Federal Product" on bottle caps and, at one time, "A Federal Product . . . Federal Distilled Products, Milwaukee", on paste board cartons in which bottles were shipped, and sold bottled liquor thus labeled and containered in substantial competition with actual producers of distilled spirits from the grain and with rectifiers who do not by use of such words as "Distilled" misrepresent their status to the trade;

With effect of misleading and deceiving dealers and purchasing public into belief that it was engaged in manufacture of distilled spirits from the grain and of inducing retailers and public to purchase liquors bottled and sold by it in such belief, and thus divert trade to it from competitors who do not thus misrepresent themselves as manufacturers, and with capacity and tendency so to mislead, deceive, and induce; to the substantial injury of substantial competition:

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

Before *Mr. John W. Addison*, trial examiner.

Mr. PGad B. Morehouse for the Commission.

Mr. Ralph J. Gutgsell, of Chicago, Ill., for respondent.

COMPLAINT¹

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 Federal Distilled Products, 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, and in violation of the Act of Congress approved June 16, 1933, known as the "National Industrial Recovery Act", and it appearing to the said Commission that a proceeding by it in respect thereof would be in the public

¹ Dismissed as to count two, charging violation of National Industrial Recovery Act.

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interest, hereby issues its complaint, stating its charges in that respect as follows:

Count 1

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under the laws of the State of Wisconsin, with its office and principal place of business in the city of Milwaukee, in said State. It is now, and has been since its organization in October 1934, engaged in the business of a rectifier and wholesaler of liquors, purchasing and bottling whiskies, gins, and other spirituous beverages and selling the same at wholesale in constant course of trade and commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its said business, it causes its said products when sold to be transported from its place of business aforesaid into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers, some located within the State of Wisconsin and some located in other States of the United States and the District of Columbia. In the course and conduct of its business as aforesaid respondent is now, and at all times since its organization has been, in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by distillation of whiskies, gins, and other spirituous beverages and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia; and in the course and conduct of its business as aforesaid, respondent is, and has been since its organization, in substantial competition with other corporations and with individuals, firms, and partnerships engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. For a long period of time the words "distilled products" when used in connection with the liquor industry have had and still have a definite significance and meaning in the minds of the wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, spirituous beverages prepared and bottled at a distillery by the distillers thereof, who have manufactured such beverages by a process of original and continuous distillation from mash, wort or wash, through continuous closed pipes and vessels until the manufacture thereof is completed; and a substantial portion of the purchasing public prefers to buy spirituous liquors prepared and bottled by the actual distillers and manufacturers thereof.

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PAR. 3. In the course and conduct of its business as aforesaid, by the use of the words "Distilled Products" in its corporate name, and the words "prepared by" and the words "a Federal product" printed on its stationery, cartons, and on the labels attached to the bottles in which it sells and ships its said products, and in various other ways, respondent represents to its customers and furnishes them with the means of representing to their vendees, both retailers and the ultimate consuming public, that the whiskies, gins, and other spirituous beverages therein contained were by it manufactured through the process of distillation from mash, wort or wash, as aforesaid, when, as a matter of fact, respondent is not a distiller, does not distill the said whiskies, gins, or other spirituous beverages by it so bottled, labeled, sold, and transported, and does not own, operate, or control any place or places where such beverages are manufactured by the process of distillation from mash, wort or wash.

PAR. 4. There are among the competitors of respondent engaged in the sale of spirituous beverages as mentioned in paragraph 1 hereof corporations, firms, partnerships, and individuals who manufacture and distill from mash, wort or wash, as aforesaid, whiskies, gins, and other spirituous beverages sold by them and who truthfully use the words "distillery", "distilleries", "distillers", "distilling", or "distilled products" as a part of their corporate or trade names and on their stationery, cartons, and on the labels of the bottles in which they sell and ship such products. There are also among such competitors corporations, firms, partnerships, and individuals engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages who do not use the words "distillery", "distilleries", "distilling", "distillers", or "distilled products" as a part of their corporate or trade names, nor on their stationery, cartons, nor on the labels attached to the bottles in which they sell and ship their said products.

PAR. 5. Representation by respondent, as set forth in paragraph 3 hereof, is calculated to and has the capacity and tendency to and does mislead and deceive dealers and the purchasing public into the belief that the whiskies, gins, and other spirituous beverages sold by the respondent are manufactured and distilled by it from mash, wort or wash, as aforesaid, and is calculated to and has the capacity and tendency to and does induce dealers and the purchasing public, acting in such belief, to purchase the whiskies, gins, and other spirituous beverages bottled and sold by the respondent, thereby diverting trade to respondent from its competitors who do not by their corporate or trade name or in any other manner misrepresent that they are manufacturers by distillation from mash, wort, or wash, of

whiskies, gins, and other spirituous beverages, and thereby respondent does substantial injury to substantial competition in interstate commerce.

PAR. 6. The acts and things above alleged to have been done and the false representations alleged to have been made by respondent are to the prejudice of the public and the competitors of respondent and 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.

Count 2

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under the laws of the State of Wisconsin, with its office and principal place of business in the city of Milwaukee, in said State. It is now, and has been since its organization in October 1934, engaged in the business of a rectifier and wholesaler of liquors, purchasing and bottling whiskies, gins, and other spirituous beverages and selling the same at wholesale in constant course of trade and commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its said business, it causes its said products when sold to be transported from its place of business aforesaid into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers, some located within the State of Wisconsin and some located in other States of the United States and the District of Columbia. In the course and conduct of its business as aforesaid respondent is now, and at all times since its organization has been, in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by distillation of whiskies, gins, and other spirituous beverages and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia; and in the course and conduct of its business as aforesaid, respondent is, and has been since its organization, in substantial competition with other corporations and with individuals, firms, and partnerships engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PARAGRAPHS 2, 3, 4 and 5. As grounds for these paragraphs of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraphs 2, 3, 4, and 5 of count 1 of this

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complaint to the same extent as though the several allegations thereof were set out at length and in separate paragraphs herein, and the said paragraphs 2, 3, 4, and 5 of count 1 of this complaint are incorporated herein by reference and adopted as the allegations of paragraphs 2, 3, 4, and 5, respectively, of this count, and are hereby charged as fully and as completely as though the several averments of the said paragraphs of count 1 were separately set out and repeated verbatim.

PAR. 6. Under and pursuant to Title I of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 195 C. 90), the President of the United States, by Executive Order No. 6182, of June 26, 1933, as supplemented by Executive Order No. 6207, of July 21, 1933, and Executive Order No. 6345, of October 20, 1933, delegated to H. A. Wallace as Secretary of Agriculture certain of the powers vested in the President of the United States by the aforesaid act.

Under and pursuant to the delegation of such powers, the said Secretary of Agriculture pursuant to Section 3 (d) of the act and Executive orders under the act, upon his own motion presented a Code of Fair Competition for the Distilled Spirits Rectifying Industry after due notice and opportunity for hearing in connection therewith had been afforded interested parties, including respondent, in accordance with Title I of the National Industrial Recovery Act and applicable regulations issued thereunder, to the President of the United States who approved the same on the 9th day of December, 1933, thereby constituting the said code a Code of Fair Competition within the meaning of the said National Industrial Recovery Act, for the regulation of the aforesaid industry.

In his written report to the President, the said Secretary of Agriculture made, among others, the following findings with respect to the said Code in the following words, to wit:

"That said Code will tend to effectuate the declared policy of Title I of the National Industrial Recovery Act as set forth in Section 1 of said Act in that the terms and provisions of such Code tend: (a) to remove obstructions to the free flow of foreign commerce, which tend to diminish the amount thereof; (b) to provide for the general welfare by promoting the organization of industry for the purposes of cooperative action among trade groups; (c) to eliminate unfair competitive practices; (d) to promote the fullest possible utilization of the present productive capacity of industries; (e) to avoid undue restriction of production (except as may be temporarily required); (f) to increase the consumption of industrial and agricultural products by increasing purchasing power; and (g) otherwise to rehabilitate industry."

By his approval of the said Code on December 9, 1933, the President of the United States, pursuant to the authority vested in him by Title I of the National Industrial Recovery Act aforesaid, made and issued his certain written Executive order, wherein he adopted and approved the report, recommendations and findings of the said Secretary of Agriculture, and ordered that the said Code of Fair Competition be, and the same thereby was approved, and by virtue of the National Industrial Recovery Act aforesaid, the following provision of Article V of said Code became and still is one of the standards of fair competition for the Distilled Spirits Rectifying Industry and is binding upon every member of said Industry and this respondent:

"The following practices constitute unfair methods of competition and shall not be engaged in by any member of the industry:

"Section 1. *False Advertising*.—To publish or disseminate in any manner any false advertisement of any rectified product. Any advertisement shall be deemed to be false if it is untrue in any particular, or if directly or by ambiguity, omission or inference it tends to create a misleading impression."

PAR. 7. The use by respondent of the words "Distilled Products" in its corporate name, together with the phrases "prepared by" and "a Federal product" printed upon its stationery, cartons and on the labels attached to the bottles in which it sells and ships such products, and in various other ways, constitutes false advertising within the meaning of the aforesaid provision of said Article V and tends to and does create the misleading impression that respondent is engaged in the business of distilling spirits from mash, wort or wash, that the spirituous beverages by it so sold and transported have been prepared and bottled by the original distillers thereof, and that the whiskies, gins, and other spirituous beverages sold by respondent have been manufactured and distilled by it from mash, wort or wash as aforesaid, all contrary to the provisions of Section 1, Article V, of the Code aforesaid.

PAR. 8. The above alleged methods, acts and practices of the respondent are and have been in violation of the standard of fair competition for the Distilled Spirits Rectifying Industry of the United States. Such violation of such standard in the aforesaid transactions in interstate commerce and other transactions which affect interstate commerce in the manner set forth in paragraph 5 of count 1 hereof, are in violation of Section 3 of Title I of the National Industrial Recovery Act and they are unfair methods of competition in commerce within the meaning of the Federal Trade Commission Acts as amended.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

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 on May 24, 1935, issued and served its complaint in this proceeding upon respondent, Federal Distilled Products, charging it with the use of unfair methods of competition in commerce in violation of said act.

After the issuance of said complaint and the filing of respondent's answer thereto, testimony and evidence in support of the allegations of said complaint were introduced by PGad B. Morehouse, attorney for the Commission, before John W. Addison, examiner for the Commission theretofore duly designated by it, and in defense of the allegations of the complaint by Ralph J. Gutgsell, attorney for the respondent, and said testimony and evidence was 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, answer thereto, testimony and evidence, and brief in support of the complaint, oral argument and brief of counsel for the respondent having been waived, and the Commission having duly considered the same 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. The respondent, Federal Distilled Products, is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, originally incorporated in May 1934 under the name "Federal Distillers Products", for the purposes of manufacturing, buying, selling, dealing in, distributing, storing, warehousing, and exporting whiskey of all kinds, high wines, spirits, alcohol, and gins of all kinds, and to do and perform all kinds of distilling, redistilling, and rectifying, and to engage in business at wholesale or retail as principal or broker or agent, and for other purposes, with 500 shares of common capital stock without par value. Concluding that the aforesaid name "Federal Distillers Products" would be misleading, the company applied for and in October 1934, by amendment of its charter, changed its name to its present corporate name, to wit, "Federal Distilled Products". Its principal office and place of business is located at 425 North Water Street in the city of Milwaukee, Wis., in a plant operated under the latter name, and there it is and has been since the issuance of its permit on February

15, 1934, engaged in the distilled spirits rectifying industry, more particularly as a rectifier and wholesaler of liquors, purchasing and bottling whiskies, gins, and other spirituous beverages and selling the same at wholesale in constant course of trade and commerce between and among the various States of the United States.

The aforesaid permit was issued by the Federal Alcohol Control Administration and designated as Permit R-302, and was issued subject to compliance with all State and Federal laws, under and pursuant to Title I of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 195, C. 90), and was a basic permit for respondent's operations up to May 27, 1935, the date of the decision of the United States Supreme Court in the case of *A. L. Schechter Poultry Corporation, etc. vs. United States* (295 U. S. 495). The Federal Alcohol Administration Act, approved August 29, 1935 (Public No. 401, 74th Congress) provided in Section 4 (a) thereof that any person who on May 25, 1935, held a basic permit as a distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government shall, on application therefor, be entitled to a basic permit to engage in the same business, and at the time of the issuance of the complaint herein, up to and including October 25, 1935, the last day of the taking of testimony, this respondent was so engaged.

Respondent never applied for a distiller's permit, was never authorized by the Government to produce any distilled spirits from the grain, never distilled and never owned a still, but purchases all of its distilled spirits requirements in bulk from distilleries or distilling companies, rectifies, bottles, labels, and sells same by the package almost exclusively to wholesale liquor dealers for resale in bottles under its own brand names. The words "Bottled by Federal Distilled Products" appear on ten of the sixteen labels of respondent admitted in evidence, and the words "Prepared by Federal Distilled Products" appear on six. In each instance the name of respondent is in substantially larger type than either the phrase "Bottled by" or "Prepared by", and the phrase "Prepared by" where it appears is in larger type than the phrase "Bottled by" where it appears on the labels.

Also in the course and conduct of its business respondent uses its name on its stationery accompanied in smaller type by the phrase "Rectifiers and Blenders", and on its price lists which also carry the phrase "We are Manufacturing Rectifiers", and places the words "A Federal Product" on caps used to cover the bottles in which it sells and ships its goods. At one time in 1934 it caused to be placed on the pasteboard cartons in which it shipped some of said bottles the

words "A Federal Product . . . Federal Distilled Products, Milwaukee". It bought from 5,000 to 10,000 of these cartons but did not use all of them, having discontinued their use more than a year prior to the trial of this case.

When sold, respondent ships its bottled liquors so labeled, and in numerous instances when contained in the aforesaid cartons, to its customers from its principal place of business aforesaid into and through various States of the United States to the purchasers thereof located in the States of the United States other than Wisconsin, although during the year 1935 no shipments were made outside of the State. During 1934 very substantial shipments were made to Illinois and to Minnesota, and respondent's president, Mr. Israel Magidson, testified that if any orders came in from other States the company would fill them.

The National Distilling Company, Milwaukee, Fruit Industries, Ltd., in California, Liquor Dealers Supply Company, at Chicago, and many other corporations, partnerships, or individuals at various points in the United States are likewise engaged in the business of selling whiskies, gins, and other spirituous beverages at wholesale to respondent's customers and others in the same localities in which respondent makes its sales and of causing the goods so sold to be transported from their respective points of location through and into other States of the United States and there delivered to the purchasers thereof. Some of these concerns actually distill from mash, wort or wash the products which they so sell and use the words "distilling", "distiller" or "distillery" as a part of their corporate or trade names on their stationery, cartons, and labels on the bottles in which they sell and ship their products. The name so used on said labels is commonly preceded by the words "distilled by". Others of them buy, rectify, blend, and bottle the beverages which they so sell and neither do any distilling nor use the words "Distilling", "distiller" or "distillery" as a part of their corporate or trade names or on their stationery, cartons, or labels.

The monthly sales of respondent's merchandise have ranged from \$4,000 to \$18,000. Its premises are on one floor, occupying a space of 45 feet by 150 feet. It employs five or six persons.

The Commission therefore finds that respondent is and has been in substantial competition with actual distillers who produce distilled spirits from the grain, and also with other rectifiers who do not by the use of such words as "Distilled" or "Federal Distilled Products" as a part of their corporate or trade names misrepresent their status to the trade.

Rectifying in the distilled spirits rectifying industry means the mixing of whiskies of different ages or the mixing of other ingredients

with whiskies, but reducing proof of whiskey by adding water is not rectifying. Rectifiers also blend whiskies with neutral spirits (grain alcohol).

PAR. 2. A distiller, in the sense ordinarily understood by the liquor industry, is one who prepares distilled spirits by a process of original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is complete. Many distillers operate a separate establishment 600 ft. or more away from their distillery, known as a rectifying plant, wherein they operate in the same manner as described above, for a rectifier—sometimes exclusively with spirits of their own distillation and sometimes with spirits purchased from other distillers or both. Some distilleries have a bottling room on the distillery bonded premises wherein their distilled spirits are bottled straight as they came from the still, or in a bonded warehouse after aging, or after reduction of proof. Any rectifying by a distiller, however, must be done in his rectifying plant. On all bottled liquors, whether bottled at the distillery or at any rectifying plant, appear the words "Bottled" or "Blended" (as the case may be) "by the ----- Company". If the distilled spirits therein contained are bottled by a distiller either in his distillery or are spirits of his own distillation bottled in his rectifying plant, the distiller may and does put "Distilled and Bottled by ----- Company". If, in the distillery's rectifying plant, other spirits have been blended or rectified he puts "Blended and Bottled by ----- Company". Finally, blown (usually in the bottom) of each bottle is a symbol, consisting of a letter followed by a number, identifying the bottler, viz a "D" for a distillery and "R" for a rectifier, the number following said letter corresponding with the distiller's or rectifier's permit. Thus "R-302" designates this respondent. A distiller who also operates a rectifying plant, having both kinds of permits, may use either symbol depending upon whether the liquor contained in the bottle was produced and bottled under his distiller's or his rectifier's permit, and at least one large distiller, namely, Hiram Walker & Sons, uses its "R number" exclusively. Knowledge of these details is not widespread among the retail trade and very limited to the general public. All whiskies, whether emanating from distilleries or rectifiers, are generally in the trade conceded to be "distilled products".

It is not alway possible to determine from the presence of the phrase "Blended and Bottled by" or the phrase "Bottled by" on the label whether the package was bottled by a rectifier who is a distiller or by a rectifier who is not a distiller.

The words "Distilled Products" of and in themselves would not, in the opinion of the Commission, constitute a misrepresentation

inasmuch as this respondent is engaged in the business of handling distilled products, namely, alcoholic beverages which originated in a distillery and may or may not have been rectified or blended. However, this respondent represented its products as "Federal" products, "Federal Distilled Products", that is, the product of the respondent "prepared by" respondent and "Federal Distilled", from which the Commission infers a distinct tendency, if not an intention, to mislead and deceive the public, a substantial portion of which prefers to buy spirituous liquors prepared and bottled by distillers.

The Commission finds that in the course and conduct of its business, as aforesaid, the manner in which respondent makes use of the phrase "Distilled Products" as a part of its corporate name, conspicuously printed on its stationery, advertising, price lists, and other printed matter, and on the labels and caps attached to the bottles in which it sells and ships its said liquors, has the capacity and tendency to, and does, mislead and deceive dealers and the purchasing public into the belief that respondent is a distiller or distilling company engaged in the business of manufacturing distilled spirits from the grain and that the whiskies, gins, and other alcoholic beverages sold by the respondent are by it manufactured and distilled from mash, wort, or wash, as aforesaid; and has the capacity and tendency to, and does, induce dealers and the purchasing public, acting in such beliefs, to purchase the whiskies, gins, and other alcoholic beverages bottled and sold by the respondent, thereby diverting trade to respondent from its competitors who do not by their corporate or trade names, or in any other manner, misrepresent that they are manufacturers by distillation from mash, wort, or wash of whiskies, gins, and other alcoholic beverages, and that thereby respondent does substantial injury to substantial competition in interstate commerce.

PAR. 3. No one who had bought goods bearing respondent's label in the belief that respondent was a distiller was produced as a witness. The Commission's counsel wrote letters to several of respondent's customers inquiring whether they had been deceived as to respondent's status. Only four customers of respondent answered. Three of these said they had not made their purchases from respondent in the belief that it was a distillery. By stipulation of counsel these three letters were offered and received in evidence. The fourth customer was a dealer at Columbia, Mo. For four or five months in 1934 respondent rectified a so-called "Prescription Whiskey" and shipped it to fill orders taken by the owner of the brand, allowing the said owner a commission on the sales. Respondent did not place its name on the labels attached to any of the bottles containing this

whiskey but allowed the brand owner space in its premises for the purpose of carrying on its business. The owner of this brand made such use of respondent's corporate name in inducing a sale of this whiskey to the aforesaid fourth customer at Columbia, Mo., as led that customer to buy the whiskey in the belief that respondent was a distiller of it. Two dealers testified that they had bought goods from respondent but knew at the time that respondent was a rectifier and not a distiller, though one of these said that the words "distilled products" on a label would lead him to a certain extent to believe the goods came from a distillery.

Ten witnesses not connected with the liquor industry gave their understanding of respondent's name. Four of these regard the name as describing a dealer and not a distiller. A fifth understands the name "Federal Distilled Products" to mean that the concern using it handles Federal-government-distilled products; and to a sixth the name means the Federal government has charge. A seventh says the name alone would lead him to believe that respondent bought raw products and redistilled them to some specific specification. He does not make it clear whether his understanding would be the same if the name on the label were preceded by the words "bottled by". The other three understand respondent's name to indicate that respondent is a distillery, or place where liquors are evaporated and condensed from raw products, or a plant fully equipped to distill alcoholic spirits from raw materials, or is engaged in distilling alcohol from bran, mash, or other organic substance. One of these three, an engineer, would be a little suspicious, though, if respondent's name on the label were preceded by "bottled by". He favors labels saying "distilled by" over those saying "bottled by". Another, an optometrist, says, if some labels say "distilled by" and others "bottled by", he would think the latter were not bottled by a distiller but by some one else.

The evidence also shows that often members of the public actually purchase bottled whiskies and other distilled spirits, being influenced in their selections by well-advertised brand names and without noticing the name of the producer, maker, or bottler. Most of the instances in this record where such was shown by the evidence were selections of whiskies which were bottled by actual distilleries either at the distillery, in the bonded warehouse or in a rectifying plant owned by the distillery.

From the testimony of members of the public adduced in this record, the Commission infers that the portion of the public which might be and is influenced to exercise the aforesaid preference is sufficiently substantial to create a competitive advantage in the respondent over those of its competitors who are distillers and those

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who are rectifiers but do not characterize themselves as distillers or distilling companies.

PAR. 4. The Commission finds that there is, and has been, some commercial advantage to this respondent through the use which it has made of its name "Federal Distilled Products". The testimony of other competitors, both rectifiers not designating themselves as distillers, and of actual distillers, shows that such commercial advantage takes the form of increased sales resistance to concerns not indulging in the practice. A substantial number of liquor dealers, both wholesale and retail, prefer to buy for resale liquors packaged or bottled by the distiller who makes the liquor by distillation from mash. The record shows that they think that by doing so they save either middleman's profits or get a better product.

Certain prestige attaches to the use of the term "Distilling" which is an advantage to the person using it in the liquor trade. The evidence shows this to be of tremendous value on account of the investment, stability and backing of an organization of the character of the ordinary distilling company or distillery to stand back of the merchandise it sells. The record shows that there exists a preference on the part of a dealer customer to buy goods bearing the label of a distilling company rather than goods which bear only the label of a distributing company, wholesaler or rectifier. No specific instance is shown in this record of a competitor losing a sales order to this particular respondent, but the record is replete with proof that competitors in the field frequently met with competition from other rectifiers who were following the identical practices of respondent in this regard, and that such practices operated and had a tendency to divert trade through increased sales resistance and because of the unfair competitive advantage accruing to the rectifier misrepresenting itself to be a distilling company. From these facts the Commission infers that this respondent's practices would have the same effect in any sales territory in which it competed in the sale of liquor with actual distillers or with rectifiers not so misrepresenting.

CONCLUSION

The practices of the said respondent, under the conditions and circumstances hereinbefore described, are to the prejudice of the public and respondent's competitors and are unfair methods of competition in interstate 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 issued and served May 24, 1935, the answer of the respondent thereto, testimony and evidence taken before John W. Addison, an examiner of the Commission theretofore duly designated by it, in support of the charges of said complaint and in opposition thereto, brief filed herein by PGad B. Morehouse, counsel for the Commission, counsel for the respondent having waived filing of brief on its behalf and oral argument, and the Commission having made its findings as to the facts and its conclusion that respondent has violated 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, Federal Distilled Products, its agents, salesmen and employees, in connection with the offering for sale or sale by it in interstate commerce of whiskies, gins, and other spirituous beverages, do forthwith cease and desist from:

Representing, through the use of the word "Distilled" in its corporate name, on its stationery, advertising or on the labels attached to the bottles in which it sells and ships its said products, or in any other way by word or words of like import, (a) that it is a distiller of whiskies, gins or any other alcoholic beverages; or (b) that the said whiskies, gins or other alcoholic beverages were by it manufactured through the process of distillation; or (c) that it owns, operates or controls a place or places where such products are by it manufactured through a process of original and continuous distillation from mash, wort or wash, through continuous closed pipes and vessels until the manufacture thereof is completed.

It is further ordered, That the said complaint be and the same is hereby dismissed as to count 2 thereof.

It is further ordered, That the said respondent within 30 days from and after the date of the service upon it of this order, shall file with the Commission a report or reports in writing setting forth in detail the manner and form in which it is complying and has complied with the order to cease and desist hereinabove set forth.

IN THE MATTER OF

LUR-EYE PRODUCTS, INC. (A NEW YORK CORPORATION), LUR-EYE PRODUCTS, INC. (A DELAWARE CORPORATION), AND W. R. ROBINSON COMPANY

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

Docket 2579. Complaint, Feb. 15, 1936¹—Decision, Mar. 24, 1936

Where two corporations engaged in the production, distribution, and sale to wholesale and retail cosmetic dealers and to others of a so-called eyelash developer—

Falsely represented in newspaper and periodical advertisements, through the mails, and otherwise and on containers and display cards of said product that it would promote the growth and change the texture of eyelashes, constituted a competent treatment for inflamed eyes or eyelids, would penetrate the follicles of the eyelashes, benefit the inner membranes, and relieve eye strain, facts being it did not have the medicinal ingredients claimed in sufficient quantities to produce such results, did not function as represented, and aforesaid representations and statements were false, misleading, and grossly exaggerated;

With result of placing in the hands of retailers and purchasers for resale an instrument enabling them to commit a fraud upon a substantial part of the purchasing public through representing said preparation as a product that would produce the results claimed and to sell substantial quantities of such preparation thereby, and with tendency and capacity to mislead and deceive a substantial number of the purchasing public into the belief that said preparation would actually develop the eyelashes and make them longer, silkier, and lovelier, and that it had the qualities and would accomplish the results hereinabove indicated, and into purchasing substantial quantities thereof in such erroneous belief, and with effect of diverting a substantial volume of trade from similarly engaged competitors who do not in any way falsely represent their products; to the substantial injury of substantial competition:

Held, That such acts and practices were each and all to the injury and prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. John W. Norwood*, trial examiner.

Mr. J. T. Welch for the Commission.

COMPLAINT¹

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 Lur-Eye

¹ Amended.