

Complaint

IN THE MATTER OF
MORGEN DISTILLING CORPORATION

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914, AND OF SEC.
3 OF TITLE I OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933

Docket 2371. Complaint, Apr. 22, 1935—Decision, July 6, 1936

Where a corporation engaged in the purchasing, rectifying, blending, and bottling of whiskies, brandies, rums, and other spirituous beverages, and in the sale thereof in competition with actual distillers and with other rectifiers, and neither owning, operating, nor controlling any place or places where spirituous beverages are made by a process of original and continuous distillation from mash, wort, or wash or other raw materials, and never applicant for a distiller's permit nor authorized by the Government to produce, nor producer of, any distilled spirits, which it purchased in bulk as required and bottled under its own brand names and under those of its wholesaler, jobber, or retailer customers—

Conspicuously printed on its stationery and advertising and on the labels attached to the bottles in which it sold and shipped its liquors, word "Distilling" as part of corporate name, with effect of misleading and deceiving dealers and purchasing public, substantial portion of which prefers purchase of liquor prepared and bottled by the actual distiller, into belief that it was a distiller, plant and operations of which, ordinarily, are more extensive and costly than the rectifier's, and that the whiskies and other alcoholic beverages sold by it were by it made through process of original distillation from raw materials, as aforesaid, and as long understood from term, and of inducing them, in such beliefs, to purchase such whiskies, etc., bottled and sold by it, and with tendency thereby to divert trade to it from competitors who do not, through their corporate or trade names or in any other manner, misrepresent themselves as manufacturers by original distillation from raw materials, as aforesaid, to the substantial injury of substantial competition, and with effect of representing to customers through such potentially deceptive name and of furnishing them with the means of representing to their retailer and jobber vendees and ultimate consuming public, that it was a distiller, and that the whiskies and other alcoholic beverages thus labeled were by it made through process of original distillation as aforesaid:

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. Bennett*, trial examiner.

Mr. PGad B. Morehouse for the Commission.

Mr. Nathaniel Seaman, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Com-

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mission, to define its power and duties, and for other purposes," the Federal Trade Commission having reason to believe that Morgen Distilling Corporation, hereinafter referred to as the 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 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 New Jersey, with its office and principal place of business in Jersey City, in the said State. It is now and since its organization in 1934 has been engaged in the business of purchasing, rectifying, blending, and bottling whiskies, brandies, rums, and other spirituous beverages and in the sale thereof 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 the said products when sold to be transported from its place of business in Jersey City, aforesaid, into and through various other States of the United States to the purchasers thereof consisting of wholesalers and retailers, some located within the State of New Jersey 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, brandies, rums, 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 rectifying, blending, and bottling whiskies, brandies, rums, 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 word "distilling" when used in connection with the liquor industry and with the products of such industry has had and still has a definite significance and meaning to

the minds of wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, the manufacturing of such liquors by the process of distillation; and a substantial portion of the purchasing public prefers to buy spirituous liquors bottled by the actual distillers and manufacturers thereof.

PAR. 3. In the course and conduct of its business as aforesaid, by the use of the word "distilling" in its corporate name, printed on its stationery 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 said whiskies, brandies, rums, and other spirituous beverages therein contained were by it manufactured through the process of distillation, when, as a matter of fact, the respondent is not a distiller, does not distill the said whiskies or other spirituous liquors by it so bottled, labeled, sold, and transported and does not own, operate, or control a place or places where such beverages are manufactured by the process of distillation.

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

PAR. 5. The representation by respondent as set forth in paragraph 3 hereof, is calculated to and has a capacity and tendency to and does mislead and deceive dealers and the purchasing public into the belief that the whiskies, brandies, rums, and other spirituous beverages sold by the respondent are manufactured and distilled by it 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, brandies, rums, and other spirituous beverages rectified, blended, and bottled by the respondent, thereby diverting trade to respondent from its competitors who do not by their corporate name or in any other manner misrepresent that they

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are manufacturers by distillation of whiskies, brandies, rums, 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 New Jersey, with its office and principal place of business in Jersey City, in the said State. It it now and since its organization in 1934 has been engaged in the business of purchasing, rectifying, blending, and bottling whiskies, brandies, rums, and other spirituous beverages and in the sale thereof 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 the said products when sold to be transported from its place of business in Jersey City, aforesaid; into and through various other States of the United States to the purchasers thereof consisting of wholesalers and retailers some located within the State of New Jersey 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, brandies, rums, 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 rectifying, blending, and bottling whiskies, brandies, rums, 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. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 2 of count one of this complaint to the same extent

as though the allegations thereof were set out at length herein and said paragraph 2 of count one of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 2 of said count one were repeated verbatim.

PAR. 3. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 3 of count one of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 3 of count one of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 3 of said count one were repeated verbatim.

PAR. 4. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 4 of count one of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 4 of count one of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 4 of said count one were repeated verbatim.

PAR. 5. As grounds for this paragraph of this complaint, the Federal Trade Commission relies upon the matters and things set out in paragraph 5 of count one of this complaint to the same extent as though the allegations thereof were set out at length herein and said paragraph 5 of count one of this complaint is incorporated herein by reference and adopted as the allegations of this paragraph of this count and is hereby charged as fully and as completely as though the several averments of said paragraph 5 of said count one were 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

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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 advertisements 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 word "distilling" in its corporate name, printed upon its stationery 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, and that the spirituous beverages by it so sold and transported have been bottled at a distillery by the original distillers thereof, 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 one 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 Act 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 April 22, 1935, issued, and on April 23, 1935, served its complaint in this proceeding upon respondent, Morgen Distilling Corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions 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. Bennett, an examiner of the Commission, heretofore duly designated by it. Respondent was represented by its attorney, Nathaniel Seaman, and offered no testimony in opposition to the complaint. The aforesaid testimony and evidence introduced in support of the allegations of said complaint were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and evidence and brief in support of the complaint, brief in defense thereto and oral arguments of counsel aforesaid 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. Morgen Distilling Corporation is a rectifier, organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business at 109 Hudson St., Jersey City, N. J. From the date of its organization, shortly after the repeal of Prohibition, up to July 1, 1935, it was engaged in the business of purchasing, rectifying, blending, and bottling whiskies, brandies, rums, and other spirituous beverages and in the sale thereof in constant course and commerce between and among the various States of the United States and in the District of Columbia, operating and conducting said business under a basic permit from the Federal Alcohol Control Administration, designated as "Permit No. R-317," issued "subject to compliance with all State and Federal laws."

The respondent's plant is of considerable size and contains three storage tanks for the receiving of bulk liquors which it buys from distilleries, these tanks having aggregate capacity of 2,650 gallons. Respondent also had three processing tanks with aggregate capacity of 2,570 gallons, bottling machinery and the other equipment ordinarily incident to the distilled spirits rectifying industry.

The liquor which respondent bought was stored in the aforesaid storage tanks and when released by officers of the United States Government it was rectified or bottled straight. Respondent had no stills and no distilling of any kind was carried on by respondent. Respondent never applied for a distiller's permit, was never authorized by the Government to produce, nor did it produce any distilled spirits from the grain and never owned a still, but always purchased its distilled spirits requirements in bulk and thereafter placed them in bottles under its own brand names or under the names and brands of its customers who were wholesalers, jobbers, or retailers.

The bottles in which the alcoholic beverages are so sold have attached thereto labels which contain the word "distilling" as a part of respondent's corporate name, for instance, the respondent sold a "King Peter" brand, 100 per cent straight whiskey, bearing the legend "Prepared by Morgen Distilling Corp." In numerous instances the respondent bottled and labeled the liquor for its customers, putting special labels thereon bearing the name of the customer instead of its own name. On other labels appear the words "Bottled By", or "Blended By Morgen Distilling Corp." It sent out advertising mailing cards to the trade bearing the name of "Morgen Distilling Corp." in bold type without further qualifica-

tion, but on one of its price lists such corporate name was qualified by the words "Blenders and Rectifiers" in considerably smaller type. The impression that respondent is a distiller, to be gained from the foregoing use of its name, is not negatived by the said qualification, because the fact is that a rectifier may also be a distiller and many of them are. When sold, respondent shipped said liquors which it had rectified or blended, or simply bottled, to its customers in the various States of the United States, including Louisiana, Connecticut, Florida, New York, and the District of Columbia, to the purchasers thereof in competition with distillers and rectifiers likewise engaged in the regular course of business in the sale of whiskies, brandies, rums, and other spirituous beverages in commerce among the several States, where it was offered for sale and sold by the said customers, both to retailers and the consuming public in States and territories co-extensive with the territories in which its said competitors likewise offered their spirituous beverages for sale. The Commission finds that respondent, during the period it was actively engaged in business as aforesaid, was in competition in interstate commerce with actual distillers and also with other rectifiers who did not, by the use of such words as "distilling," "distiller," or "distilleries" as part of their trade or corporate names, misrepresent their status to the trade.

On July 1, 1935, respondent's aforesaid permit expired and it failed to renew it. Its corporate existence is still preserved, its assets have not been liquidated or disposed of, and its plant has not been dismantled but is ready for operation at any time upon a new permit being obtained.

PAR. 2. For a long period of time the word "distilling," when used in connection with the liquor industry and the products thereof, has had and still has, a definite significance and meaning to the minds of wholesalers and retailers in such industry and to the ultimate purchasing public, to wit: the manufacturing of such liquors by a process of original distillation from raw materials.

The record contains the testimony of approximately fifty members of the public whose names were obtained from the classified section of telephone directories, including dentists, engineers, real estate men, public accountants, bond brokers, physicians, inspectors, and promoters. This testimony shows that the word "Distilling," when used in connection with the distilled spirits or whiskey industry, signifies to them the manufacture of spirits from raw materials. Practically without exception, each of these members of the public not only expressed a definite preference to buy packaged goods bottled

by a distiller, but gave reasons which appeared to them to justify such preference.

The Commission therefore finds that a substantial portion of the purchasing public prefer to purchase spirituous liquors which have been prepared and bottled by the actual distillers thereof.

PAR. 3. In the course and conduct of its business as aforesaid, respondent's use of the word "distilling" as a part of its corporate name conspicuously printed on its stationery, advertising, and on the labels attached to the bottles in which it sold and shipped its said liquors, had the capacity and tendency to, and did, mislead and deceive dealers and the purchasing public into the belief that respondent was a distiller and that the whiskies, gins, and other alcoholic beverages sold by respondent were by it manufactured through the process of original distillation from raw materials as aforesaid and such use of the word "Distilling" had the capacity and tendency to, and did, 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 tending to divert trade to respondent from its competitors who did not, by their corporate or trade names, or in any other manner, misrepresent that they were manufacturers by original distillation from raw materials of the whiskies, gins, and other alcoholic beverages by them sold, and thereby respondent did substantial injury to substantial competition in interstate commerce.

PAR. 4. Activities in connection with the manufacture and sale of alcoholic beverages are divided among several classes of manufacturers, processors, and dealers. The initial process of manufacturing is in the hands of distillers. In the case of whiskey, these distillers manufacture their products by the distillation of fermented grain mash, which produces at lower temperatures of distillation the product called whiskey. This whiskey contains certain esters or flavoring elements, and also some ingredients which it is necessary to eliminate before the whiskey is entirely potable. After the distillation process has been completed, the whiskey is placed in wooden barrels, charred on the inside, and stored in bonded warehouses, which are separate and distinct from the distillery, being located in a different and separate building. The whiskey thus distilled is usually held for an aging process, which removes certain undesirable elements from the product by absorption or other elimination, by means of the charred wood on the inside of the container. After it is considered fit for market, it may be sold by the distiller in bulk to rectifiers, or the rectifiers may acquire the bulk whiskey by buying bonded warehouse certificates. After the Government tax has been paid on the product it may be transferred to tanks in rectifying

establishments, and there the whiskey may be bottled and labeled. Distillers are permitted to bottle "Straight Whiskey" in the warehouse and to sell the bottled goods to wholesalers. Distillers may have rectifying plants, separate from the distillery and warehouse, operated under a rectifier license. It is then ready for sale in wholesale and retail channels of trade and may be sold by rectifiers to wholesalers and retailers or it may be sold by rectifiers only to wholesalers, and the wholesalers may in turn make sales to retailers. These retailers include package goods stores and proprietors of drinking places, where the liquor is sold by the glass to consumers.

Each distiller operates under a specific Federal license carrying the symbol "D" with a number, indicating the designation of his license to do a distilling business. The rectifier operates under a license designated by the symbol "R" with a number, which indicates the designation of his license to do business as a rectifier. The wholesaler does business under a wholesaler's license with the symbol "L. L." and a number indicating the designation of his license. The retail dealer is licensed under the symbol "L." While the distiller may also take out a rectifier's license and a wholesaler's license, and a rectifier may take out a wholesaler's license, no class of manufacturers or dealers is permitted to do business in the other class without qualifying in the class in which that business is ordinarily conducted. Besides the Federal regulations, there are elaborate State regulations requiring additional State licenses.

Many distillers do business under the name of distillers. Some have the words "distiller" or "distilleries" or "distilling" in their corporate names and others advertise themselves as distillers or are known as distillers. The words "distillers," "distillery," "distilling," or "distilleries" in the whiskey trade for a long period of time have definitely signified the true distilling process of manufacturing whiskey from fermented mash. Distillers who are also rectifiers bottle their goods and come into competition with dealers doing business such as is conducted by respondent. They also come into competition with rectifiers in the sale of straight whiskies bottled in warehouses. A distiller who also operates a rectifying plant, having both kinds of permits, may use either the "R" symbol or the "D" symbol, depending upon whether the liquor contained in the bottle was produced and bottled under his distiller's or his rectifier's permit. If spirits other than those of the distiller's distillation have been blended, rectified, and bottled in the distiller's rectifying plant, the label thereon will read "Blended and Bottled by -----
----- Distilling Company," or simply "Bottled by
----- Distilling Company," so that it is

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not possible to determine merely 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. There are many rectifiers, wholesalers, and jobbers selling in the same territories as respondent who do not have the words "distilling" or "distilleries" in their corporate names and do not use that designation in connection with their sales activities.

Knowledge of the foregoing details is not widespread among the retail trade and is very limited to the general public. Of course, the trade is more familiar with the exact situation than the buying public, but even the liquor tradesmen, particularly during the first year after repeal, did not know who were distillers and who were rectifiers, and were consequently quite susceptible to deception in that respect.

Rectifying of alcoholic products, as hereinabove indicated, including the rectifying of whiskey, like the distilling of alcoholic products, is done under strict Government supervision and under Government license. Ordinarily it requires a less extensive plant and a smaller investment. In the distilling process the distillery must be entirely separate and distinct from all other buildings. In connection with the distillery there must be provided a bonded warehouse in an entirely separate building. Bonds, as a rule, guaranteeing taxes in the distillery business are much larger than in the rectifying business, and in the rectifying business the processes may be all conducted in one building. The reception or storage tank may be in one building. In practice, very limited space is required by the small rectifiers.

The words "distiller," "distillers," "distilling," and "distilleries," used in the corporate names of concerns which are rectifiers and wholesalers, in fact confer a distinct advantage to the concerns using them or one of them in the sale of their products to dealers and in the sale by dealers to consumers. The whole record in this case supports this statement, with scarcely an exception.

It appears from this record that in the sale of its products, the use by respondent of the word "Distilling" in its corporate name, gave it an unfair competitive advantage over a rectifier who did not use the word "Distilling" or any other word connoting a distilling process in its corporate name or otherwise. Some of the labels of respondent unqualifiedly implied that respondent was a distiller. The aforesaid use by respondent of the word "Distilling" was of a potentially deceptive character, since respondent does not now and never did own, operate or control any place or places where spirituous bever-

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ages are manufactured by a process of original and continuous distillation from mash, wort or wash, or other raw materials. By such potentially deceptive name respondent represented to its customers and furnished them with the means of representing to their vendees, both retailers and jobbers and the ultimate consuming public that it was a distiller and that the said whiskies, gins, and other alcoholic beverages therein contained were by it manufactured through the process of original distillation from raw materials. Such representations are untrue.

PAR. 5. The aforesaid representations by respondent had the capacity and tendency to, and did, mislead and deceive dealers and the purchasing public into the belief that respondent was a distiller and that the whiskies, gins and other alcoholic beverages sold by respondent were manufactured or distilled by it from mash, wort or wash by one continuous process; and such representations had the capacity and tendency to, and did, induce dealers and the purchasing public, acting in such beliefs to purchase the whiskies, gins, and other alcoholic beverages so labeled 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 distillers, and thereby respondent did substantial injury to substantial competition in interstate commerce.

No assurance is in sight that respondent, if not prohibited, would not resume and continue its former acts and practices as hereinbefore set out.

CONCLUSION

The practices of the said respondent, under the conditions and circumstances hereinbefore described, were to the prejudice of the public, and respondent's competitors, and were 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, the answer of respondent, testimony and evidence taken before John W. Bennett, an examiner of the Commission, theretofore duly designated by it, in support of the charges of said complaint, no testimony having been offered in opposition thereto, brief filed herein by PGad B. Morehouse, counsel for the Commission, and respondent's brief and oral arguments of both counsel having been waived, and the Commission

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having made its findings as to the facts and its conclusion that said 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 Morgen Distilling Corporation, 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 "Distilling" in its corporate name, on its stationery, advertising or on the labels attached to the bottles in which it sells and ships said products, or in any other way by word or words of like import, (a) that it is a distiller of whiskies, cordials, or any other spirituous beverages; or (b) that the said whiskies, cordials, or other spirituous beverages were by it manufactured through the process of distillation; or (c) that it owns, operates, or controls a place or places where any such products are by it manufactured 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, unless and until respondent shall actually own, operate, or control such a place or places.

It is further ordered, That the aforesaid complaint be, and the same is hereby, dismissed as to count two 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.

Syllabus

IN THE MATTER OF
ESBECO DISTILLING CORPORATIONCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914*Docket 2428. Complaint, June 6, 1935—Decision, July 6, 1936*

Where a corporation engaged in the purchase of whiskies, brandies, and gins from distillers, and in rectifying, bottling, and selling same to wholesalers and retailers in the several States, and doing no distilling prior to its one year lease of two distilleries, nor theretofore operator, nor owner, of any still other than one purchased for production of gin by redistillation of purchased alcohol, nor applicant for permit to produce distilled spirits, which it purchased in bulk from distillers—

Displayed on labels of alcoholic beverages sold by it prior thereto, its corporate name and word "Distilling," as included therein, in larger type than phrase "Bottled by" or "Blended and Bottled by," which, as case might be, followed in type of considerably smaller size, and conspicuously displayed said name in its advertising and on its business letterheads, and there represented itself as "Producers of Fine Whiskies," as well as "Rectifiers and Wholesale Liquor Dealers," and sold its bottled liquors, thus labeled, and rectified, blended, or bottled by it, to its jobber and dealer customers in competition with distillers and rectifiers who do not, through use of such words as "Distilling," "Distiller," or "Distilleries" as a part of their corporate or trade names, misrepresent their status to the wholesale and retail trade, and to ultimate purchasing public, to which word "Distilling" has long definitely signified manufacture of liquor by process of original distillation from raw materials, and on the part of a substantial portion of which public there is a preference for the purchase of liquor prepared and bottled by the actual distillers thereof;

With effect of misleading and deceiving dealers and purchasing public into belief that it was a distiller, plant and operations of which, ordinarily, are more extensive and costly than the rectifier's, and that the whiskies, etc., sold by it were made by it through process of original distillation as aforesaid, and of inducing them in such belief to purchase such whiskies, etc., and thereby divert trade to it from its competitors who do not, through their corporate or trade names or in any other manner, misrepresent themselves as manufacturers by original distillation, as above set forth, of their beverages, to the substantial injury of substantial competition in commerce, and with effect, through such potentially deceptive name, of representing to its customers and furnishing them with a means of representing to their retailer and jobber vendees and the ultimate consuming public, that it was a distiller and that said whiskies, etc., thus containered and labeled, were made by it through process of original distillation:

Held, That such acts and 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. Bennett*, trial examiner.

Mr. PGad B. Morehouse for the Commission.

Mr. Fred A. Caskey, of Washington, D. C., and *Mr. Lawrence A. Jacobson*, of Chicago, Ill., for respondent.