

Syllabus

IN THE MATTER OF
DISTILLERS EXCHANGE, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2475. Complaint, June 28, 1935—Decision, July 21, 1936*

Where a corporation engaged in wholesaling spirituous beverages, i. e., chiefly whiskies, gins, and cordials, and in buying bottled goods from distillers in various States, and, in small quantities, from rectifiers, and in selling same to wholesalers, jobbers, retailers, and retail package stores, and advertising in newspapers to a limited extent, and by the sending out of from 4 to 6 thousand circulars every 4 months, and doing a monthly business of about \$125,000, and neither owning, operating, nor controlling any place or places where alcoholic beverages are made by process of original and continuous distillation from mash, wort, or wash, and not a distiller, and in substantial competition, as thus engaged, with distillers, rectifiers, and other wholesalers whose bottled goods reach retail stores for sale in same States and territories in which its goods are offered—

- (a) Made use of words "Distillers" and "Exchange," as included in its corporate name, on stationery, catalogs, advertising, and labels attached to bottles in which it sold and shipped its said products, and in various other ways, and represented thereby to customers that it was a distiller and that the said whiskies, gins, and other alcoholic beverages thus contained were by it made through process of distillation from mash, wort, or wash, and furnished its said customers with means of thus representing it to their vendees, both retailers and ultimate consuming public; and
- (b) Represented, through use of words "Distillers Exchange" in its corporate name, to customers and prospective customers, that it was operating, a place where distillers engaged in trading or bartering spirits or liquors of equivalent values, and that the whiskies, gins, etc., by it so labeled, sold, and distributed, were commodities which had been so exchanged, notwithstanding fact it did not operate or control an exchange or place where commodities are bartered or traded for equivalent articles, and its business was clearly not an exchange as usually understood from word;

With effect of misleading dealers and purchasing public into beliefs that it was a group or association of distillers, operating an exchange, and that it was a distiller, or group of distillers, and that whiskies, etc., sold by it had been made or distilled by it or them from mash, wort, or wash, by one continuous process, and with capacity and tendency so to do, and with effect of inducing dealers and purchasing public, acting in such beliefs, to buy such whiskies, etc., thus labeled and sold by it, 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 distillers; to the substantial injury of substantial competition in commerce:

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.

Complaint

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Before *Mr. John W. Bennett*, trial examiner.
Mr. PGad B. Morehouse for the Commission.
Glatzer & Glatzer, 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 Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Distillers Exchange, Inc., hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said 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:

PARAGRAPH 1. Respondent is a corporation organized, existing, and doing business under the laws of the State of New York, with its office and principal place of business in the city of New York, in said State. It is now, and for more than 1 year last past has been, engaged in the business of a wholesaler and distributor of whiskies, gins, and other alcoholic 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 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, 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 for more than 1 year last past has been, in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by true distillation of whiskies, gins, and other alcoholic beverages from mash, wort, or wash, 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; in the course and conduct of its business as aforesaid, respondent is, and for more than 1 year last past has been, 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 alcoholic beverages and in the sale thereof in 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 now, and for more than 1 year last past has been, in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the business as wholesalers and distributors of whiskies, gins, and other alcoholic 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 "Distillers" when used in connection with the liquor industry and with 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 manufacturers of alcoholic liquors by an original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is complete, and a substantial portion of the purchasing public prefers to buy spirituous liquors bottled and prepared by distillers.

PAR. 3. In the course and conduct of its business as aforesaid, by the use of the word "Distillers" in its corporate name, printed on its stationery, catalogs, advertising, 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 it is a distiller and that the said whiskies, gins, and other alcoholic beverages therein contained were by it manufactured through the process of distillation from mash, wort, or wash, when, as a matter of fact, respondent is not a distiller, does not distill the said whiskies, gins, and other alcoholic beverages by it so labeled, sold, and transported. Respondent does not own, operate, or control any place or places where alcoholic beverages are manufactured by a process of original and continuous distillation from mash, wort, or wash.

In the course and conduct of its business as aforesaid, by the use of the word "Exchange" in its corporate name, respondent represents to its customers and prospective customers that it is operating a place where distillers engage in trading or bartering spirituous or other liquors of equivalent values, and that the whiskies, gins, and other alcoholic beverages by it so labeled, sold and transported are commodities which have been so exchanged, when in truth and fact respondent does not own, operate, or control an exchange or place where commodities are bartered or traded for equivalent commodities and is engaged in a business that is clearly not an "exchange" within the usually understood meaning of the word.

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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 alcoholic beverages sold by them and who truthfully use the words "distillery," "distilleries," "distillers," or "distilling" as a part of their corporate or trade names and on their stationery, catalogs, advertising, 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, bottling, and selling whiskies, gins, and other alcoholic beverages who do not use the words "distillery," "distilleries," "distilling," or "distillers" as a part of their corporate or trade names, nor on their stationery, catalogs, advertising, nor on the labels attached to the bottles in which they sell and ship their said products. There are also among the competitors of respondent corporations, firms, partnerships, and individuals engaged in the business as wholesalers and distributors of whiskies, gins, and other alcoholic beverages who do not use the words "distillery," "distilleries," "distilling," "distillers," or "distillers exchange" as a part of their corporate or trade names, nor on their stationery, catalogs, advertising, nor on the labels attached to the bottles in which they sell and ship their said products.

PAR. 5. The representations by respondent, as set forth in paragraph 3 hereof, are calculated to and have a capacity and tendency to and do mislead and deceive dealers and the purchasing public into the beliefs that respondent operates an exchange and that the spirituous commodities sold and transported by respondent, as aforesaid, have been exchanged by distillers; that respondent is a distiller and that the whiskies, gins, and other alcoholic beverages sold by respondent are manufactured or distilled by it from mash, wort, or wash by one continuous process, and such representations are calculated to and have the capacity and tendency to and do induce dealers and the purchasing public, acting in such beliefs, to purchase the whiskies, gins, and other alcoholic beverages so labelled 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 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.

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 June 28, 1935, issued, and on June 29, 1935, served its complaint in this proceeding upon respondent, Distillers Exchange, Inc., 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 theretofore duly designated by it, and in defense of the allegations of the complaint by Messrs. Glatzer & Glatzer, attorneys for the respondent; and said testimony and evidence were duly recorded and filed in the office of the Commission. Thereafter this proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and evidence, briefs in support of the complaint and in defense thereto; oral arguments of both counsel for the Commission and 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. Respondent is a corporation, organized November 21, 1933, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 425 Fourth Avenue, in the city of New York, in said State. While respondent's corporate charter is broad enough to permit it to engage in almost any branch of the liquor business, it has since its organization engaged only in the selling of spirituous beverages (chiefly whiskies, gins, and cordials) 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. Its principal customers are wholesalers, jobbers, retailers, and retail package stores, the bulk of its sales being made to retailers within the State of New York. Respondent buys its goods already bottled from distillers in Kentucky, Maryland, Pennsylvania, and Illinois, and a small quantity from rectifiers. It does an average monthly business of approximately \$125,000 volume, and sells in limited quantities in the District of Columbia, Connecticut, and other States. Between February 1934 and November 1935, it had more than 100 customers outside of the State of New York, and keeps a resident sales agent in the District of Columbia who does not solicit customers actively, but receives and forwards orders for the goods of respondent. It has also done some mail-order business in liquors. Respondent advertises its goods in newspapers to a limited extent, and sends out circular advertising matter in quantities of 4,000 to 6,000 at intervals of several months during each year.

In the course and conduct of its business, it causes its said products, when sold, to be transported and shipped from its place of business aforesaid, into and through various States of the United States to its aforesaid customers and, in the conduct of its said business, is in substantial competition with distillers, rectifiers, and other wholesalers whose bottled goods reach retail stores for sale in the same States and territories where respondent's goods are offered for sale.

PAR. 2. 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 packaged 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. There are many wholesale dealers and jobbers selling in the same territories as respondent who do not have the words "distillers" or "distilleries" in their corporate names and do not use that designation in connection with their sales activities.

The words "distiller," "distillers," "distilling," and "distilleries," used in the corporate names of concerns which are rectifiers and wholesalers are in fact, in general, a distinct advantage to the concerns using them or one of them in the sale of their products to

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dealers and in the sale by dealers to consumers. The whole record in this case supports this statement, with scarcely an exception.

PAR. 3. The record contains the testimony of 44 members of the public, whose names were obtained from the classified section of telephone directories, including dentists, mining engineers, real estate men, public accountants, bond brokers, physicians, inspectors, and promoters. With scarcely an exception, this testimony shows that the word "distillers," when used in connection with the distilled spirits or whiskey industry, signified to them as members of the public the manufacture of spirits from the raw materials. Some of these witnesses positively indicated that the use of the name "Distillers Exchange" would mislead them and indicate to them an advantage in purchasing the goods of respondent, and some of them testified that to them the "Exchange" connoted a place where distillers had met to barter their products, or that it was an association of distillers; a trade organization of distillers.

Such use by respondent of the terms "Distillers Exchange," separately, and in combination, is of a potentially deceptive character, respondent being neither a distiller, nor an exchange of distillers. The Commission finds that by such use of the word "Distillers" in its corporate name, printed on its stationery, catalogs, advertising, 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 it is a distiller and that the said whiskies, gins, and other alcoholic beverages therein contained were by it manufactured through the process of distillation from mash, wort, or wash, when, as a matter of fact, respondent is not a distiller, does not distill the said whiskies, gins, and other alcoholic beverages by it so labeled, sold, and transported. Respondent does not own, operate, or control any place or places where alcoholic beverages are manufactured by a process of original and continuous distillation from mash, wort, or wash.

The Commission also finds that by the use of the combination of words "Distillers Exchange" in its corporate name respondent represents to its customers and prospective customers that it is operating a place where distillers engage in trading or bartering spirituous or other liquors of equivalent values, and that the whiskies, gins, and other alcoholic beverages by it so labeled, sold, and transported are commodities which have been so exchanged, when in truth and fact respondent does not own, operate, or control an exchange or place where commodities are bartered or traded for equivalent commodi-

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ties, and is engaged in a business that is clearly not an "Exchange" within the usually understood meaning of the word.

PAR. 4. The aforesaid representations by respondent have the capacity and tendency to, and do, mislead dealers and the purchasing public into the beliefs that respondent is a group or association of distillers operating an exchange; that respondent is a distiller, or group of distillers; and that the whiskies, gins, and other alcoholic beverages sold by respondent have been manufactured or distilled by it, or them, from mash, wort, or wash by one continuous process; and such representations have the capacity and tendency to, and do, 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 does substantial injury to substantial competition in interstate commerce.

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 June 29, 1936, the answer of respondent thereto, 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 and in opposition thereto, briefs filed herein by PGad B. Morehouse, counsel for the Commission and by Messrs. Glatzer & Glatzer, counsel for the respondent, oral argument having been waived by both counsel for the Commission and counsel for the respondent, and the Commission having made its findings as to the facts and its conclusion that respondent has violated 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."

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It is ordered, That the respondent, Distillers Exchange, Inc., its agents, salesmen, and employees, in connection with the offering for sale, or sale by it, in interstate commerce of whiskies, gins, and other alcoholic beverages, do forthwith cease and desist from:

1. Representing, through the use of the word "Distillers" 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, unless and until it shall actually own, operate, or control such a place or places:

2. Representing, through the use of the word "Distillers" in connection with the word "Exchange" or any other word or words of like import 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, that it is operating a place where distillers engage in trading or bartering spirituous liquors, or that the spirituous liquors by it so labeled, sold and transported, are commodities which have been exchanged by or between distillers unless and until respondent shall in fact own, operate, or control an exchange or a place where commodities are bartered or traded by an association, combination, or group of individuals, some of whom are engaged in the manufacture of spirituous liquors by the process of original and continuous distillation from mash, wort, or wash.

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.

Complaint

IN THE MATTER OF
ELECTRO THERMAL COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2243. Complaint, Oct. 29, 1934—Decision, July 23, 1936*

Where a corporation engaged in the sale of an electric device designated "Thermal-aid", for treatment of prostate gland, in competition with others engaged in offer and sale in commerce of various therapeutic devices and appliances designed and intended for treatment thereof—

Falsely represented, in advertisements thereof in newspapers and periodicals and in booklets sent to prospective purchasers, and through asserted testimonials published therein, that said device would cure diseases and ailments of said gland, and constipation and other ailments associated by it therewith, and, in connection with its advertisement of its said device, made numerous false and misleading statements with respect to the functioning of said gland, and the asserted symptoms, and results on masculine performance, efficiency and well-being which assertedly followed its failure to function properly, and asserted results of surgical or other methods of treating ailments and diseases thereof;

With effect of misleading and deceiving purchasers and inducing their purchase from it of said device in reliance upon the truth of such various misrepresentations in its said advertisements, booklets, pictorial representations, form letters, and published testimonials, and with capacity and tendency so to mislead and deceive and to divert trade to it from competitors; 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. Charles F. Diggs*, trial examiner.

Mr. Morton Nesmith for the Commission.

Mr. John A. Nash and *Mr. Harry S. Harned*, of Chicago, Ill., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress 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 Electro Thermal Company, a corporation, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint.