

Syllabus

IN THE MATTER OF
WESTERN AMERICAN DISTILLERS CORPORATION

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914, AND OF SEC. 3 OF TITLE I OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933¹

Docket 2407. Complaint, May 23, 1935—Decision, July 29, 1936

Where a corporation engaged as liquor rectifier and wholesaler in purchasing and bottling whiskies, gins, and other spirituous beverages and in purchasing its distilled spirituous requirements from other distillers, and in making gin by redistillation of purchased alcohol over juniper berries and other aromatics, and neither owning, operating, nor controlling any place where beverages are made by original distillation from grain, fruit, or vegetable mash, wort, or wash, nor distilling any beverages—

Used on stationery and placed on labels attached to bottles in which it sold and shipped its said beverages, other than gins, its corporate name, including word "Distillers" and words "Bottled (or Bottled and Proofed or Blended and Bottled or Prepared and Bottled) by Western American Distillers Corp.", and failed to negative misleading and false impression or assertion that it was a distiller through back labels on some bottles showing State in which liquor was distilled;

With effect of misleading and deceiving dealers and purchasing public into the belief that the whiskies, etc., sold by it were by it made and distilled from mash, wort, or wash, as long understood from word by trade and public, and of inducing dealers and purchasing public, substantial portion of which prefers to buy liquors from the actual distillers thereof, acting in such belief, to buy its said whiskies and other spirituous beverages bottled and sold by it, and of thereby securing an advantage, by reason of prestige attaching to distiller in wholesale trade, and control over product by distiller, associated therewith in mind of trade and public, over concerns who do not falsely purport to be manufacturers, and with capacity and tendency so to mislead, etc.; and

With result of diverting trade to it from truthful competitors, among whom there are (1) those who manufacture and distill, from mash, wort, or wash, whiskies, etc., sold by them, and who, as distillers, investment and expenses of which are greater than those of rectifier, truthfully use words "Distillery," "Distilleries," "Distillers," or "Distilling," as part of their corporate names and on their stationery and on the labels of the bottles in which they sell and ship their products, and (2) competitors engaged in business of purchasing, rectifying, blending, and bottling whiskies, etc., who do not use such words as aforesaid, and who do not, by their corporate name or in any other manner, misrepresent that they are manufacturers by distillation from mash, wort, or wash of whiskies, etc.; to the substantial injury of substantial competition in commerce:

¹ Count 2 of the complaint, under the National Industrial Recovery Act, dismissed by reason of decision in *A. L. A. Schechter Poultry Corp. v. U. S.*, 295 U. S. 495.

Complaint

23 F. T. C.

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

Before *Mr. W. W. Sheppard* and *Mr. John W. Addison*, trial examiners.

Mr. Edw. W. Thomerson and *Mr. PGad B. Morehouse* for the Commission.

Mr. Albert A. Axelrod, of San Francisco, Calif., 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 Western American Distillers 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 interest, hereby issues its complaint, stating its charges in that respect as follows:

Count 1

PARAGRAPH 1. Respondent is a corporation originally organized under the name of American Distillers Corporation, later changing said name to Western American Distillers Corporation, existing and doing business under the laws of the State of California with its office and principal place of business in the city of San Francisco in the said State. It is now and for more than 1 year last past has been engaged in the business of purchasing, rectifying, blending, and bottling whiskies, vermouth, gins, 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 its said products when sold to be transported from its place of business in San Francisco 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 California 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

individuals, partnerships, and firms engaged in the manufacture by distillation of whiskies, vermouth, 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, vermouth, 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. In the course and conduct of its business as aforesaid respondent has, upon its said premises, a still which it uses in the production of gin by a process of rectification whereby alcohol, purchased but not produced by respondent, is redistilled over juniper berries and other aromatics. Such rectification of alcoholic spirits does not make or constitute respondent a distiller, as defined by section 3247 of the Revised Statutes regulating internal revenue, nor as commonly understood by the public and the liquor industry. 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 manufacture of such liquors by the process of 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 by the actual distillers and manufacturers thereof.

PAR. 3. In the course and conduct of its business as aforesaid, by use of the word "Distillers" 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, vermouth, gins, and other spirituous 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, vermouth, or other spirituous beverages by it so bottled, labeled, sold, and transported, and merely by the use of a still as aforesaid in the rectification of alcoholic spirits by redistil-

lation over juniper berries and other aromatics, respondent does not distill the gins by it so bottled, labeled, sold, and transported in the sense in which the word "distilled" is commonly accepted and understood by those engaged in the liquor trade and the public. Respondent does not own, operate, or control any place or places where such beverages are manufactured by the process of original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is complete.

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, vermouth, gins, 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 purchasing, rectifying, blending, and bottling whiskies, vermouth, gins, and other spirituous beverages who do not use the words "distillery," "distilleries," "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, vermouth, 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, vermouth, gins, 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 are manufacturers by distillation from mash, wort, or wash, as aforesaid, of whiskies, vermouth, 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 originally organized under the name of American Distillers Corporation, later changing said name to Western American Distillers Corporation, existing and doing business under the laws of the State of California with its office and principal place of business in the city of San Francisco in the said State. It is now and for more than 1 year last past has been engaged in the business of purchasing, rectifying, blending and bottling whiskeys, vermouth, gins, 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 its said products when sold to be transported from its place of business in San Francisco 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 California 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 individuals, partnerships, and firms engaged in the manufacture by distillation of whiskeys, vermouth, 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 whiskeys, vermouth, 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.

PARS. 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 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 para-

graphs 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 affectuate 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 word "Distillers" 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 from mash, wort, or wash and that the spirituous beverages by it so sold and transported have been bottled 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 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 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 May 23, 1935, issued, and on May 27, 1935, served its complaint in this proceeding upon respondent Western American Distillers Corp., 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 Edward W.

Findings

23 F. T. C.

Thomerson, attorney for the Commission, before W. W. Sheppard, an examiner of the Commission, heretofore duly designated by it; and by PGad B. Morehouse, attorney for the Commission, before John W. Addison, an examiner of the Commission thereafter by the Commission duly substituted to take testimony in the place and stead of the said W. W. Sheppard; and in defense of the allegations of the complaint by Albert A. Axelrod, attorney for the respondent; and said testimony and evidence 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 of respondent and all oral arguments 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. Western American Distillers Corp., is a corporation existing and doing business under and by virtue of the laws of the State of California as a rectifier and a wholesaler of liquors, having its principal office and place of business at 110 First Street in the city of San Francisco, California. It purchases and bottles whiskies, gins, and other spirituous beverages and sells 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 California 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. 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 whisky by adding water is not rectifying. Rectifiers also blend whiskies with neutral spirits (grain alcohol).

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 feet 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 tax-paid 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 under his rectifier's permit. 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-567" 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 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 is very limited to the general public. All whiskies, whether emanating from distilleries or rectifiers, are generally in the trade conceded to be "distilled products."

Findings

23 F. T. C.

It is not always 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.

PAR. 3. This respondent purchases its distilled spirituous requirements from other distillers, rectifies, bottles, and sells it in interstate commerce. In the course and conduct of its business respondent uses its aforesaid name on its stationery and places on the labels attached to the bottles in which it sells and ships its said beverages, other than gins, the words "* * * (Or Bottled And Proofed Or Blended And Bottled Or Prepared And Bottled) By Western American Distillers Corporation * * *". The label on a rum bottled and proofed by respondent states that the rum is distilled by A. H. Riise Company in the Virgin Islands. In some cases respondent also places labels on the back of its whisky bottles showing in what State the whisky is distilled. On its labels for gins purchased by it, it places the words "* * * Bottled By Western American Distillers Corporation * * *"; on its labels for its gins that are mixed or compounded by it from purchased alcohol and aromatics it places the words "* * * Made and Bottled By Western American Distillers Corporation * * *", and on its labels for gins which are the distillate by its own redistillation of neutral spirits with aromatics it places the words "* * * Distilled Dry Gin * * * Distilled By Western American Distillers Corporation * * *".

Like many other rectifiers, this respondent bottles certain brands of liquors for customers, placing the customer's label on the whiskies or liquors at the customer's request. These are known as "private brand labels", do not contain the offending name, and with them this case is not concerned. Commission's exhibits contain numerous specimens of all of these labels. The impression that respondent is a distiller, to be gained from a reading of these labels, is not negated by the fact that on the back of the bottles in some cases are back labels showing the State in which the liquor was distilled, as presumptively and actually real distillers may and do have distilleries located in more than one State and in States other than the sites of their rectifying plants.

Respondent is a rectifier and not a distiller. It does not own, operate, or control any place where beverages are made by original distillation from grain, fruit, or vegetable mash, wort, or wash, and it does not distill any beverage. It has a still which it uses in making gin by redistillation of purchased alcohol, not produced by it, over juniper berries and other aromatics, but this redistillation does not make respondent a distiller as defined by United States Code, title 26,

section 241, regulating internal revenue, nor as commonly understood by the public and the liquor industry. As shown by the testimony of many witnesses who for long periods of time had been and still were actively engaged in the liquor industry, including distillers, wholesalers, and retailers, and by the testimony of representative members of the consuming public, for a long period the word "distillers" when used in connection with the liquor industry and with products thereof has had, and still has, the definite significance and meaning to the minds of wholesalers and retailers in such industry and to the ultimate purchasing public of making beverages by original distillation from grain, fruit, or vegetable mash.

In general the investment and expenses of the distiller are greater than those of the rectifier.

Much of the "distilled" gin on the market is produced by companies who do distill their own alcohol and produce gin therefrom by redistillation in exactly the same manner that respondent produces its gins—not under any distillery permit, but under a rectifying permit. These distiller-rectifiers place on their gin labels: "Distilled by ----- Distillers". There are distilleries which produce gin by the same process in the distillery by one continuous process and the tax is paid at the completion of the process, that is, after the alcohol becomes gin, so that although the final redistillation process is the same as that of respondent, yet it is all done in a distillery and the distiller has control over the process from the mash to the gin. Thus it includes original or primary distillation through closed pipes and vessels, as well as the final process of redistillation over the juniper berries.

Section 5 of the Federal Alcohol Administration Act, approved August 29, 1935, dealing with unfair competition and unlawful practices in the industry, provides that it shall be unlawful to sell in bottles any distilled spirits in interstate or foreign commerce unless they are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Administrator, as will prohibit deception of the consumer with respect to such products.

Existing regulations and regulations proposed under this act define "distilled gin" as the distillate by original distillation or redistillation of neutral spirits with aromatics.

The regulations further provide that on labels of domestic distilled spirits bottled by or for the actual distiller thereof, there shall be stated the words "distilled by" and immediately thereafter the name of such distiller and the place where distilled.

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, whiskies, gins, 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 purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages who do not use the words "distillery," "distilleries," "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. A substantial portion of the purchasing public does prefer to buy spirituous liquors bottled by the actual distillers and manufacturers thereof, and such representation is a misrepresentation in fact, and has a tendency to mislead and deceive dealers and the purchasing public, with the resultant tendency to induce them to buy respondent's products in preference to the products of truthful competitors.

The opinion and preference of the consuming public is illustrated by the following brief references to representative testimony on this point:

A person that distills liquor, I would imagine, would attempt to put forth a better product because of the fact his reputation as a distiller would be at stake, whereas, a person who blends liquors and sells them just as a distributor, I would imagine, that if the liquor was not just exactly right, he would say his reputation as a manufacturer was not concerned;

Generally speaking, I prefer to buy it from the distiller, I say that generally; if you happened to know who the rectifier was and he shows you what he was blending, then you would know what distiller made the product and what was going into the blend; in that case you might be just as well satisfied, but, generally speaking, "distillery" would mean more to me;

If he saw the word "distillers" in the firm name of a concern on its labels, that would influence him to purchase it over another product which did not have on it those words, because he would have confidence that that firm would be more certain to deliver a product that had no deleterious matter in it for beverage purposes, and he would take it that such firm had actually distilled and bottled it and that would be his reason for buying from them.

The testimony clearly showed and the Commission finds that a prestige attaches in the minds of the wholesale trade to the distiller, and that that prestige is an advantage in overcoming sales resistance; that in the mind of the wholesale trade and the public, the belief that a distiller controlling the making of such products from start to finish,

with all the ingredients going into them within its own establishment, is an advantage, together with uniformity; and that the use of the word "distilling" or "distiller" in a trade or corporate name of a concern gives it an advantage over concerns who do not pursue or practice such characterizations, and who do not purport to be manufacturers when they are not.

The Commission therefore finds that the representations of respondent through use of the word "Distillers" in its corporate name as aforesaid 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 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 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 complaint was issued in two counts. Count 1 specifically charged a violation of the Federal Trade Commission Act, and count 2 charged that the practices of respondent, as hereinbefore set out, were unfair methods within the meaning of the Federal Trade Commission Act because they were in violation of section 3 of title I of the National Industrial Recovery Act, which was invalidated by the decision of the United States Supreme Court in the case of *A. L. A. Schechter Poultry Corporation, et al. v. United States* (295 U. S. 495). For that reason the Commission has dismissed the complaint as to count 2 thereof.

PAR. 7. Because of existing regulations, and regulations proposed under the Federal Alcohol Administration Act approved August 29, 1935 (49 Stat. 977), and which regulations are presently expected to become effective as of August 15, 1936, providing that rectifiers who redistill purchased alcohol over juniper berries and other aromatics may label such resulting product "distilled gin", and requiring that the labels state who distilled it, the Commission has excepted gins produced by respondent by redistillation of alcohol over juniper berries and other aromatics from the prohibitions of its order.

Order

23 F. T. C.

CONCLUSION

The aforesaid acts and practices of the said respondent, under the conditions and circumstances hereinbefore described, are to the prejudice of the public and respondent's competitors, 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 on May 23, 1935, and served on May 27, 1935, the answer of respondent, testimony and evidence taken before W. W. Sheppard and John W. Addison, examiners of the Commission theretofore duly designated by it, in support of the charges of the complaint and in opposition thereto, and the Commission 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 Western American Distillers 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, except gins produced by a process of rectification whereby alcohol purchased but not produced by respondent is redistilled over juniper berries and other aromatics, do cease and desist from:

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 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 spirituous beverages; or (b) that the said whiskies, gins, 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 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
BARAGER-WEBSTER COMPANY

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

Docket 2506. Complaint, July 31, 1935—Decision, Aug. 3, 1936

Where a corporation engaged in manufacture and sale of candy, including both "straight" goods and "draw" or "deal" assortments, in two of which consumer-purchaser received, in accordance with number pushed or punched by chance and card's legend, one or two suckers or one of larger candy pieces or bars, or other article of merchandise for his penny, or choice of any bar in assortment, or two chocolate pellets, or box of chocolate angel food, and in third of which five-cent purchaser similarly received one or two candy bars or box of chocolate fudge, and, for last purchase, large box of chocolates—

Sold said various assortments and cards to wholesalers, jobbers and retailers, knowingly packed and designed for display, offer and sale, without alteration, addition or rearrangement, to consuming purchasing public, by means of said cards and by lot or chance, by retailers, stores of which, in case of the small establishments, are frequently near schools and attract trade of school children, substantial proportion of whom constitute the consumers of the lottery or prize package candy and who, given choice, purchase same in preference to "straight" goods because of lottery or gambling feature connected therewith, and chance of winning;

With result that competitors dealing in "straight" goods candy, who regard such sale and distribution as morally bad and as encouraging gambling, and especially among children, and as injurious to the industry in merchandising, instead of candy, a chance or lottery, and as providing retail merchants with means of violating the laws of the States, and refuse to sell candy so packed and assembled that it can be resold to public by lot or chance, were put to a disadvantage, retailers bought from it and others employing similar methods of sale as enabling them to sell more candy, and trade was diverted to it and such others from aforesaid competitors dealing in "straight" goods and able to compete on even terms only by giving same or similar devices to retailers, some competitors began sale and distribution of candy to public by lot or chance to meet constant demand for candy thus sold, sale of "straight" goods candy showed a marked decrease whenever and wherever lottery or prize package candy appeared in its markets by reason of gambling feature connected therewith, public and competitors were prejudiced and injured, and there was a restraint upon and a detriment to the freedom of fair competition in said industry and a violation of public policy:

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

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank and *Mr. P. C. Kolinski* for the Commission.

Mr. Walter C. Hughes, of Chicago, Ill., for respondent.