

Syllabus

IN THE MATTER OF
 AVERY SALT COMPANY ¹

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

Docket 2248. Complaint, Nov. 13, 1934—Decision, Nov. 28, 1936

Where a corporation engaged in manufacture and sale of a product which consisted of salt, treated with pyroligneous liquor or acid, secured through destructive distillation of wood in the absence of air, with the addition of pepper, saltpeter, and sugar, and of caramel or burnt sugar, to simulate the appearance of a product actually treated with natural wood smoke, produce a merchantable commodity, and satisfy the expectations of the trade and consuming public—

- (a) Described said product as "Smoke Salt" or as "Avery Sugar Curing Smoke Salt," and displayed and featured such name, together with word, in small letters, "Evaporated," on the containers of its said product, together with depiction of a dish and portion and slices of ham thereon; and,
- (b) Included with its directions for curing and flavoring meat, in small letters, the words "This time-saving and sure method of curing meat has been made possible by the scientific blending of the best meat salt with sugar cure, spices and concentrated smoke produced from hard wood. Avery Sugar Curing Smoke Salt (appearing in large letters) does the complete job of curing and smoking meat. When used according to the following directions, it will produce meat that is properly cured with a delicious smoke taste";

Notwithstanding fact that its said "Smoke Salt" had not been, as signified to consuming public from use of such a word, smoked with natural wood smoke, nor subjected directly or at all to such smoke, and had not derived from such smoke and did not have either its qualities and properties for, or its efficacy in, curing, preserving, smoking, or flavoring meats as in the conventional smoke house or as in the operation or course of similar or equivalent processes, and could not, by virtue of the nature thereof, do the complete job of curing meats nor the curing and smoking of meats in one operation;

With capacity and tendency to mislead and deceive retail dealers into the belief that so-called "Smoke Salt" was a product subjected directly to the action and effect of, or impregnated or treated with, the smoke of burning wood during the process or course of its combustion, and that it could do the complete job of curing and smoking meat in one operation, and into pur-

¹Through subsequent Commission action, effective date for report of compliance with order in the instant matter was extended until such time as the Commission rendered its final decisions in *Smoke Salt Products Co., et al.*, Docket 2783, and *Pennsylvania Salt Manufacturing Co., et al.*, Docket 2784, subject, however, to amendments or revocation at any time if such action appeared warranted in the discretion of the Commission, and through later Commission action relating to its aforesaid stay order, it was directed that the matter "remain *in fieri* without prejudice to the right of the Commission forthwith to enter such final order as seems just at or after the Commission's final decision in the matter" of the aforesaid two cases.

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chase thereof in reliance on such erroneous belief, and with result of placing in the hands of retail dealer vendees the means whereby they were enabled to and did mislead and deceive the consuming public into the belief that its said product had been smoked with natural wood smoke and that application and use thereof would do the complete job of curing and smoking meats as hereinabove set forth, and into purchase thereof in reliance on such erroneous belief, and of diverting trade to it from competitors engaged in the sale of salt, truthfully represented and described, for the purpose, among others, of curing and preserving meat, in substantial competition with it; to said competitors' substantial injury:

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

Before *Mr. Charles F. Diggs* and *Mr. Robert S. Hall*, trial examiners.

Mr. James M. Brinson for the Commission.

Putney, Twombly & Hall, 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 the Avery Salt Company, hereinafter called respondent, 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, it hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Avery Salt Company, is now and for more than a year last past has been a corporation organized, existing, and doing business under the laws of the State of West Virginia, with its principal office and place of business in the city of Scranton and State of Pennsylvania. It has been and is engaged in the manufacture of a product described as "Avery Sugar Curing Smoke Salt" and in its sale in commerce among and between the State of Pennsylvania and the various other States of the United States. It causes its said product, when sold, to be transported to purchasers thereof in and through the various other States of the United States.

It has been and is, in the course and conduct of such business, in competition with individuals, partnerships, and corporations engaged in the sale of salt or of so-called smoked or smoke salt in interstate commerce.

PAR. 2. Respondent, Avery Salt Company, has been for more than a year last past and now is, offering for sale and selling a certain product which it has described and designated, and still describes and designates, as "Smoke Salt" or "Avery Sugar Curing Smoke Salt."

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The container in which the salt of respondent is packed and marketed bears directions for use of the product. The leaflet containing the directions bears the following: "Directions for use of Avery Sugar Curing Smoke Salt" in large letters followed by:

This time saving and sure method of curing meat has been made possible by the scientific blending of the best meat salt with sugar curing spices and concentrated smoke produced from hardwood.

These words are followed by: "Avery Sugar Curing Smoke Salt" in large letters and, in smaller letters, the words "Does the complete job of curing and smoking meat."

In truth and in fact the product "Avery Sugar Curing Smoke Salt" offered for sale and sold by respondent in interstate commerce, so described and designated, has not been and is not smoked or brought in direct contact with smoke, has not been and is not treated in any way with natural wood smoke, or subjected to the action and effect of natural wood smoke. The word "Smoked" or the word "Smoke" when applied to, or used in connection with the curing of meats, has, for a considerable period of time, signified and meant, and now signifies and means to the consuming public that the product to which the word "Smoked" or "Smoke" is applied has been or is smoked with natural wood smoke, subjected to the action and effect of, or treatment or impregnation with smoke produced by wood in process of combustion.

PAR. 3. There have been for many years last past, and now are, individuals, partnerships and corporations engaged in the manufacture and sale, in commerce among and between the various States of the United States, of salt truthfully described and designated as "Smoked Salt" or "Smoke Salt."

PAR. 4. The practice of respondent, Avery Salt Company, in offering for sale or selling its product as "Avery Sugar Curing Smoke Salt" has had and has the capacity and tendency to mislead and deceive the consuming public, including wholesale and retail dealers, into the belief that the product of respondent, so described and designated, has been and is salt actually smoked with, treated or impregnated with, or subjected to the action and effect of natural wood smoke as described in paragraph 2 hereof.

The aforesaid practice of respondent also has had and has the capacity and tendency to divert trade to it from competitors selling smoked salt or smoke salt in interstate commerce truthfully designated and described.

PAR. 5. The aforesaid practices of respondent have been and are all to the prejudice of the public and of respondent's competitors, and are unfair methods of competition in interstate commerce in vio-

lation of the provisions of Section 5 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."

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 the 13th day of November 1934, issued and thereafter caused to be served upon respondent, Avery Salt Company, its complaint in this proceeding, charging it with the use of unfair method of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answer thereto, a stipulation subject to the approval of the Federal Trade Commission, and which hereby is approved, was introduced by James M. Brinson, counsel for the Commission, and Henry B. Twombly, counsel for the respondent, before Charles F. Diggs, an examiner theretofore duly designated by it whereby and wherein there were adopted and accepted as testimony and other evidence for the purpose of this proceeding all testimony taken and evidence received of a general character in the matters of Morton Salt Company, Docket 2150, Jefferson Island Salt Company, Docket 2151, and Myles Salt Company, Docket 2152. Thereupon further testimony and evidence in support of the allegations of the complaint were introduced by James M. Brinson, counsel for the Commission, and in opposition thereto by Henry B. Twombly, counsel for respondent.

Further testimony and evidence were introduced by said counsel for respondent in opposition to the allegations of the complaint before Robert S. Hall, an examiner of the Federal Trade Commission duly designated by it as a substitute for and in place of the said Charles F. Diggs because of an emergency requiring such action. This stipulation, testimony and evidence were reduced to writing 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, the testimony and evidence including the testimony and evidence admitted by the stipulation aforesaid, briefs in support of the complaint and in opposition thereto, and the oral arguments of counsel aforesaid; and the Commission having duly considered the same and being now fully advised in the premises finds that this proceeding is in the interest of the public and makes this its report stating its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Avery Salt Company is now and for more than a year last past has been a corporation organized, existing, and doing business under and by virtue of the laws of the State of West Virginia. It has its principal office and place of business in the city of Scranton in the State of Pennsylvania, and is now, and for more than a year last past has been, engaged in the manufacture of a product described and designated as "Avery Sugar Curing Smoke Salt," and in the sale of such product in commerce between and among the State of Pennsylvania and the various other States of the United States. It causes such product, when sold, to be transported from its said place of business to purchasers in and through the various other States of the United States than the said State of Pennsylvania.

In the course and conduct of its said business, respondent Avery Salt Company has been and is in substantial competition with individuals, partnerships, and corporations engaged in the sale of salt in interstate commerce.

PAR. 2. Respondent Avery Salt Company has been for more than a year last past and now is offering for sale and selling to retail dealers and through them to their customers, the consuming public, in the commerce aforesaid the product mentioned in paragraph 1 in containers on or around which are labels bearing in large and conspicuous letters the words "Avery Smoke Salt." Beneath the word "Avery" appears in small letters the word "Evaporated," while under the word "Evaporated" are the words "Sugar Curing." Between the words "Sugar Curing" and the words "Smoke Salt," there is a pictorial representation of a portion of ham together with several slices on a platter or dish. There also appears the following in large letters "Easier—Quicker—Surer" followed by the words "Avery Salt Company, Avery Island, La., a Subsidiary of International Salt Company, New York." On the opposite side of the container, there are directions for the application or use of the salt in curing and flavoring meat. They are entitled "Avery Sugar Curing Smoke Salt" and are expressed in large and conspicuous letters. There also appears in small and inconspicuous letters the following:

This time-saving and sure method of curing meat has been made possible by the scientific blending of the best meat salt with sugar cure, spices and concentrated smoke produced from hard wood. Avery Sugar Curing Smoke Salt (appearing in large letters) does the complete job of curing and smoking meat. When used according to the following directions, it will produce meat that is properly cured with a delicious smoke taste.

In truth and in fact, wood smoke, as commonly understood by the public is the product or result of the incomplete or imperfect com-

bustion of wood, in the presence of air. The word "Smoke," and the word "Smoked" used in connection with salt offered for sale, distributed, or sold, for curing preserving, smoking, or flavoring meats, or any other word or words used in such connection implying smoke, or use of smoke, have for a considerable period of time signified and meant and now signify and mean, to the consuming public, that the product to which the word "Smoke," or "Smoked" or any word, or words, implying smoke or use of smoke is applied, has been or is smoked with natural wood smoke, that is, subjected directly to the action and effect of, or to treatment or impregnation with, smoke produced by burning wood, during the process or course of its combustion, sufficiently to acquire from such source alone smoke or smoke effects for use in curing, preserving, smoking, or flavoring meats.

The product which respondent offers for sale, distributes and sells to retail dealers, described and designated as "Smoke Salt" has not been and is not smoked with natural wood smoke. It has not been and is not subjected directly or at all to such smoke, that is, smoke produced by burning wood during the process or course of its combustion. It has not acquired or derived from such smoke, and has not had and does not have either its qualities and properties for, or its efficacy in curing, preserving, smoking or flavoring meats, as in the conventional smokehouse, or as in the operation or course of similar or equivalent processes. It can do neither the complete job of curing and smoking meats, nor the curing and smoking of meats in one operation. The product of respondent consists of salt, treated with a liquid known as pyroligneous liquor or acid, to which are added pepper, saltpeter, sugar and caramel or burnt sugar.

Pyroligneous liquor or acid is manufactured by a process known and described as the destructive distillation of wood. This process requires the absence of air for its efficiency in recovery of the maximum amount of the constituents or products of the wood. As a result of this necessity, air is excluded from the retort in which the decomposition of the wood is accomplished by the external application of heat. The only opening in the retort when the process is in operation is that leading into the condensing apparatus. It affords no entrance for air but, on the contrary, provides an exit through which air present in the retort and in the wood is expelled as soon as the vapors or fumes, and other material or products in the wood commence their passage into the condensing apparatus. This absence of air and consequently of combustion effects in the course of the destructive distillation recovery of all condensable material resulting from decomposition of the wood. The distillate so produced, pyro-

ligneous liquor, contains therefore many substances which would be destroyed in the course of the combustion or incomplete or imperfect combustion of wood, or would escape into the atmosphere, and which have not been discovered or identified in the smoke produced by burning wood in the process or course of its combustion. The application of respondent's product, treated with such pyroligneous liquor, to meats, therefore, necessarily subjects them to an entirely different treatment under different atmospheric and other conditions than does the conventional smoke house method, or equivalent processes in which natural wood smoke is employed.

A product exposed to the dense natural wood smoke of the smoke house or its equivalent is subjected to conditions which the application of pyroligneous liquor or acid does not and cannot supply and salt treated with such liquor or acid also fails to supply such conditions. Pyroligneous liquor or acid subjects the product with which it is treated and such product subjects meats to which it is applied to the action and effect of numerous substances never found in smoke and which do not and cannot serve as a substitute for the conditions and effects of natural wood smoke operating in the smoke house or its equivalent processes. This fact is emphasized by the practice of respondent, in adding caramel or burnt sugar, as an ingredient, to its product, in order to produce the honey brown color which the trade and public associates with products subjected to or impregnated or treated with the said natural wood smoke. In other words, although using the product of destructive distillation, which it designates as condensed smoke, for the treatment of its salt, it is necessary for respondent to resort to caramel or burnt sugar as a coloring agent, in order to simulate the appearance of a product actually treated with natural wood smoke and thereby to produce a merchantable commodity, which can, in appearance, satisfy the expectations of the trade and consuming public.

PAR. 3. There are now and for several years last past have been individuals, partnerships and corporations engaged in the sale of salt truthfully represented and described, in interstate commerce for the purpose, among others, of curing and preserving meat in substantial competition with respondent.

PAR. 4. The above and foregoing practices of respondent, described in paragraph 2 hereof have had and have and each of them has had and has the capacity and tendency to mislead and deceive retail dealers, into the belief that the so-called smoke salt has been and is a product subjected directly to the action and effect of, or impregnated or treated with, the smoke of burning wood during

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the process or course of its combustion and that such product can do the complete job of curing and smoking meat in one operation and into the purchase of such product in reliance on such erroneous belief.

The practices aforesaid have placed and do place in the hands of retail dealers to whom respondent sells its product the means whereby they have been and are enabled to mislead and deceive, have misled and deceived, and do mislead and deceive the consuming public into the belief that the product of respondent has been smoked with natural wood smoke as described in paragraph 2 hereof, and that application and use of such product will do the complete job of curing and smoking meats in one operation, and into the purchase of such product in reliance on such erroneous belief.

The aforesaid practices of respondent have had and have and each of them has had and has the capacity and tendency to divert and each of them has diverted and does divert trade to respondent from competitors mentioned in paragraph 3 hereof. Such practices have done and are doing and each of them has done and is doing substantial injury to such competitors so engaged in substantial competition with respondent.

CONCLUSION

The aforesaid acts and practices of the respondent, Avery Salt Company, are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 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 the respondent, a stipulation as to certain testimony and evidence, testimony and evidence taken before Charles F. Diggs and also before Robert S. Hall, examiners of the Federal Trade Commission theretofore duly designated by it for such purpose in support of the allegations of said complaint and in opposition thereto, briefs filed herein and oral arguments by James M. Brinson, counsel for the Commission, and by Henry B. Twombly, counsel for respondent, and the Commission having made its report stating its findings as to the facts and its conclusion that said respondent has violated the provisions of Section 5 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."

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Order

It is ordered, That the respondent Avery Salt Company its officers, representatives, agents, and employees in connection with the offering for sale, sale and distribution of its salt in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

(1) Using the word "smoke", or any other word or words signifying smoke, or implying use of smoke, to designate or describe salt offered for sale, or sold, for curing, preserving, smoking, or flavoring meats, unless the salt so described or designated has been or is directly subjected to the action and effect of the smoke from burning wood during the process and course of its combustion sufficiently to acquire from such source alone all of its smoke or smoke effects for use in curing, preserving, smoking, or flavoring meats.

(2) Representing that its product described or designated as "Avery Sugar Curing Smoke Salt" does the complete job of curing and smoking meat, or that meat by treatment with such product acquires therefrom the same taste or flavor or other properties or effects, as meat acquires from treatment with salt and subsequent exposure to the smoke of burning wood during the process and course of its combustion.

It is further ordered, That respondent Avery Salt Company shall file within 60 days from and after the service of this order a report in writing setting forth in detail the manner and form of its compliance herewith.

IN THE MATTER OF
AMBUR DISTILLERIES, INC.

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

Docket 2481. Complaint, June 29, 1935—Decision, Nov. 28, 1936

Where a corporation engaged in purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages, and in use of a still for producing gin through process of rectification, whereby alcohol purchased, but not produced, by it was redistilled over juniper berries and other aromatics, and in selling its aforesaid various products, in substantial competition with those engaged in manufacture by distillation of whiskies, gins, and other spirituous beverages, and in sale thereof, and with those engaged in purchasing, rectifying, blending, and bottling such products and selling the same among the various States and in the District of Columbia, and including among aforesaid competitors those who manufacture and distill from mash, wort, or wash, as commonly understood, their whiskies and other spirituous beverages and truthfully use words "distillery," "distilleries," "distilling," or "distillers" as a part of their corporate or trade name, on their stationery and advertising, and on the labels of the bottles in which they sell and ship their products, and those who, engaged in purchasing, rectifying, blending, bottling, and selling such various products, do not thus use aforesaid words as a part of their corporate or trade names, etc., as above set forth—

Represented, through use of word "Distilleries" in its corporate name, printed on its stationery and advertising and on the labels attached to the bottles in which it sold and shipped its said products, and in various other ways, to its customers, and furnished the same with the means of representing to their vendees, both retailers and ultimate consuming public, that it was a distiller and that the whiskies, gins, and other spirituous beverages contained in such bottles were by it made through process of distillation from mash, wort, or wash, notwithstanding fact it did not distill said whiskies, etc., thus bottled, labeled, sold, and transported by it, nor own, operate, or control any place or places where such beverages were made by process of distillation from mash, wort, or wash, as long definitely understood from word "Distilleries" by trade and ultimate purchasing public as meaning places where such liquors are made by process of original and continuous distillation as above set forth, and through continuous closed pipes and vessels until manufacture is complete, and was not a distiller, for purchase of bottled liquors of which there is a preference on the part of a substantial portion of the purchasing public;

With effect of misleading dealers and purchasing public into belief that it was a distiller and that the whiskies, gins, and other spirituous beverages sold by it were by it made and distilled from mash, wort, or wash as above set forth, and of inducing dealers and purchasing public, acting in such beliefs, to buy its said whiskies, etc., bottled and sold by it, and diverting thereby trade to it from its competitors who do not, by their corporate or trade names, misrepresent that they are manufacturers by distillation, as above set