

IN THE MATTER OF
ARROW DISTILLERIES, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 3
OF TITLE I OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933¹

Docket 2400. Complaint, May 20, 1935—Decision, Dec. 30, 1936

Where a corporation engaged as rectifier and wholesaler of spirituous beverages, in purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages and in the making of gin with a still which it used therefor by redistillation of purchased alcohol, not produced by it, over juniper berries and other aromatics, and in selling its aforesaid various products to wholesalers and retailers in substantial competition with those engaged in the manufacture by distillation of whiskies, gins, and other spirituous beverages, and in selling same in trade and commerce among the various States and in the District of Columbia, and with those engaged in purchasing, rectifying, blending, and bottling such various beverages and in similarly selling same, and including among said competitors those who, as manufacturers and distillers of whiskies, gins, and other spirituous beverages sold by them, by process of original and continuous distillation from mash, wort, or wash through continuous closed pipes and vessels until manufacture is complete, truthfully use words "distillery," "distilleries," "distillers," or "distilling" as a part of their corporate names and on their stationery, advertising, and on the labels of the bottles in which they sell and ship their said products, and those who, engaged in rectifying, blending, and bottling such various products, do not use aforesaid words as above set forth—

Represented, through use of word "Distilleries" in its corporate name, in advertising matter, on its stationery and invoices, and on the labels attached to the bottles in which it sold and shipped its said beverages, together with words "Distilled by" on labels for gin redistilled by it, "Prepared by" on labels for some of the cordials and other beverages which it compounded, and words "Bottled by" or "Prepared by" on whiskey labels, and with nothing further on the labels of some of its cordials to indicate that they were not distilled by it, and with such prefixes, insofar as reproduced in advertising matter, not legible without use of a magnifying glass, and with words "Peoria, Illinois" in close conjunction with its said corporate name on labels and advertising, and in various other ways represented to its customers, and furnished the same with the means of representing to their vendees, both retailers and ultimate consuming public, 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 thus distill said various beverages thus bottled, labeled, sold, and transported by it, as commonly accepted and understood in the trade and by the public, and did not operate or control any place or places where such beverages were made by process of original and con-

¹ Count Two 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.

tinuous distillation from mash, etc., as hereinbefore set forth, and was not a distiller or distillery, for the purchase of the bottled or packaged liquors of which there is a preference on the part of a substantial portion of the liquor purchasing public;

With effect of misleading and deceiving dealers and purchasing public into the belief that the whiskies, gins, and other spirituous beverages sold by it were by it made and distilled from mash, wort, or wash as hereinabove set forth, and of inducing dealers and purchasing public, acting in such belief, to buy its said whiskies, etc., rectified, blended, and bottled by it, and of thereby diverting trade to it from its competitors who do not, by their corporate name or in any other manner, misrepresent that they are distilleries or that they manufacture by distillation from mash, etc., as above set forth, whiskies, gins and other spirituous beverages; to the substantial injury of substantial competition in commerce:

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

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

Mr. John J. Keenan, *Mr. Edw. W. Thomerson* and *Mr. PGad B. Morehouse* for the Commission.

Shurtleff & Niehaus of Peoria, Ill., and *Mr. Lawrence A. Jacobson*, of Chicago, Ill., for respondents.

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 Arrow Distilleries, Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, and in violation of the Act of Congress approved June 16, 1933, known as the "National Industrial Recovery Act," and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Count 1

PARAGRAPH 1. Respondent is a corporation organized, existing, and doing business under the laws of the State of Illinois, with its office and principal place of business in the city of Peoria in said State. It is now, and has been for more than one year last past engaged in the business of purchasing, rectifying, blending, and bottling whiskies, 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 Peoria 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 Illinois 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. In the course and conduct of its business as aforesaid respondent has, upon its 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 distillery, 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 "distilleries" 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, places where such alcoholic liquors 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, and a substantial portion of the purchasing public prefers to buy spirituous liquors bottled by distilleries.

PAR. 3. In the course and conduct of its business as aforesaid, by the use of the word "Distilleries" in its corporate name, printed on its stationery, 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 the said whiskies, 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 nor a distillery, does not distill the said whiskies, gins, 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 redistillation 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, 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, 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 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. 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, gins, and other spirituous beverages sold by the respondent are manufactured and distilled by it from mash, wort, or wash as aforesaid, and is calculated to and has the capacity and tendency to and does induce dealers and the purchasing public, acting in such belief, to purchase the whiskies, gins, and other spirituous beverages 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 distilleries or that they manufacture by distillation from mash, wort, or wash as aforesaid whiskies, gins,

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

PAR. 6. The acts and things above alleged to have been done and the false representations alleged to have been made by respondent are to the prejudice of the public and the competitors of respondent and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Count 2

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under the laws of the State of Illinois, with its office and principal place of business in the city of Peoria, in said State. It is now, and has been for more than one year last past, engaged in the business of purchasing, rectifying, blending and bottling whiskies, 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 Peoria 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 Illinois 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.

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 allegations thereof were separately,

by like numbered paragraphs, set out at length herein, and said paragraphs 2, 3, 4, and 5 of count 1 of this complaint are incorporated herein by reference and adopted as the allegations of paragraphs 2, 3, 4, and 5 respectively of this count and are hereby charged as fully and as completely as though the several averments of each of the said paragraphs of count 1 were here repeated verbatim.

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

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

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

That said Code will tend to effectuate the declared policy of Title I of the National Industrial Recovery Act as set forth in Section 1 of said Act in that the terms and provisions of such Code tend: (a) to remove obstructions to the free flow of foreign commerce, which tend to diminish the amount thereof; (b) to provide for the general welfare by promoting the organization of industry for the purpose 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 interinference it tends to create a misleading impression.

PAR. 7. The use by respondent of the word "Distilleries" 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 operates a place or places where alcoholic spirits are distilled from mash, wort, or wash, and that the spirituous beverages by it so sold and transported have been bottled by a distillery or 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 20, 1935, issued and served its complaint on Arrow Distilleries, 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 other evidence in support of the allegations of said complaint were introduced by

John J. Keenan, Edward W. Thomerson, and PGad B. Morehouse, attorneys for the Commission, before W. W. Sheppard, Joseph A. Simpson, and John W. Addison, examiners of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Messrs. Shurtleff and Niehaus, and Lawrence A. Jacobson, attorneys for the respondent; and said testimony and other 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 other evidence, 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 findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is a corporation organized, existing, and doing business under the laws of the State of Illinois, with its principal office and place of business at 401 South Washington Street, in the city of Peoria, in said State. From the date of its organization in November 1933 to February 26, 1936, it was engaged in business solely as a rectifier and wholesaler of spirituous beverages, purchasing, rectifying, blending, and bottling whiskies, 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, and it still engages in that business under basic permit No. R 224 issued by the Federal Alcohol Administration. In November 1935, respondent applied for, and in December 1935, received, a basic distillers permit from the same authority, contracted for a leased run of four days a month at a Kentucky Distillery producing from 105 to 110 barrels of whiskey per day, and on February 26, 1936, respondent commenced to operate such distillery under said lease. During its four days' run that month, the respondent produced for future use approximately 420 barrels of whiskey.

Respondent's premises consist of a building sixty feet wide and half a block long, having a small office in the front on the first floor, large bottling tanks of different sizes, and the ordinary equipment necessary for the conduct of distilled spirits rectifying operations. It also has upon its premises a duly registered still, which it uses in the production of gin by a process of rectification whereby tax-paid

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alcohol, purchased, but not produced, by respondent, is redistilled over juniper berries and other aromatics. By this means respondent can produce approximately 550 gallons of gin every four hours, and the gin still has been operated daily since respondent commenced business. On the third floor, respondent has a room where it makes cordials and other products. Attached to the said building is a loading platform and back of it a large warehouse.

From March 1934 to October 8, 1935, the total gallonage handled by respondent was as follows:

Whiskey -----	10,567 gals.
Gin -----	27,930 "
Brandy -----	3,600 "
Cordials -----	11,296 "
Vermouth -----	10 "
	53,403 gals.

From the time when respondent commenced business, up to the present time, it has purchased its entire distilled spirits requirements, both whiskey and alcohol, which it has used in its rectifying business, from distillers who produced it from the raw materials.

PAR. 2. In the course and conduct of its business, it causes its said products, when sold, to be transported from its place of business in Peoria, 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 Illinois 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. 3. For a long period of time the word "distilleries," 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: places where spirituous liquors 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. Also, there is a substantial portion of the public which does not know that most "distilled" gin is a distillate by redistillation rather than by original distillation, but thinks that it is distilled in the same manner as whiskey. Respondent's plant, premises, and operations, including the aforesaid rectification of tax-paid purchased alcohol not by it distilled (with the exception of its operations as a lessee distiller subsequent to February 26, 1936, as aforesaid), do not make or constitute respondent a distillery in the sense commonly understood by the public or by the liquor industry. Section 3247 of the Revised Statutes regulating Internal Revenue, defines the word "distiller" in the following language:

Every person who produces distilled spirits, or who brews or makes mash, wort, or wash, fit for distillation or for the production of spirits, or who, by any process of evaporation separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still, shall be regarded as a distiller. (U. S. Code 1934 Edition, Title 26, Section 1158 (a).)

One of the customary methods used in the production of gin by actual distilleries is shown by this record to be as follows: The grain is received in cars, ground, cooked, and turned into a mash which has yeast added to it, and the fermentation takes place by which the alcohol is produced. This fermented liquid runs through the beer still, in which the original evaporation or distillation of the alcohol from the beer takes place. Thereafter the vapor is cooled and dropped into the receiving tank, from where it goes into what is known as the "continuous unit," where it is purified by evaporation, and again the vapors are collected and the liquid drops into another receiving tank. In order to further purify that liquid, it goes through what is known as the "redistillation still," through pipes which are in place all the time, to the gin still. All of the foregoing takes place on the distillery bonded premises. While the final technical redistillation process of distillery produced gin may be exactly similar to respondent's redistillation process, the whole prior course of its manufacture from the grain up to the point where it reaches the redistillation still is a process which respondent does not use. Such a distillery has control over its gin products from the grain to the finished product, and the process is one of original and continuous distillation from mash, wort or wash. In the case of dis-

tillery-made gin, the Federal tax is computed and paid, when the manufacture of the gin is completed by the proprietor of the bonded warehouse from which the product is withdrawn and at the time of the withdrawal, whereas in the case of rectifier-made gin, the tax thereon is paid when the alcohol which the rectifier purchased to make the gin was withdrawn from the bonded warehouse of the distiller. A rectifier does not have on his rectifying premises an Internal Revenue bonded warehouse to which the alcohol may be removed in bond prior to the payment of the tax, and the tax on his gin is not paid by him, except in the price which he pays for the alcohol when withdrawn from the distiller's bonded warehouse.

PAR. 4. Rectifying, in the distilled spirits rectifying industry, means the mixing of cordials and whiskies of different ages or types, or the mixing of other ingredients with whiskies, but reducing proof of whiskey by adding water is not rectifying. Rectifiers also blend whiskies with neutral spirits (grain alcohol).

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 come 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 some bottled liquors, whether bottled at a distillery rectifying plant, 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) in 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-224" designates this respondent. A distiller who also operates a rectifying plant, having both kinds of permits, may use either symbol depending upon whether the liquor contained in the bottle was produced and bottled under his distiller's or his rectifier's permit.

A distiller has a maximum bond of \$100,000, and is permitted to have untaxed liquor; the average bond of the rectifier is about \$5,000; the distiller must own the fee title of the premises upon which the business is conducted, or have consent from the owner waiving the owner's interest so that the Government can have a first lien upon that property for taxes; a distillery is under constant general supervision by storekeeper-gaugers, who are always there; absolute supervision is maintained over the bonded warehouse of a distillery. The primary distinction is that one storekeeper-gauger may take care of several rectifying plants, but at the distillery he is in constant supervision, primarily to supervise the tax payments; a rectifier is not permitted to store spirits in bond; a distiller produces spirits from grains, alcohol, molasses, and fruits, but a rectifier produces no distilled spirits whatever; but must obtain them from the producer or from someone holding warehouse certificates; the requirements are considerably more detailed in the case of a distiller than in the case of a rectifier.

A distiller must have a distillery, which must be a complete building and a warehouse, a separate building; he has to have necessary weighing equipment, a grain hopper, cooker, cooking equipment, mash tubs, fermenters, sufficient distilling equipment to take care of his continuous distillation until the spirits are run through the pipe lines into the receiving tanks; at the warehouse he has to have the weighing and testing instruments for checking and many other things; a rectifier is not required to have a separate building. A rectifying plant may consist of a room within a building. He needs no bonded warehouse. If one room, it would have to be divided into three separate rooms by wire mesh partitions. The regulations for the equipment of a rectifier are not so specific as those for a distiller.

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."

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

PAR. 5. Respondent in the course and conduct of its business uses its name in advertising matter on its stationery, on invoices, and on

labels attached to the bottles in which it sells and ships beverages. The name is preceded by the words "Distilled By" on labels for the gin it redistills; by the words "Prepared By" on labels for some of its cordials and other beverages which it compounds; and by the words "Bottled By" or "Prepared By" on labels for whiskies. Labels for some of its cordials carried nothing but the name of the product to indicate that they were not distilled by respondent. The use of a magnifying glass is required to tell what the name is preceded by on the labels on bottles portrayed in some of its advertising matter. Its symbol of an arrow piercing a target, with the legend "A product of Arrow" is reproduced on the illustrations of some of its whiskey bottles. In a September 1935, advertisement of its Clark's Pure Rye, the corporate name is preceded by the words "Distilled and Bottled in Peoria." Respondent nearly always used the words "Peoria, Illinois," long and well known as a whiskey distilling center in plain type in conjunction with, and close juxtaposition to, its corporate name on its labels and in its advertising. In one newspaper advertisement published by respondent, one of its brands was described as follows: "Pride O'Peoria, one of the outstanding products of the whiskey center of the world."

The Commission finds that in the course and conduct of its business as aforesaid, by the use of word "Distilleries" in its corporate name, printed on its stationery, 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 the said whiskies, 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 nor a distillery, does not distill the said whiskies, gins, 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 redistillation 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 by 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. 6. Twenty-seven lay witnesses, representative of many different professions, trades, and occupations, such as surgeons, contractor,

civil engineer, insurance agent, etc., were called to the stand and examined to test the reaction of a representative cross-section of the general public to such terms as "distilleries" and "distillers" when used in connection with whiskey or the distilled spirits industry, and all of them testified in substance that by "distilleries" they understood the place of manufacture of spirits, whiskey, or liquors from raw materials; that by "Arrow Distilleries, Inc." they would naturally assume respondent to be engaged in such manufacturing process; and all but two or three clearly indicated that they would be influenced in the purchase of respondent's products in preference to the products of others, by reason of the word "Distilleries" being included in the respondent's trade or corporate name. These witnesses were fairly representative of the Peoria and Chicago, Ill., and Milwaukee, Wis. public. Some of these witnesses gave reasons for such preference as follows:

Would think such products came from a reputable concern;

For responsibility;

Possibly just the psychology of it;

Would just naturally take it that it was a product you could rely upon;

Would assume that the distillery would be a manufacturer who would stand behind its product from the time the thing started until it was finished;

Where you see the word "distilleries" you know it is genuine;

The testimony of many liquor tradesmen, retailers, and wholesalers was substantially to the same effect, namely, that they had observed, from their contacts in selling the public, a definite preference for distillery packaged products.

Respondent produced seventy members of the public who had no such preference for distillery bottled packages, and it is unquestionably true that there are many drinkers who, in buying liquors, are governed principally by a brand name established by advertising or by long usage, or who are governed by taste and quality which is known to them, without regard to the source of bottling. The Commission finds, however, that there is a substantial portion of the liquor purchasing public which prefers to buy spirituous liquors, including gins, which have been bottled or packaged by distilleries.

PAR. 7. There are among the competitors of respondent engaged in the sale of spirituous beverages as mentioned in paragraph 2 hereof corporations, firms, partnerships, and individuals who manufacture and distill from mash, wort, or wash, as aforesaid, whiskies, gins, and other spirituous beverages sold by them, and who truthfully use the words "distillery," "distilleries," "distillers," or "distilling" as a part of their corporate names and on their stationery, 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 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. 8. This record contains evidence of undisputed instances where liquor dealers purchased beverages in substantial quantities from this respondent under the erroneous belief, induced by respondent's name, that respondent was the actual distiller of the grain products that it sold, and because their customers preferred to buy whiskey distilled by the firm which bottled it. The representation by respondent as set forth in paragraph 5 hereof is calculated to, has the capacity and tendency to, and does, mislead and deceive dealers and the purchasing public into the belief that the whiskies, gins, and other spirituous beverages sold by the respondent are manufactured and distilled by it from mash, wort, or wash as aforesaid, and is calculated to, and has the capacity and tendency to, and does, induce dealers and the purchasing public, acting in such belief, to purchase the whiskies, gins, and other spirituous beverages 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 distilleries, or that they manufacture by distillation from mash, wort, or wash as aforesaid, whiskies, gins, and other spirituous beverages, and thereby respondent does substantial injury to substantial competition in interstate commerce.

PAR. 9. The Commission's complaint in this case was issued prior to the decision of the United States Supreme Court in the case of *A. L. A. Schechter Poultry Corporation, et al. vs. United States* (295 U. S. 495), and contained two counts. Count one specifically charged a violation of the Federal Trade Commission Act, and count two 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 aforesaid decision. For that reason the Commission is dismissing the complaint as to count two thereof.

PAR. 10. Existing regulations promulgated under the Federal Alcohol Administration Act approved August 29, 1935 (49 Stat. L. 977), which regulations became effective August 15, 1936, provide that rectifiers who redistill tax-paid purchased alcohol over juniper

berries and other aromatics may call such resulting product "distilled gin," and require that the labels shall state thereon who distilled it. For this reason the Commission has excepted from the application of its order herein gins so produced by this respondent.

CONCLUSION

The aforesaid acts and practices of the respondent Arrow Distilleries, Inc., 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 respondent, testimony and other evidence taken before W. W. Shepard, Joseph A. Simpson, and John W. Addison, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral arguments by John J. Keenan, Edward W. Thomerson, and PGad B. Morehouse, counsel for the Commission, and by Shurtleff and Niehaus, and Lawrence A. Jacobson, counsel for the respondent, 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 the respondent, Arrow Distilleries, Inc., its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of whiskies, gins, or other spirituous beverages, in interstate commerce or in the District of Columbia, (except gins produced by it through a process of rectification whereby alcohols purchased, but not produced, by respondent are redistilled over juniper berries and other aromatics), do forthwith cease and desist from:

Representing, through the use of the word "Distilleries" 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 other spiritous beverages; or (b) that the said whiskies, gins, or other spirituous beverages were by it

Order

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manufactured through the process of distillation; or (c) that it owns, operates, or controls a place or places where any such products are by it manufactured by a process of original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is completed, unless and until respondent shall actually own, operate, or control such a place or places.

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

It is further ordered, That the said respondent within 60 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
SWEET CANDY COMPANY

COMPLAINT, AND MODIFIED FINDINGS AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 2621. Complaint, Nov. 11, 1935—Decision Dec. 31, 1936

Where a corporation engaged in manufacture and sale of candy, including both "straight" or "staple" goods and "draw" or "deal" push card and punch board assortments, in one of which number of bars received in return for five-cent punch depended on chance selection of legend concealed within partially perforated disk and upon making of last sale, and in other of which chance five-cent punch from 200-hole board determined, in accordance with number punched, whether one of several sixty-cent boxes, one of a number of thirty-cent boxes, or nothing other than chance to punch, was secured by purchaser—

Sold said assortments, with cards and boards, to jobbers and to retailers, so packed and assembled, with its knowledge, that they might be used for distribution to purchasing public by lot or chance without alteration or rearrangement by retailer, by whom they were thus resold by lot or chance to public, in competition with concerns who regard such a method of sale and distribution as morally bad and one which encourages gambling and especially among children, who constitute substantial number of the consumers purchasers of the "draw" or "deal," and particularly, such push card candy, and as injurious to the industry in merchandising a chance or lottery rather than candy, and as providing retailers with the means of violating the laws of the several States, and who refuse to sell candy so packed and assembled that it can be resold to public by lot or chance;

With result of putting at a disadvantage, by reason of their said refusal to adopt such practice, said competitors, who can compete on even terms only through following same to meet demand and preference for such candy from retailers, who find "draw" or "deal" candy more salable than the "straight" or "staple" candy, sale of which showed a marked decrease, some competitors began sale and distribution of candy to public by lot or chance, public and competitors were prejudiced and injured, trade was diverted from them to it and to others employing similar methods of sale, and there was a restraint upon and a detriment to the freedom of fair and legitimate competition in the industry, and a violation of public policy in such sale to consuming public:

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

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

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

Dey, Hoppaugh, Mark & Johnson, and *Mr. F. W. James*, of Salt Lake City, Utah, for respondent.