

Syllabus

IN THE MATTER OF
BANNER DISTILLING COMPANY

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 2397. Complaint, May 18, 1935—Decision, Jan. 15, 1937

Where a corporation engaged as rectifier and wholesaler of spirituous liquors, in purchasing and bottling whiskies and gins and other spirituous beverages, including different grades of cordials made by it through combining fruit and fruit flavors with neutral spirits or whiskey, and purchasing, incident to its aforesaid business, its entire distilled spirits requirements of both whiskey and alcohol from distillers who produced same from the raw materials, and in selling its aforesaid various products at wholesale in constant course of trade and commerce among the various States and in the District of Columbia, in substantial competition with those engaged in the manufacture by distillation of whiskies, gins, and other spirituous beverages and in selling same as aforesaid, 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 from mash, wort or wash as above set forth, 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 "Distilling" 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, together with the words "Bottled by" on some of its labels, "Produced in California and Bottled by" on others, "Prepared and Bottled by" on others, and "Made and Bottled by" on still others, and words "Rectifiers and Blenders" on its stationery, invoices and advertising matter, and through other ways to its customers, and furnished 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 whiskies, gins and other spirituous beverages, thus bottled, labeled, sold, and transported by it, by process of original and continuous distillation from mash, wort, or wash through continuous closed pipes and vessels until manufacture is complete, as long definitely understood from word "Distilling" in liquor industry in the trade and by the ultimate purchasing public, and did not rectify, purify, or refine distilled spirits or wines by such process, and was not a distiller, for the purchase

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.*, 205 U. S. 495.

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of the bottled or packaged liquors of which, including gins, there is a preference on the part of a substantial portion of both liquor purchasing public and trade;

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 aforesaid, and with capacity and tendency to induce such dealers and public, acting in such belief, to buy its said whiskies, etc., rectified, blended, and bottled by it, and thereby divert 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. John W. Addison*, trial examiner.

Mr. John J. Keenan and *Mr. PGad B. Morehouse* for the Commission.

Mr. Lawrence A. Jacobson, of Chicago, Ill., 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 Banner Distilling Company, 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 the said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Count 1

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under the laws of the State of Illinois, with its office and principal place of business in the city of Chicago, in said State. It is now, and has been since its organization in February 1934, engaged in the business of a rectifier and wholesaler of liquors, purchasing and bottling whiskies, gins, and other spirituous beverages and selling 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

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its place of business aforesaid into and through various other States of the United States to the purchasers thereof, consisting of wholesalers and retailers, some located within the State of 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. For a long period of time the word "distilling" when used in connection with the liquor industry and the products thereof has had and still has a definite significance and meaning in the minds of the 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 completed; and a substantial portion of the purchasing public prefers to buy spirituous liquors bottled by the actual distillers and manufacturers thereof.

PAR. 3. In the course and conduct of its business as aforesaid, by the use of the word "Distilling" in its corporate name, printed on its stationery and on the labels attached to the bottles in which it sells and ships its said products, and in various other ways, respondent represents to its customers and furnishes them with the means of representing to their vendees, both retailers and the ultimate consuming public, that the 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, does not distill the said whiskies, gins or other spirituous beverages by it so bottled, labeled, sold, and transported, and does not own, operate, or control any place or places where such beverages are manufactured by the process of distillation from mash, wort, or wash.

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PAR. 4. There are among the competitors of respondent engaged in the sale of spirituous beverages as mentioned in paragraph 1 hereof corporations, firms, partnerships, and individuals who manufacture and distill from mash, wort, or wash, whiskies, gins, and other spirituous beverages sold by them and who truthfully use the word "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 product.

PAR. 5. Representation by respondent, as set forth in paragraph 3 hereof, 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 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 Chicago, in said State. It is now, and has been since its organization in February 1934, en-

gaged in the business of a rectifier and wholesaler of liquors, purchasing and bottling whiskies, gins, and other spirituous beverages and selling 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 other 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 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 paragraphs 2, 3, 4, and 5 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 Execu-

tive 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 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 "Distilling" in its corporate name, printed upon its stationery and on the labels attached

to the bottles in which it sells and ships such products and in various other ways, constitutes false advertising within the meaning of the aforesaid provision of said Article V and tends to and does create the misleading impression that respondent is engaged in the business of distilling spirits 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 18, 1935, issued and served its complaint on Banner Distilling Company, 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 respondents answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by John J. Keenan and PGad B. Morehouse, attorneys for the Commission, before John W. Addison, an examiner of the Commission, theretofore duly designated by it, and in defense of the allegations of the complaint by Lawrence A. Jacobson, attorney 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, brief of counsel for the Commission in support of the complaint, (respondent's brief in opposition thereto having been waived) 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 February 5, 1934, existing under the laws of the State of Illinois with its principal office and place of business at 2100 South Morgan Street in the city of Chicago in said State. It is now and has been since its commencement of business shortly after its organization, operating as a rectifier and wholesaler of spirituous liquors, purchasing and bottling whiskies and gins and other spirituous beverages and selling 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. It engages in that business under basic permit No. R-422 issued by the Federal Alcohol Administration.

Respondent's premises consist of two floors and a basement of a four-story building at the above address. It has the usual filter percolators and whiskey tanks constituting the ordinary equipment of a rectifier of spirituous liquors, but has no stills. It combines fruit and fruit flavors with neutral spirits or whiskey for the purpose of making different grades of cordials and also handles whiskey made by different distilleries. Its aggregate business is approximately fifty-five thousand dollars a month in sales. It employs no salesmen but circularizes its customers with direct advertising matter. From the time when respondent commenced its business up to the present time it has purchased its entire distilled spirits requirements of both whiskey and alcohol 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 aforesaid into and through various other States of the United States to the purchasers thereof, consisting of wholesalers and retailers, some located within the State of 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 "distilling," 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 spirituous 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. Respondent's plant premises and operations do not make or constitute it a distilling company in the sense commonly understood by the public or by the liquor industry. Section 3244 (Second) of the Revised Statutes of the United States (U. S. C. A., Title 26, Sec. 1398-f) defines a rectifier in the following language:

Every person who rectifies, purifies, or refines distilled spirits or wines by any process other than by original and continuous distillation from mash, wort, or wash, through continuous closed vessels and pipes, until the manufacture thereof is complete, and every wholesale or retail liquor dealer who has in his possession any still or leach tub, or who keeps any other apparatus for the purpose of refining in any manner distilled spirits, and every person who, without rectifying, purifying, or refining distilled spirits, shall, by mixing such spirits, wine, or other liquor with any material, manufacture any spurious, imitation, or compound liquors for sale, under the name of whisky, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name, shall be regarded as a rectifier, and as being engaged in the business of rectifying.

Respondent does not now and never has rectified, purified, or refined distilled spirits or wines by a process of original and continuous distillation from mash, wort, or wash through continuous closed vessels and pipes until the manufacture thereof is complete, and is a rectifier and wholesaler only.

PAR. 4. Rectifying, in the distilled spirits rectifying industry, means the mixing of 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-422" 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 whereas the average bond of the rectifier is about \$5,000. A distiller is required either to own the free title of the premises upon which his business is conducted, or have a waiver of 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 and absolute supervision is maintained over the bonded warehouse of a distillery. Another difference is that one storekeeper gauger may take care of several rectifying plants, but at a distillery one 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, producing no distilled spirits whatever, must obtain them from the producer or from someone holding warehouse receipts. In short, all requirements are considerably more detailed in the case of a distiller than in the case of a rectifier, viz:

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, and 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 but his plant may consist of a room within a building. If one room, it would have to be divided into three separate rooms by 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 a distiller.

PAR. 5. Respondent in the course and conduct of its business uses its name on labels attached to bottles in which it sells and ships its beverages and on stationery, invoices, and advertising matter. The name is preceded by the words "Bottled By" on some of its labels; "Produced in California and Bottled by" on others; "Prepared And Bottled By" on others; and "Made and Bottled By" on still others. On its stationery, invoices and advertising matter the name is preceded or followed by the words "Rectifiers And Blenders".

The Commission finds that in the course and conduct of its business as aforesaid, by the use of the word "Distilling" in its corporate name, printed on its stationery, 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, not a distillery, does not distill the said whiskies, gins, or other spirituous beverages by it so bottled, labeled, sold, and transported in interstate commerce.

PAR. 6. Seventeen lay witnesses, representative of many different professions, trades, and occupations, such as surgeon, 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 "distilling," "distilleries," and "distillers" when used in connection with whiskey or the distilled spirits industry, and

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all of them testified in substance that by "distilling" they understood the manufacture of spirits, whiskey, or liquors from raw materials; and by "Banner Distilling Company" they would naturally assume respondent to be engaged in such manufacturing process. All but two of them indicated that they would be influenced to purchase respondent's product by reason of the word "distilling" being included in its corporate name. 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. 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.

The Commission also finds that a substantial portion of the trade as well as the public has a preference for handling liquors bottled by distillers or distilling companies notwithstanding the fact that sufficient time has now elapsed since repeal for a more widespread knowledge on the part of both retailers and wholesalers as to the exact status of the concerns from whom they buy their bottled goods for resale and such customers and prospective customers of respondent are not likely to be misled by respondent's corporate name alone.

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. The representations by respondent as set forth in paragraph 5 hereof have the capacity and tendency to, and by necessary inference do mislead and deceive dealers and the purchasing public into the

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belief that the whiskies, gins, and other spirituous beverages sold by the respondent are distilled by it from mash, wort, and wash as aforesaid and have the capacity and tendency to induce such 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. v. United States* (295 U. S. 495), and contained 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 aforesaid decision. For that reason the Commission is dismissing the complaint as to count 2 thereof.

CONCLUSION

The aforesaid acts and practices of the respondent Banner Distilling 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 respondent, testimony and other evidence taken before John W. Addison, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief of counsel for the Commission filed herein, (brief on behalf of respondent having been waived), and oral arguments by P. B. Morehouse, counsel for the Commission, and by 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

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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 Banner Distilling Company, a corporation, 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 do forthwith cease and desist from:

Representing, through the use of the word "Distilling" in its corporate name, on its stationery, advertising, or on the labels attached to the bottles in which it sells and ships said products, or in any other way by word or words of like import, (a) that it is a distiller of whiskies, gins, or 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 manufacturer 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 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.

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IN THE MATTER OF
A. O. LEONARD, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 2855. Complaint, June 27, 1936—Decision, Jan. 15, 1937*

Where a corporation engaged in manufacture, sale, and distribution of a product sold by it under trade name "Leonard Ear Oil" or "Leonard's Ear Oil"—Represented, through pamphlets, booklets, labels, statements on safety match box containers, and otherwise, that its said product was an ear oil and possessed such therapeutic properties as to relieve deafness, facts being it did not, used as directed or otherwise, accomplish such result and was not an ear oil;

With capacity and tendency to mislead and deceive purchasers of its products into the belief that in buying same they would obtain such oil and a product that possessed such therapeutic value as to relieve deafness, and with effect of causing a substantial number of the purchasing public to buy its said product on account of the mistaken and erroneous belief induced by its representation, and of unfairly diverting trade to it from many competitors engaged in manufacture and distribution of products designed for similar usage, and who do not misrepresent the capacities or effects thereof; to the substantial injury and prejudice of 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. William C. Reeves*, trial examiner.

Mr. T. H. Kennedy for the Commission.

Rogers, Ramsay & Hoge, 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 A. O. Leonard, Inc., a corporation, hereinafter referred to as respondent, has been and now is using unfair methods of competition in commerce as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, A. O. Leonard, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, and at all times herein referred to has maintained and now maintains its principal place of business at 70 Fifth Avenue, New York, N. Y. Respondent is, and for more than two years last past has been.