

Syllabus

IN THE MATTER OF
OSTRUCON DISTILLED PRODUCTS COMPANY, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2444. Complaint, June 19, 1935—Decision, Jan. 28, 1937*

Where a corporation engaged in purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous liquors, 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 other States and in the District of Columbia, in substantial competition with those engaged in the manufacture by true distillation of whiskies, gins, and other spirituous liquors from mash, wort, or wash, and in selling same in trade and commerce among the various States and in said District, and with those engaged in purchasing, rectifying, blending, and bottling such various liquors and in similarly selling same, and including among said competitors those who, as manufacturers and distillers of whiskies, gins, and other spirituous liquors sold by them from mash, wort, or wash, truthfully use words "distillery," "distilleries," "distillers," "distilling" or "distilled products" as a part of their corporate or trade names, on their stationery, catalogs, advertising, and labels of the bottles in which they sell and ship their said products, and those who, engaged in purchasing, rectifying, blending, bottling, and selling such various products, do not use aforesaid words as above set forth, nor misrepresent themselves as distillers on their letterheads or invoices used to solicit, obtain and retain customers for sale of said products—

Represented, through use of words "Distilled Products" in its corporate name, printed on its stationery, catalogs, advertising, and labels attached to the bottles in which it sold and shipped its said products, and through express representation upon its letterheads and invoices used to solicit, obtain, and retain customers, and in various other ways, to its customers and furnished same with 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 the said whiskies, gins, and other spirituous liquors, thus bottled, labeled, sold, and transported by it, by process of original distillation from mash, wort, or wash through continuous closed pipes and vessels until manufacture is complete, as long definitely understood from word "distilled" in connection with liquor industry and products thereof, in the trade and by the ultimate purchasing public, and did not own, operate, or control any place or places where such liquors are made by aforesaid process, and was not a distiller, for the purchase of the bottled liquors of which there is a preference on the part of a substantial portion of the purchasing public;

With effect of misleading and deceiving dealers and purchasing public into the belief that it was a distiller and that the whiskies, gins, and other spirituous liquors sold by it were by it made and distilled from mash, wort, or wash

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by one continuous process, and of inducing dealers and such public, in such belief, to buy its said whiskies, etc., rectified and bottled by it, and of thereby diverting trade to it from its competitors who do not, by their corporate or trade name or in any other manner, misrepresent that they are distillers; 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.

Mr. PGad B. Morehouse for the Commission.

Mr. Fred A. Caskey, of Washington, D. C., 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 Ostrucon Distilled Products Co. Inc., hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to the said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under the laws of the State of New York, with its office and principal place of business in the city of New York, in said State. It is now, and for more than one year last past has been, engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous liquors 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 aforesaid into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers, located in other States of the United States and the District of Columbia. In the course and conduct of its business as aforesaid, respondent is now, and for more than one year last past has been, in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by true distillation of whiskies, gins, and other spirituous liquors from mash, wort, or wash, and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia; and in the course and conduct of its business as aforesaid respondent is, and for more than one year last past

has been, in substantial competition with other corporations and with individuals, firms, and partnerships engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous liquors 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. Upon the premises of respondent's place of business aforesaid there is a still for use in the production of gins 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 or a distiller, as defined by Section 3247 of the Revised Statutes regulating Internal Revenue, nor as commonly understood by the public and the liquor industry. For a long period of time the word "distilled" 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, spirituous liquors produced by a process of original distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is complete, and a substantial portion of the purchasing public prefers to buy spirituous liquors bottled and prepared by distillers.

PAR. 3. In the course and conduct of its business as aforesaid by the use of the words "Distilled Products" in its corporate name, printed on its stationery, catalogs, advertising, and labels attached to the bottles in which it sells and ships its said products, together with the express representation upon its letterheads and invoices used to solicit, obtain and retain customers for the sale of its said products, and in various other ways, respondent represents to its customers and furnishes them with the means of representing to their vendees, both retailers and the ultimate consuming public, that it is a distiller and that the said whiskies, gins, and other spirituous liquors therein contained were by it manufactured through the process of distillation from mash, wort, or wash, when, as a matter of fact, respondent is not a distiller, does not distill the said whiskies, gins, and other spirituous liquors by it so bottled, labeled, sold, and transported, and merely by the use of a still operated by it as aforesaid in the rectification of alcoholic spirits by redistillation over juniper berries and other aromatics, does not distill the whiskies, gins, and other spirituous liquors by it so bottled, labeled, sold, and transported in the sense in which the word "distillers" is commonly accepted and understood by those engaged in the liquor trade and the public. Respondent

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does not own, operate, or control any place or places where spirituous liquors are manufactured by a process of original and continuous distillation from mash, wort, or wash.

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 liquors sold by them and who truthfully use the word "distillery," "distilleries," "distillers," "distilling," or "distilled products" as a part of their corporate or trade names and on their stationery, catalogs, advertising, and on the labels of the bottles in which they sell and ship such products. There are also among such competitors corporations, firms, partnerships, and individuals engaged in the business of purchasing, rectifying, blending, bottling and selling whiskies, gins, and other spirituous liquors who do not use the words "distillery," "distilleries," "distilling," "distillers," or "distilled products" as a part of their corporate or trade names, nor on their stationery, catalogs, advertising, nor on the labels attached to the bottles in which they sell and ship their said products, and who do not misrepresent themselves to be distillers on their letterheads or invoices used to solicit, obtain and retain customers for the sale of said products.

PAR. 5. The representations by respondent, as set forth in paragraph 3 hereof, are calculated to and have a capacity and tendency to and do mislead and deceive dealers and the purchasing public into the beliefs that respondent is a distiller and that the whiskies, gins, and other spirituous liquors sold by respondent are manufactured or distilled by it from mash, wort, or wash by one continuous process and are calculated to and have the capacity and tendency to and do induce dealers and the purchasing public, acting in such beliefs, to purchase the whiskies, gins, and other spirituous liquors rectified and bottled by the respondent, thereby diverting trade to respondent from its competitors who do not by their corporate or trade name or in any other manner misrepresent that they are distillers, and thereby respondent does substantial injury to substantial competition in interstate commerce.

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

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission on June 19, 1935, issued and served its complaint in this proceeding upon respondent Ostrucon Distilled Products Company, 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, the Commission by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission the said complaint and the substitute answer, briefs and oral arguments of counsel having been waived, and the Commission having duly considered the same and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is a corporation organized, existing, and doing business under the laws of the State of New York with its principal office and place of business at 601 West 26th Street in the city of New York in said State. It is now and for more than one year last past has been engaged under basic permit from the United States Government, designated as R-242, in the business of purchasing, rectifying, blending, and bottling whiskies, gins and other spirituous liquors 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 aforesaid into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers, located in other States of the United States and the District of Columbia. In the course and conduct of its business as aforesaid, respondent is now, and for more than one year last past has been in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by true distillation of whiskies, gins, and other spirituous liquors

from mash, wort, or wash, and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia; and in the course and conduct of its business as aforesaid respondent is, and for more than one year last past has been, in substantial competition with other corporations and with individuals, firms, and partnerships engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous liquors 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. Upon the premises of respondent's place of business aforesaid there is a still for use in the production of gins 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 or a distiller, as defined by Section 3247 of the Revised Statutes regulating Internal Revenue, nor as commonly understood by the public and the liquor industry. For a long period of time the word "distilled" 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, spirituous liquors produced by a process of original distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is complete, and a substantial portion of the purchasing public prefers to buy spirituous liquors bottled and prepared by distillers.

PAR. 3. In the course and conduct of its business as aforesaid by the use of the words "Ostrucon Distilled Products" in its corporate name printed on its stationery, catalogs, advertising, and labels attached to the bottles in which it sells and ships its said products, together with the express representation upon its letterheads and invoices used to solicit, obtain, and retain customers for the sale of its said products, and in various other ways, respondent represents to its customers and furnishes them with the means of representing to their vendees, both retailers and the ultimate consuming public that it is a distiller and that the said whiskies, gins, and other spirituous liquors therein contained were by it manufactured through the process of distillation from mash, wort, or wash, when as a matter of fact, respondent is not a distiller, does not distill the said whiskies, gins, and other spirituous liquors by it so bottled, labeled, sold, and transported, and merely by the use of a still operated by it as aforesaid in the rectification of alcoholic spirits by redistillation over juniper berries and other aro-

matics, does not distill the whiskies, gins, and other spirituous liquors 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 spirituous liquors are manufactured by a process of original and continuous distillation from mash, wort, or wash.

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 liquors sold by them and who truthfully use the words "distillery," "distilleries," "distillers," "distilling," or "distilled products" as a part of their corporate or trade names and on their stationery, catalogs, advertising, and on the labels of the bottles in which they sell and ship such products. There are also among such competitors, corporations, firms, partnerships, and individuals engaged in the business of purchasing, rectifying, blending, bottling, and selling whiskies, gins, and other spirituous liquors who do not use the words "distillery," "distilleries," "distilling," "distillers," or "distilled products" as a part of their corporate or trade names, nor on their stationery, catalogs, advertising, nor on the labels attached to the bottles in which they sell and ship their said products, and who do not misrepresent themselves to be distillers on their letterheads or invoices used to solicit, obtain, and retain customers for the sale of said products.

PAR. 5. The representations by respondent, as set forth in paragraph 3 hereof, are calculated to and have a capacity and tendency to and do mislead and deceive dealers and the purchasing public into the beliefs that respondent is a distiller and that the whiskies, gins, and other spirituous liquors sold by respondent are manufactured or distilled by it from mash, wort or wash by one continuous process and are calculated to and have the capacity and tendency to and do induce dealers and the purchasing public, acting in such beliefs to purchase the whiskies, gins, and other spirituous liquors rectified and bottled by the respondent, thereby diverting trade to respondent from its competitors who do not by their corporate or trade name or in any other manner misrepresent that they are distillers, and thereby respondent does substantial injury to substantial competition in interstate commerce.

CONCLUSION

The aforesaid acts and practices of the respondent, Ostrucon Distilled Products, Inc., are to the prejudice of the public and of re-

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spondent'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 and the answer filed herein, dated April 13, 1936, by respondent, admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, 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, Ostrucon Distilled Products Company, Inc., its officers, representatives, agents, and employees in connection with the offering for sale, sale and distribution of whiskies, gins, and other spirituous beverages in interstate commerce or in the District of Columbia (except gins by it produced through redistillation of tax-paid purchased alcohol over juniper berries and other aromatics), do forthwith cease and desist from representing:

Through the use of the word "Distilled" in its corporate name, on its stationery, advertising, or on the labels attached to the bottles in which it sells and ships its said products, or in any other way by word or words of like import, (a) that it is a distiller of whiskies, gins, or 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 wherein 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 complete, unless and until respondent shall actually own, operate, or control such a place or places.

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
IMPERIAL DISTILLERS CORPORATIONCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914*Docket 2455. Complaint, June 22, 1935—Decision, Jan. 28, 1937*

Where a corporation engaged as rectifier and wholesaler of spirituous liquors, in purchasing, rectifying, blending, and bottling whiskies, gins, liquors 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 selling its aforesaid various products to wholesalers and retailers in other States, 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 similarly selling same, and including among said competitors those who, as manufacturers and distillers from mash, wort, or wash of whiskies, gins, and other spirituous beverages sold by them, truthfully use words "distiller," "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 their said products, and those who, engaged in purchasing, rectifying, blending, and bottling such various products, do not use aforesaid words as above set forth—

Represented, through use of its corporate name, including word "Distillers," printed on its stationery, invoices, and labels, together with words "Distilled * * * by" in case of gins and words "Bottled by" in case of whiskies and liquors, and in various other ways to its customers, and furnished same with 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 original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until manufacture was complete, notwithstanding fact it did not thus distill said various beverages, thus bottled, labeled, sold, and transported by it as above set forth, and as long definitely understood from word "distillers," used in connection with liquor industry and products thereof, in the trade and by the ultimate purchasing public, and did not own, operate, or control any place or places where such beverages are made by process of distillation from mash, wort, or wash, and was not a distiller, investment and expenses of which are, in general, greater than those of the rectifier, and for the purchase of the bottled liquors of which, as products of actual distiller and manufacturer, there is a preference on the part of a substantial portion of the purchasing public, and to which prestige, of competitive advantage in overcoming sales resistance, attaches in the minds of the wholesale trade, and associated with which is belief in trade and public that distiller's control over making of such products from start to finish is of advantage to the seller;