

Syllabus

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;

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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, and of inducing dealers and such public, acting in such belief, to buy its said whiskies, etc., bottled and sold by it, and of thereby diverting trade to it from its competitors who do not, by their corporate names or in any other manner, misrepresent that they are manufacturers by distillation from mash, wort, or wash of such products; 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* and *Mr. John W. Addison*, trial examiners.

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

Mr. Samuel P. Novick, of Los Angeles, Calif., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Imperial Distillers Corp., 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 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 California, with its office and principal place of business in the city of Los Angeles, in said State. It is now, and for more than one year last past has been, engaged in the business of a wholesaler and rectifier, purchasing, rectifying, blending, and bottling whiskies, gins, liqueurs, and other alcoholic 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 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

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individuals, partnerships, and firms engaged in the manufacture by true distillation of whiskies, gins, and other alcoholic beverages 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, liqueurs, and other alcoholic beverages in rectifying plants 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 "distillers" when used in connection with the liquor industry and with the products thereof has had and still has a definite significance and meaning to the minds of wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, those who manufacture spirituous liquors by an 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 and prepared by distillers.

PAR. 3. In the course and conduct of its business as aforesaid by the use of the word "Distillers" in its corporate name, printed on its stationery, catalogs, and on the labels attached to the bottles in which it sells and ships its said products, by express representation on its letterheads used by it to solicit and obtain customers for the sale of its aforesaid liquors, 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, liqueurs and other alcoholic 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, and other alcoholic beverages 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 beverages 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 beverages 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 beverages sold by them and who truthfully use the words "distillery," "distilleries," "distillers," or "distilling" as a part of their corporate or trade names and on their stationery, catalogs, 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, liqueurs, and other alcoholic beverages who do not use the words "distillery," "distilleries," "distilling," or "distillers" 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.

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 beverages 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 alcoholic beverages 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 22, 1935, issued and served its complaint, in this proceeding upon respondent Imperial Distillers Corporation, 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 Edward W. Thomerson, attorney for the Commission, before W. W. Sheppard, an examiner of the Commission theretofore duly designated by it; and by P. B. Morehouse, attorney for the Commission, before John W. Addison, an examiner of the Commission theretofore by the Commission duly substituted to take testimony and other evidence in the place and stead of said W. W. Sheppard; and in opposition to the allegations of the complaint by Samuel P. Novick, 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, and brief in support of the complaint (counsel for respondent having failed to file brief or request oral argument); 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. Imperial Distillers Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, as a rectifier and wholesaler of spirituous liquors, with its principal office and place of business at No. 1615 Los Angeles Street, in the city of Los Angeles, State of California. It purchases, rectifies, blends, and bottles whiskies, gins, liquors, and other spirituous beverages, and sells the same at wholesale in constant current of trade and commerce between and among the various States of the United States. It estimated its average

sales (as of December 1935) at approximately \$30,000 per month. 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 States of the United States other than the State of California. 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 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 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 beverages and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. Rectifying, in the distilled spirits rectifying industry, means the mixing of whiskies of different ages or 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 all bottled liquors, whether bottled at a distillery rectifying plant, or at any other 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 rectifier, the number following said letter corresponding with the distiller's or rectifier's permit. Thus "R-409" designates this respondent. A distiller who also operates a rectifying plant, having both kinds of permits, may use either symbol, depending upon whether the liquor contained in the bottle was produced and bottled under his distiller's permit.

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

PAR. 3. In the course and conduct of its business as aforesaid, respondent uses its name printed on its stationery, invoices, and labels. The name on the labels is preceded by the words "Distilled * * * by" in the case of redistilled gins; and by the words "Bottled by" in the case of its whiskies and liquors. The Commission finds that by the use which respondent makes of the word "Distillers" in its corporate name printed on its stationery and on the labels attached to the bottles in which it sells and ships its said products, and in various other ways, respondent represents to its customers, and furnishes them with the means of representing to their vendees, both retailers and the ultimate consuming public, that the whiskies, gins, and other spirituous beverages therein contained were by it manufactured through the process of distillation from mash, wort, or wash, as aforesaid, 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.

Respondent has a still which it uses in making gin by redistillation of purchased alcohol, not produced by it, over juniper berries and other aromatics, but this redistillation does not make respondent a distiller as defined by United States Code, Title 26, Section 241, regulating internal revenue, nor as commonly understood by the public and the liquor industry. As shown by the testimony of many witnesses who for long periods of time had been, and still were,

actively engaged in the liquor industry, including distillers, wholesalers, and retailers, and by the testimony of representative members of the consuming public, for a long period the word "distillers," when used in connection with the liquor industry and with products thereof, has had, and still has, the definite significance and meaning to the minds of wholesalers and retailers in such industry and to the ultimate purchasing public of the making of beverages by original distillation from grain, fruit, or vegetable mash.

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

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

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

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

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

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

"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 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 products.

PAR. 5. A substantial portion of the purchasing public does prefer to buy spirituous liquors bottled by the actual distillers and manufacturers thereof, and such representation is a misrepresentation in fact, and has a tendency to mislead and deceive dealers and the purchasing public, with the resultant tendency to induce them to buy respondent's products in preference to the products of truthful competitors.

The testimony clearly showed, and the Commission finds, that a prestige attaches in the minds of the wholesale trade to the distiller, and that this prestige is an advantage in overcoming sales resistance; that in the minds of the wholesale trade and the public, the belief that a distiller's controlling the making of such products from start to finish, with all the ingredients going into them within its own establishment, is an advantage to the seller; and that the use of the word "distilling" or "distiller" in a trade or corporate name of a concern gives it a competitive advantage over concerns which do not pursue or practice such characterizations, and which do not purport to be manufacturers when they are not.

The Commission, therefore, finds that the representation of respondent through use of the word "Distillers" in its corporate name as aforesaid is calculated to, and has the capacity and tendency to and does, mislead and deceive dealers and the purchasing public into the belief that the whiskies, gins, and other spirituous beverages sold by the respondent are manufactured and distilled by it from mash, wort, or wash, and is calculated to and has the capacity and tendency to and does, induce dealers and the purchasing public, acting in such belief, to purchase the whiskies, gins, and other spirituous beverages bottled and sold by the respondent, thereby diverting trade to respondent from its competitors who do not by their corporate names 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 a substantial injury to substantial competition in interstate commerce.

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CONCLUSION

The aforesaid acts and practices of the respondent, Imperial Distillers Corporation, 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 and John W. Addison, examiners of the Commission theretofore duly designated by it, in support of the allegations of the said complaint and in opposition thereto, and brief in support of the complaint filed herein (counsel for respondent having failed to file brief or request oral argument); 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, Imperial Distillers Corporation, its officers, representatives, agents, and employees, in connection with the sale, offering for sale, and distribution in interstate commerce and in the District of Columbia, of whiskies, gins, and all other spirituous beverages, except gins produced by it through a process of rectification whereby alcohol purchased but not produced by respondent is redistilled over juniper berries and other aromatics, do cease and desist from:

Representing, through the use of the word "Distillers" in its corporate name, on its stationery, advertising, or on the labels attached to the bottles in which it sells and ships said products, or in any other way by word or words of like import,

(a) That it is a distiller of whiskies, gins, or any other spirituous beverages;

(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 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,

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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
PARAMOUNT DISTILLERS, INC.

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

Docket 2453. Complaint, June 21, 1935—Order, Jan. 30, 1937

Consent order requiring respondent, its officers, etc., in connection with sale or offer, in interstate commerce and in the District of Columbia, of whiskies, gins, and other alcoholic beverages produced by it, but excepting gins produced by it through process of rectification whereby alcohol purchased, but not produced, by it is redistilled, as specified, to cease and desist from representing, through use of word "Distillers" in its corporate name and on its stationery, advertising, etc., or in any other way, that it is a distiller of whiskies, gins, and other alcoholic beverages, or that said whiskies, etc., were by it made through process of distillation, or that it owns, operates, or controls a place where such products are thus made, unless and until it shall own, operate, or control a place or places where such products are by it manufactured through process of original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until manufacture is complete.

Before *Mr. John W. Bennett*, trial examiner.

Mr. PGad B. Morehouse for the Commission.

Cooke & Beneman, 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 Paramount Distillers, 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 Ohio, with its principal office and place of business in the city of Cleveland, 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 alcoholic 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