

IN THE MATTER OF
JAMES CLARK DISTILLING CORPORATION AND D. & B.
PRODUCTS CORPORATION

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 2411. Complaint, May 24, 1935—Decision, June 26, 1937

Where a corporation and its selling agency engaged, under common control and, as the case might be, in purchasing, rectifying, blending, bottling, and selling whiskies, gins, and other spirituous beverages, and in the making of gin with a still used therefor by said first-named corporation, by redistillation of purchased alcohol, not produced by it, over juniper berries and other aromatics, and in transporting their aforesaid products into and through various States to the wholesale and retail purchasers thereof in States other than State of origin, and in the District of Columbia, in substantial competition with those engaged in the manufacture, by original and continuous distillation from mash, wort, or wash, of whiskies, gins, and other spirituous beverages, 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 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 "distillery," "distilleries," "distilling," or "distillers" as a part of their corporate or trade names and on their stationery and catalogs and on the 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—

Represented, through use of word "Distilling" in corporate name of said first corporation, printed on stationery and catalogs and on the labels attached to the bottles in which they sold and shipped their said various products and in various other ways to their customers, and furnished same with a means of representing to their vendees, both retailers and ultimate consuming public, that said first-named corporation was a distiller and that the whiskies, gins, cordials, brandies, and other alcoholic beverages contained in such bottles were by it made through process of distillation from mash, wort, or wash, notwithstanding fact it did not distill said various beverages, thus bottled, labeled, sold, and transported, by 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" 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

¹ Count Two of the complaint, under the National Industrial Recovery Act, dismissed.

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by process of original and continuous distillation from mash, wort, or wash, and, notwithstanding (1) distillation, theretofore, for a limited time and by a separate company, but under supervision of an individual specialist in construction of distilleries and himself a distiller, of quantity of whiskey for it and its thereafter use at its rectifying plant, nor (2) distillation, under contract of sale with a separate company but in its name, for a limited time and theretofore, of quantity of whiskey, thereafter left in storage to age and bearing its name, and distiller's permit secured, and subsequently permitted to lapse, under such contract of purchase, 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 said first-named corporation was a distiller or distilling company in the ordinarily accepted sense of those terms, and that the whiskies, gins, and other spirituous beverages sold by them were made or distilled by said first-named corporation from mash, wort, or wash by one continuous process, and of inducing dealers and purchasing public, acting in such beliefs, to buy their said whiskies and other beverages rectified and bottled by said first-named corporation, and with distinct tendency of giving them an unfair competitive advantage over those of their competitors who do not, through use of such terms in their trade or corporate names, represent that the package of alcoholic liquors offered to retailer, and in turn to consumers is a distillery-bottled one, and thereby to divert trade to them from such competitors; to the substantial injury 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. John L. Hornor*, trial examiner.

Mr. PGad B. Morehouse and *Mr. DeWitt T. Puckett* for the Commission.

Mr. Mortimer S. Gordon, *Mr. Max J. Miller* and *Mr. Herman Keller*, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that James Clark Distilling Corporation and D. & B. Products Corporation, hereinafter referred to as respondents, have been and are 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:

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Count 1

PARAGRAPH 1. Respondent, James Clark Distilling Corporation, is a corporation organized, existing, and doing business under the laws of the State of New Jersey, having its principal office and place of business at 26 Exchange Place in Jersey City, in the said State. Respondent D. & B. Products Corporation is a corporation organized, existing and doing business in and under the laws of the State of New Jersey with its principal office and place of business at 26 Exchange Place, Jersey City in said State. Both respondents are subsidiaries or affiliates of Distillers and Brewers Corporation of America, a holding corporation incorporated under the laws of the State of Delaware in June 1933 and all three corporations aforesaid have interlocking officers and directors. Respondent, James Clark Distilling Corporation, is now and since its organization in August 1933, has been engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages, and in the sale thereof to the respondent, D. & B. Products Corporation aforesaid. The D. & B. Products Corporation and the James Clark Distilling Corporation, by the D. & B. Products Corporation, its distributing and selling agent, are now and since their organizations have been engaged in the sale of said products 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 their said businesses they cause their said products when sold to be transported from their places of business in Jersey City aforesaid, into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers, some located within the State of New Jersey and some located in other States of the United States and the District of Columbia. In the course and conduct of their businesses aforesaid, respondents are now and for more than one year last past have been in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by original and continuous distillation from mash, wort, or wash of whiskies, gins, and other spirituous beverages and in the sale thereof in constant course of trade and commerce between and among the various States of the United States and the District of Columbia; and in the course and conduct of their businesses as aforesaid, respondents are and have been for more than one year last past in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the business of purchasing, rectifying, blending and bottling whiskies, gins, and other spirituous beverages and in

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the sale thereof in constant course of trade and commerce between and among the various States of the United States and the District of Columbia.

PAR. 2. In the course and conduct of its business as aforesaid, respondent, James Clark Distilling Corporation, has upon its said premises, stills used in the production of gin by a process of rectification whereby tax paid alcohol purchased but not produced by the said respondent is redistilled over juniper berries and other aromatics. Such rectification of alcoholic spirits does not make or constitute the respondent James Clark Distilling Corporation, 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 "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 production of such 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 prepared and bottled by the actual distillers thereof.

PAR. 3. In the course and conduct of its business as aforesaid respondent, James Clark Distilling Corporation, 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 its said products to the D. & B. Products Corporation and in various other ways, and the respondent, D. & B. Products Corporation in the course and conduct of its business as aforesaid by the sale in interstate commerce as aforesaid of the products of the James Clark Distilling Corporation containing the word "distilling" on the labels attached to the bottles in which it sells and ships the said products, printed on its stationery, in its advertising, and in various other ways represent to customers and furnish them with a means of representing to their vendees, both retailers and the ultimate consuming public, that the said whiskies, gins, and the other spirituous beverages therein contained, were by the James Clark Distilling Corporation aforesaid, produced through an original and continuous process of distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof was complete, when as a matter of fact the respondent, James Clark Distilling Corporation, is not a distiller and does not distill the said whiskies, gins, or other

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spirituous beverages by it so bottled and labeled and by it and the respondent, D. & B. Products Corporation so sold and transported, and merely by the use of stills as aforesaid in the rectification of alcoholic spirits by redistillation over juniper berries and other aromatics, respondent, James Clark Distilling Corporation, does not distill the gins by it so bottled and labeled and by both respondents so 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. The respondent James Clark Distilling Corporation is a rectifier of alcoholic liquors and does not own, operate or control any place or places where such beverages are produced by the process of distillation from mash, wort, or wash as aforesaid and respondent, D. & B. Products Corporation is solely engaged in the business of selling the alcoholic beverages aforesaid.

PAR. 4. There are among the competitors of respondents 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 and 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 or trade names, nor on their stationery and advertising, nor on the labels attached to the bottles in which they sell and ship their said products.

PAR. 5. The representation by respondents as set forth in paragraph 3 hereof, is calculated to and has a capacity and tendency to and does mislead and deceive dealers and the purchasing public into the belief that the whiskies, gins, and other spirituous beverages sold by the respondents are manufactured and distilled by James Clark Distilling Corporation 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 rectified, blended, bottled, and sold as aforesaid thereby diverting trade to the respondents from their competitors who do not by their corporate or trade names or in any other manner misrepresent that they are manufacturers by

distillation from mash, wort, or wash as aforesaid of whiskies, gins, and other spirituous beverages, and thereby respondents do 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 respondents are to the prejudice of the public and the competitors of respondents 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, James Clark Distilling Corporation, is a corporation organized, existing, and doing business under the laws of the State of New Jersey, having its principal office and place of business at 26 Exchange Place in Jersey City, in the said State. Respondent D. & B. Products Corporation is a corporation organized, existing, and doing business in and under the laws of the State of New Jersey with its principal office and place of business at 26 Exchange Place, Jersey City in said State. Both respondents are subsidiaries or affiliates of Distillers and Brewers Corporation of America, a holding corporation incorporated under the laws of the State of Delaware in June 1932 and all three corporations aforesaid have interlocking officers and directors. Respondent, James Clark Distilling Corporation, is now and since its organization in August 1933 has been engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages, and in the sale thereof to the respondent, D. & B. Products Corporation aforesaid. The D. & B. Products Corporation and the James Clark Distilling Corporation, by the D. & B. Products Corporation, its distributing and selling agent, are now and since their organizations have been engaged in the sale of said products 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 their said businesses they cause their said products when sold to be transported from their places of business in Jersey City aforesaid, into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers, some located within the State of New Jersey and some located in other States of the United States and the District of Columbia. In the course and conduct of their businesses aforesaid, respondents are now and for more than one year last past have been in substantial com-

petition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by original and continuous distillation from mash, wort, or wash of whiskies, gins, and other spirituous beverages and in the sale thereof in constant course of trade and commerce between and among the various States of the United States and the District of Columbia; and in the course and conduct of their businesses as aforesaid, respondents are and have been for more than one year last past in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages and in the sale thereof in constant course of trade and commerce between and among the various States of the United States and in the District of Columbia.

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, respectively, 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 Executive orders under the act, upon his own motion presented a Code of Fair Competition for the Distilled Spirits Rectifying Industry after due notice and opportunity for hearing in connection therewith had been afforded interested parties, including respondent, in accordance with Title I of the National Industrial Recovery Act and applicable regulations issued thereunder, to the President of the United States who approved the same on the 9th day of December 1933, thereby constituting the said code a Code of Fair Competition

within the meaning of the said National Industrial Recovery Act, for the regulation of the aforesaid industry.

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

That said Code will tend to effectuate the declared policy of Title I of the National Industrial Recovery Act as set forth in Section 1 of said Act in that the terms and provisions of such Code tend: (a) to remove obstructions to the free flow of foreign commerce, which tend to diminish the amount thereof; (b) to provide for the general welfare by promoting the organization of industry for the 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 respondents as aforesaid of the word "distilling" in the corporate name of James Clark Distilling Corporation, on stationery, advertising, and labels attached to the bottles in which the products of such corporation are sold and shipped and in various other ways, constitutes false advertising within the meaning of the aforesaid provision of Article V and tends to and does create the misleading impression that the whiskies, gins, and other spirituous beverages so sold by respondents are manufactured and distilled by the respondent, James Clark Distilling Corporation from mash, wort or wash as aforesaid and that the respondent, James Clark Distilling

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Corporation is engaged in the business of distilling spirits from mash, wort or wash as aforesaid and that the spirituous beverages by respondents so sold and transported have been prepared and bottled by the 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 respondents 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 24, 1935, issued and on May 25, 1936 served its complaint in this proceeding upon the respondents, James Clark Distilling Corporation and D. & B. Products Corporation, charging them 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 the said complaint were introduced by PGad B. Morehouse and DeWitt T. Puckett, attorneys for the Commission, before John L. Hornor, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Mortimer S. Gordon, Max J. Miller, and Herman E. Keller, attorneys for the respondents, 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, brief in opposition thereto and oral arguments of counsel aforesaid having been waived; 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. The respondent, James Clark Distilling Corporation, is a corporation organized, existing and doing business under the laws of the State of Delaware, licensed to do business in the State of New Jersey and having its principal office and place of business at 26 Exchange Place, Jersey City, in the State of New Jersey.

The respondent, D. & B. Products Corporation, is a corporation organized, existing, and doing business in and under the laws of the State of New Jersey, with its principal office and place of business at the same address aforesaid.

Both respondents are subsidiaries or affiliates of the Distillers and Brewers Corporation of America, a holding corporation, incorporated under the laws of the State of Delaware in June, 1933, and all three corporations aforesaid are under common control through stock ownership.

The respondent, James Clark Distilling Corporation, is now, and since its organization in August 1933, has been, engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages, and in the sale thereof through the agency of the other respondent, D. & B. Products Corporation.

The D. & B. Products Corporation and the James Clark Distilling Corporation, by the D. & B. Products Corporation, its distributing and selling agent, are now and since their organization have been engaged in the sale of said products 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 their said businesses they cause their said products when sold to be transported from their places of business in Jersey City aforesaid, into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers, some located within the State of New Jersey and some located in other States of the United States and the District of Columbia. In the course and conduct of their businesses aforesaid, respondents are now and for more than one year last past have been in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by original and continuous distillation from mash, wort, or wash of whiskies, gins, and other spirituous beverages and in the sale thereof in constant course of trade and commerce between and among the various States of the United States and the District of Columbia; and in the course and conduct of their businesses as aforesaid, respondents are and have been for more than one year last past in substantial competition

with other corporations and with individuals, partnerships, and firms engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins and other spirituous beverages and in the sale thereof in constant course of trade and commerce between and among the various States of the United States and the District of Columbia.

Respondent James Clark Distilling Corporation received Permit No. R-24 from the Federal Alcohol Control Administration January 10, 1934, to engage in the distilled spirits rectifying industry, which said permit became and was invalidated August 29, 1935, by reason of the passage of the Federal Alcohol Administration Act (49 Stat. 977), and since November 23, 1935, it has done the same kind of business under a permit of the same number issued by the Federal Alcohol Administration.

In April of 1934, James H. Cocke, a consulting engineer specializing in the construction of distilleries, and himself a distiller of about 40 years' experience, was employed by respondent James Clark Distilling Corporation to supervise the distillation of 3,210 barrels of whiskey at the Seagram Distillery No. 1, at Lawrenceburg, Ind., under a formula prepared by him, and he did so, inspecting the quality of the grains used and the entire fermenting up until the whiskey was drawn off in barrels, the barrels being marked and branded with said respondent's name. The first day's mash was made April 9, 1934, and this order was completed on the 28th or 30th of April 1934. Of this whiskey, 3,116 barrels were used by the respondent in its distilled spirits rectifying plant between April of 1934 and February of 1936.

On January 28, 1936, pursuant to a previous application filed October 25, 1935, a distiller's basic permit No. D-697 was issued under the Federal Alcohol Administration Act and Regulations to the respondent, James Clark Distilling Corporation, authorizing it to engage in the business of distilling whiskey at "Old 31" East Turnpike, Bardstown, Ky., under lease of the distillery of the Tom Moore Distilling Company. Under contract, the terms of which are herein-after set forth, with the aforesaid distillery, and between the months of February and May 1936, there was produced by the Tom Moore Distilleries, in the name of James Clark Distilling Corporation, a total of 358,370.54 proof gallons of whiskey, none of which at the time of the hearings had been withdrawn or used by respondent in its business, it being desired to leave it in storage for the purpose of aging. This whiskey is in barrels or kegs bearing respondent's corporate name.

Respondent's sales volume is approximately three and one-half million dollars per year, and averages approximately 700,000 gallons of spirituous beverages annually, all of which is sold through the

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medium of the other respondent, D. and B. Products Corporation, as aforesaid.

The whiskey which was produced at the Tom Moore Distilleries, as aforesaid, was produced under an agreement in writing, dated August 20, 1935, between respondent and the said distilling company, which agreement, in substance, provided as follows:

Whereas on the 2d day of August, 1935, the parties hereto entered into a certain agreement whereby Tom Moore agreed to manufacture and sell to James Clark, and James Clark agreed to purchase specific quantities of manufactured distillations of certain whiskey to be manufactured by the Tom Moore Bardstown Distillery, and

Whereas James Clark is desirous of having the said whiskey manufactured by Tom Moore under the name of James Clark, now, therefore, in consideration of the sum of \$10 and other good and valuable consideration in hand paid to the other by the parties hereto, the receipt of which is hereby acknowledged, the parties hereto mutually agree as follows:

(1) Whiskey to be manufactured and sold by Tom Moore to James Clark pursuant to the contract between said parties dated the 2d day of August, 1935, shall be manufactured and sold to James Clark as whiskey manufactured in the name of James Clark and all barrels of his whiskey shall be marked and branded by Tom Moore in accordance with the Internal Revenue Laws, in such a manner as to indicate the name of James Clark as the actual distiller thereof.

(2) James Clark agrees to apply to the State of Kentucky for the issuance to it of a distiller's permit in order to effectuate the distillation of whiskey by Tom Moore, in the name of James Clark, and James Clark further agrees to obtain from the United States Treasury Department and/or the latter's appropriate bureau the necessary distiller's permit and authority to have such whiskeys manufactured by Tom Moore in the name of James Clark and agrees to file with the said United States Treasury Department all necessary documents and bonds required in order to effectuate the same.

(3) Tom Moore hereby agrees to pay to James Clark no later than 60 days from the date hereof the sum of \$500, the same representing a reimbursement to James Clark of one-half of the Kentucky State distiller's permit fee of \$1,000 paid to the State of Kentucky by James Clark.

(4) Tom Moore hereby agrees to use his best efforts in assisting James Clark, its agents or representatives, in procuring the aforesaid distiller's permits from the State of Kentucky and the United States Treasury Department.

(5) Tom Moore hereby covenants and agrees that it will save harmless James Clark as the preceding distiller against any and all manner of liability and/or claims, suits, actions, damages, charges, and/or expenses (including attorney and counsel fees) that may be asserted, alleged, or created by any person, firm, or corporation against James Clark individually or jointly with others, by reason of the manufacture by Tom Moore and/or James Clark as superseding distiller, of any whiskey in the name of James Clark, at the Tom Moore Bardstown, Kentucky, distillery, and Tom Moore further covenants and agrees that it will cause to be effected at its own expense and with responsible insurance companies sufficient insurance to cover all distilling and manufacturing operations at its Bardstown distillery as will adequately inure to

the benefit of James Clark as superseding distiller, and by reason of the manufacture of such whiskey in the name of James Clark, and by way of specification but not in limitation thereof, said insurance shall include coverage against workmen's compensation, general accident and public liability, fire, explosions of boilers, and theft, burglary, robbery, and elevator.

(6) It is definitely understood and agreed by and between the parties hereto that this memorandum of agreement shall not in any manner be considered to be in limitation or modification of the agreement between the parties hereto dated the 2d day of August, 1935, and it is definitely understood that this memorandum of agreement is intended to supplement the aforesaid agreement, and it is not intended for any other purpose.

In witness whereof the parties hereto have hereunto set their hands and seals this 26th day of August, 1935.

The agreement of August 2, 1935, referred to in the above agreement, was an agreement between Tom Moore Distillery, therein referred to as the "manufacturer," and James Clark Distilling Corporation, therein referred to as the "purchaser," whereby Tom Moore Distillery agreed to manufacture in bond for the account of James Clark during the months of August, September, October, November and December of 1935, 2,500 barrels of full-bodied straight Kentucky bourbon whiskey, setting approximately 125,000 gallons to conform to the standards of identity theretofore promulgated by the Federal Alcohol Administration. The agreement provided for the Tom Moore Distillery to pay the State of Kentucky a production tax, and if the said tax should be increased during the term of the contract, the increase was to be paid by the James Clark Distilling Company. The price included the State of Kentucky production tax.

The agreement also provided for the Tom Moore Distillery to furnish to the James Clark Distilling Corporation promptly at the manufacture of the aforementioned whiskey negotiable warehouse receipts representing 500 barrels of whiskey distilled during the then current month, said warehouse receipts to be issued in the name of James Clark Distilling Corporation, in such respective denominations as it might select.

The agreement further provided for the whiskey to be stored by the Tom Moore Distillery, the warehouse storage charges accrued to be paid by the James Clark Distilling Corporation upon withdrawal from the bonded warehouse, and the said whiskey was at James Clark's expense insured while the same was stored in the Tom Moore Distillery's bonded warehouse, except that the distillery agreed to insure the whiskey from the time it entered into bond up to the first day of the next succeeding month, which insurance furnished by the distillery was to inure to the benefit of the James Clark Distilling Corporation.

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The agreement provided that the Tom Moore Distillery warranted that the whiskey made by it would be all Kentucky straight bourbon whiskey made from good sound grain, containing at least 21 percent small grain, properly mashed, and distilled in accordance with the formula to be furnished by the James Clark Distilling Corporation.

The fact of these arrangements was received in evidence subject to a later check by the Commission of the official records of the Alcohol Tax Unit and the Federal Alcohol Administration Divisions of the United States Treasury Department. Such subsequent check showed, and the Commission finds, that this respondent's basic permit D-697 was cancelled on December 28, 1936.

A check of said records also shows, and the Commission finds, that during April of 1934, the production and operation, above referred to, of Seagram Distillery No. 1, at Lawrenceburg, Indiana, was by Joseph E. Seagram & Sons Corporation, operating during that month under the name and style of James Clark Distilling Corporation, which was legally permissible arrangement. This respondent, however, filed no notice of intention to distill, no bond, application, or other document to qualify as a distiller under the Internal Revenue laws and was not at that time so qualified. Neither did it apply for, or receive, a basic distiller's permit from the former Federal Alcohol Control Administration under the then existing laws and regulations.

PAR. 2. Upon the premises of respondent James Clark Distilling Corporation are one or more stills used for the production of gin by a process of rectification whereby tax-paid alcohol, purchased but not produced by respondent, is distilled over juniper berries and other aromatics. This gin constitutes approximately 10 percent of this respondent's total rectifying business.

A method generally used in this country of producing so-called distilled gin is to redistill either purchased or manufactured alcohol over juniper berries and other aromatics usually used in the production of gin and this gin derives its main characteristic flavor from the juniper berries. The purchasing public has no preference in gins by reason of the method of manufacture as it is possible to make gin of equivalent quality by processes of original distillation, redistillation, or compounding. The public preference is predicated solely on the quality of the ingredients and the skill and reputation of the manufacturer insofar as the gin itself is concerned.

Rectifying, in the distilled spirits rectifying industry, means the mixing of whiskies of different ages and types, or the mixing of ages or types, or the mixing of other ingredients with whiskies, but reducing proof of whiskey by adding water is not rectifying. Recti-

fiers also blend whiskies with neutral spirits (grain alcohol). Some rectifiers blend it with cane.

Many distillers operate a separate establishment 600 feet or more away from their distilleries, 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 often 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 done by a distiller, however, must be done in his rectifying plant under his rectifier's permit. On all bottled liquors, whether bottled at the distillery rectifying plant or 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, in his distillery, or are spirits of his own distillation bottled in his rectifying plant as straight whiskey, the distiller may and does on said bottles, put "distilled and bottled by ----- Company." Finally, blown in the bottom of each bottle is a symbol, consisting of a letter followed by a number, identifying the bottler. For instance, there is a "D" for a distiller and an "R" for a rectifier. The number following the said letter corresponds with the distiller's or rectifier's basic permit. Thus, "R-24" designates the James Clark Distilling Corporation, a rectifier. A distiller who also operates a rectifying plant and who has both kinds of permits may use either symbol, depending upon whether the liquor contained in the bottle was produced and bottled under a distiller's or a rectifier's permit.

The James Clark Distilling Corporation does not now and never has produced or manufactured distilled spirits of any kind from mash, wort, or wash, although its charter did authorize it to do so and although between January 28, 1936 and December 28, 1936, it was the holder of a basic distiller's permit, a warehousing and bottling permit, and otherwise qualified to own, operate, and control a place where spirituous liquors were so produced. The Commission finds that the so-called lease arrangements of August 2, 1935, and the subsequent modification thereof dated August 26, 1935, constituted a contract for the purchase by respondent of distilled spirits manufactured pursuant to such arrangement by the Tom Moore Distillery, and that during such period of time this respondent did not operate, own, or control a distillery, and was not a distilling company in the sense or significance in which such terms are generally under-

stood in the trade and by a substantial portion of the consuming public.

Section 3247 of the Revised Statutes (U. S. C. A. Title 26, Sec. 1158 (a)) Regulating Internal Revenue defines a "distiller" as follows:

Every person who produces distilled spirits or who brews or makes a mash, wort, or wash fit for distillation or for the production of spirits, or who, by any process of evaporation, separates alcoholic spirits from any substance, or who, making or keeping, mash, wort or wash, has also in his possession or use a still, shall be regarded as a distiller.

Section 3244 of the Revised Statutes (U. S. C. A. Tit. 26, Sec. 1398 (f)) defines a "rectifier" as follows:

Every person who rectifies, purifies, or refines distilled spirits or wine by any process other than by original and continuous distillation from mash, wort, or wash, through continuous enclosed vessels or pipes, until the manufacture thereof is complete, and every wholesaler and 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 materials, manufacture any spurious imitation, or compound liquors for sale under the name of whiskey, brandy, gin, rum, wine spirits, cordials, or wine bitters, or any other name, shall be regarded as a rectifier, and that being engaged in the business of rectifying, etc.

The rectification of alcoholic spirits by this respondent as aforesaid in the production of its gin, does not make or constitute respondent a distiller or a distilling company as defined by Sec. 3247 of the Revised Statutes of the United States regulating Internal Revenue.

PAR. 3. The testimony of those having long experience in both the distilled spirits rectifying industry and the distilling industry, established, and the Commission finds, that the foregoing rectification of alcoholic spirits by redistillation over juniper berries and other aromatics in the production of gin does not make or constitute this respondent a distilling company in the sense commonly understood by the liquor industry. There were also called a large number of witnesses who were lay-members of the purchasing public, and with few exceptions, their testimony was to the effect, and the Commission also finds it to be a fact, that by such terms as "distilling" or "distillery" or "distiller" when used in the trade or corporate name of a concern handling alcoholic beverages, the public understands that that concern is engaged in the initial distilling process of producing spirituous or alcoholic beverages from fermented grain or mash, and that they have a preference for a distillery bottled package over one bottled by a rectifier.

The Commission finds that 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 manufacturing of 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. 4. In the course and conduct of its business as aforesaid by the use of the word "distilling" in the corporate name of James Clark Distilling Corporation printed on stationery, catalogs, and on the labels attached to the bottles in which respondents sell and ship these said products, and in various other ways, respondents represent to their customers and furnish them with the means of representing to their vendees, both retailers and the ultimate consuming public, that respondent James Clark Distilling Corporation, is a distiller and that the said whiskies, gins, cordials, brandies, and other alcoholic beverages therein contained were by said respondent manufactured through the process of distillation from mash, wort, or wash, when, as a matter of fact, James Clark Distilling Corporation is not a distiller, does not distill the said whiskies, gins, and other alcoholic beverages by respondents so bottled, labeled, sold, and transported, and, merely by the use of a still operated as aforesaid in the production of gin, James Clark Distilling Corporation does not distill the whiskies, gins, and other spirituous beverages by respondents 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. Neither respondent owns, operates, or controls any place or places where spirituous beverages are manufactured by a process of original and continuous distillation from mash, wort, or wash.

PAR. 5. There are among the competitors of respondents 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, rectify-

ing, blending, bottling, and selling whiskies, gins, 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. 6. The representations by respondents, as set forth in paragraph 4 hereof, have the capacity and tendency to and do mislead and deceive dealers and the purchasing public into the beliefs that respondent James Clark Distilling Corporation is a distiller or distilling company in the ordinarily accepted sense of those terms, and that the whiskies, gins, and other spirituous beverages sold by respondents are manufactured or distilled by James Clark Distilling Corporation from mash, wort, or wash by one continuous process, 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 James Clark Distilling Corporation. The Commission finds that the whole situation in this industry is such that the foregoing representations have a distinct tendency to give respondents what amounts to unfair competitive advantage over those of their competitors who do not, by the use of such terms in their trade or corporate names, represent that the package of alcoholic liquor offered to the retailer and in turn to the consumers, is a distillery-bottled package and this in turn tends to divert trade to respondents from such competitors and thereby respondents do substantial injury to competition in interstate commerce.

PAR. 7. Because of existing regulations promulgated under the Federal Alcohol Administration Act approved August 29, 1935 (49 Stat. 977), providing that rectifiers who redistill purchased alcohol over juniper berries and other aromatics may label such resulting product "Distilled Gin," and requiring that the labels state who distilled it, the Commission has excepted gins produced by respondent James Clark Distilling Corporation by redistillation of alcohol over juniper berries and other aromatics from the prohibitions of its order.

PAR. 8. The Commission's complaint in this case was issued on the same day as the decision of the United States Supreme Court in the case of *A. L. A. Schechter Poultry Corporation, et al. vs. United States* (295 U. S. 495), and contained two counts. Count 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 respondents, James Clark Distilling Corporation and D. & B. Products Corporation, are to the prejudice of the public and of respondents' 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 respondents, testimony and other evidence taken before John L. Hornor, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief filed herein by PGad B. Morehouse and DeWitt T. Puckett, counsel for the Commission, brief and oral argument by Mortimer S. Gordon and Herman Keller, counsel for respondents having been waived, and the Commission having made its findings as to the facts and its conclusion that said respondents have 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 respondents, James Clark Distilling Corporation and D. & B. Products Corporation, their officers, representatives, agents, and employees, in connection with the offering for sale or sale and distribution by them in interstate commerce or in the District of Columbia of whiskies, gins, or other spirituous beverages (except gins produced by them through a process of rectification whereby alcohol purchased but not produced by respondents is redistilled over juniper berries and other aromatics) do cease and desist from:

Representing, through the use of the word "distilling" in the corporate name of respondent James Clark Distilling Corporation, on all stationery, advertising, or labels attached to the bottles in which the James Clark Distilling Corporation products are sold and shipped, or in any other way by word or words of like import, (a) that James Clark Distilling Corporation is a distiller of whiskies,

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Order

gins, or other spirituous beverages; or (b) that the said whiskies, gins, or other spirituous beverages were by James Clark Distilling Corporation manufactured through the process of distillation; or (c) that James Clark Distilling Corporation owns, operates or controls a place or places where any such products are by it manufactured by a process of original and continuous distillation from mash, wort or wash, through continuous closed pipes and vessels until the manufacture thereof is completed, unless and until James Clark Distilling Corporation shall actually own, operate, or control such a place or places.

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

It is further ordered, That the said respondents, within 60 days from and after the date of the service upon them of this order, shall file with the Commission a report or reports in writing setting forth in detail the manner and form in which they are complying and have complied with the order to cease and desist hereinabove set forth.

IN THE MATTER OF
I. S. U. RANK AND FILE GROUP, ET AL.

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

Docket 2694. Complaint, Aug. 1, 1936¹—Decision, June 29, 1937

Where a union, known as the International Seamen's Union, with some 60,000 members scattered along the Atlantic, Pacific, and Gulf coasts and the Great Lakes, had long engaged in the regular publication and circulation of an official paper known as the "Seamen's Journal," and letters "I. S. U." through their use by said union and its local branches, had become known and understood by aforesaid and other unions and by the general public as initials for said union and as a designation thereof; and thereafter, various individual members of I. S. U. Rank and File Group, and groups and organizations thus indicated, and a corporation—

Made use of designation "I. S. U. Pilot" for a periodical sold and solicited, in competition with such "Seamen's Journal," by aforesaid individuals, acting personally and through and by said groups, notwithstanding fact said groups were not committees of the International Seamen's Union, and aforesaid "I. S. U. Pilot" was not publication of said union;

With capacity and tendency, through such unauthorized use of name "I. S. U. Pilot," to mislead and deceive members of aforesaid union, and members of other labor unions and purchasing public, into the beliefs that periodical in question was a publication of said union and into purchase of same in such erroneous beliefs, and with result that trade was thereby diverted to said individuals and groups from their competitors, who do not mislead and deceive, and have not misled and deceived, purchasing public by such misuse of name for their publications; 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 L. Hornor*, trial examiner.

Mr. Wm. T. Chantland, for the Commission.

Mr. Hyman N. Glickstein, of New York City, for Joseph Curran and Uptown Cooperative Press, Inc.

Mr. M. Herbert Syme, of Philadelphia, Pa., for Albert Fleming.

AMENDED COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that the I. S. U.

¹ Amended.