

Complaint

IN THE MATTER OF

EASTERN PHARMACAL 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 2948. Complaint, Oct. 16, 1936—Decision, July 19, 1937

Where a corporation engaged in distribution and sale of a certain liquid pharmaceutical product, in substantial competition with others engaged in distribution and sale of acetyl salicylic acid products, such as aspirin, in commerce among the various States and in the District of Columbia, and including among such competitors those who make, sell and distribute acetyl salicylic acid products, such as aspirin, as above set forth, without in any wise misrepresenting the composition, nature, quality, or effectiveness of their products—

Made use of name "Aspiral" in designating its said product in advertising literature of various types circulated to prospective purchasers, and featured said name on the cartons in which its said product was displayed for sale to purchasing public, and set forth in its advertising literature that its said "Elixir Aspiral offers the better way of prescribing aspirin," facts being its said "Aspiral" was neither true acetyl salicylic acid nor aspirin, as commonly designated and long, well, and favorably known to drug trade and to purchasing public as meaning acetyl salicylic acid preparation of recognized merit and value;

With capacity and tendency to mislead and deceive substantial number of purchasing public into erroneous and mistaken belief that said product was aspirin and designed and intended for treatment of same ills and conditions as aspirin, and that it contained all ingredients contained in aspirin, and with effect of causing a substantial volume of such public to buy substantial volume of its said product on account of such belief, and of causing an unfair diversion of trade from, and otherwise substantially injuring, competitors in commerce:

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

Before *Mr. John J. Keenan*, trial examiner.

Mr. Morton Nesmith for the Commission.

Mr. George H. Rosen, of New York City, and *Mr. Isaac Silberman*, of Monticello, N. Y., 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 Eastern Pharmacal Company, Inc., hereinafter referred to as respondent, has been and now is using unfair methods of competition in com-

merce as "commerce" is defined in said act, and it appearing to the 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, Eastern Pharmacal Company, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business at 151 Ludlow Street, Yonkers, N. Y. Respondent is now, and has been for some time, engaged in the business of distributing and selling, in commerce as herein set out, a certain product designated by it as "Aspiral." It causes said product, when sold, to be transported from its principal place of business in the State of New York to purchasers thereof located at various points in other States of the United States and in the District of Columbia. It has, at all times since its incorporation, maintained a constant current of trade in the product distributed and sold by it, in commerce among and between the various States of the United States and in the District of Columbia. In the course and conduct of its business, it is now, and has been, in substantial competition with other corporations and with firms and individuals engaged in the business of distributing and selling acetyl salicylic acid products such as aspirin, in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and operation of its business, and for the purpose of inducing individuals, firms, and corporations to purchase said "Aspiral," respondent has caused advertising literature of various types to be circulated, through the United States mails and through other means, to prospective purchasers of its product. In said advertising literature, the product is designated by the respondent as "Aspiral" and the following statement is also used:

Elixir Aspiral offers the better way of prescribing aspirin.

On the cartons in which said product is displayed for sale to the purchasing public, the product is also designated by the name "Aspiral" appearing in large and conspicuous letters. The statement, hereinabove set out, appearing in respondent's advertising matter, together with the respondent's use of the name "Aspiral" to designate its product, and other similar statements and designations, serve as representations on the part of the respondent to the effect that the product designated by it as "Aspiral" is in fact aspirin, or the same as aspirin, and is designed and intended for similar usage.

PAR. 3. For a number of years, various competitors of the respondent have been manufacturing, distributing, and selling a certain pharmaceutical preparation, acetyl salicylic acid, commonly designated as aspirin. Through use, over a period of many years, this product has become well and favorably known to the drug trade and to the purchasing public under the designation aspirin. It has been, and now is, generally used in the treatment of certain ills and conditions of the human body and in relieving the pain attendant to certain ills and conditions of the human body. The word "aspirin," when used in connection with pharmaceutical preparations, means, and the public well understands it to mean, that the product being referred to is an acetyl salicylic acid preparation and is of recognized merit, as herein detailed.

PAR. 4. The representations made by the respondent with respect to the nature of its product are false, misleading, and untrue. In truth and in fact, respondent's product, designated by it as "Aspiral," is not an acetyl salicylic acid product, is not the same as aspirin and is not designed and intended for all of the usages for which aspirin may be used.

PAR. 5. The use by the respondent of the statements and representation, hereinabove set out, and the use of the designation "Aspiral" to describe its product, have the capacity and tendency to, and do, mislead and deceive the purchasing public into the erroneous and mistaken belief that said product is aspirin and is designed and intended for the treatment of the same ills and conditions of the human body as aspirin and that said product contains all of the ingredients contained in aspirin. Acting in said beliefs, induced as aforesaid, a substantial portion of the purchasing public has purchased a substantial volume of respondent's product on account of such beliefs. As a result thereof, trade is unfairly diverted to the respondent from competitors engaged in the distribution and sale of acetyl salicylic acid products, commonly designated as aspirin, who truthfully advertise and represent the nature and effectiveness of said products. In consequence thereof, injury has been, and is now being, done by the respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 6. The above and foregoing acts, practices and representations of the respondent have been, and are, all to the prejudice of the public and respondent's competitors as aforesaid, and constitute unfair methods of competition within the meaning and intent 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."

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 issued and served its complaint upon the respondent herein, Eastern Pharmacal Company, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, charging said respondent with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondent having entered its appearance and having filed its answer herein did on the 21st day of June 1937, the date set for hearing, execute its motion to withdraw said answer and file a consent answer attached to said motion waiving hearing on the charges set forth in the complaint and consenting that without further evidence or other intervening procedure the Commission may issue and serve upon it findings as to the facts and conclusion drawn therefrom, and an order to cease and desist from the violations of law charged in the complaint. Contemporaneously respondent entered into a stipulation as to the facts which stipulation was dictated into the record. All of this was done, of course, subject to the approval of the Commission:

And, thereupon, this proceeding came on for final hearing and the respondent having waived the filing of briefs and oral argument herein before the Commission, and the Commission having approved and accepted said stipulation as to the facts and having duly considered the record and being fully advised in the premises, makes this its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Eastern Pharmacal Company, Inc., was incorporated under and by virtue of the laws of the State of New York in 1931. Its principal office and place of business is located at 1 Herriot Street, Yonkers, N. Y. The respondent is now and has been for some time engaged in the business of distributing and selling in commerce a certain pharmaceutical product designated by it as "Aspiral." This product has been and is now sold and transported by the respondent in substantial quantities in commerce among and between the several States of the United States and in the Dis-

trict of Columbia. It has at all times since its incorporation maintained and still maintains a constant current of trade in "Aspiral" in commerce among and between the various States of the United States and in the District of Columbia. The respondent sells its product designated as "Aspiral" in substantial competition with other corporations, firms, and individuals engaged in the business of distributing and selling acetyl salicylic acid products, such as aspirin, in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and operation of its business, and for the purpose of inducing individuals, firms, and corporations to purchase said "Aspiral," respondent has caused advertising literature of various types to be circulated through the United States mails and through other means to prospective purchasers of this product. In this advertising literature the product is designated by the respondent as "Aspiral," and the following statement was also used in literature accompanying or descriptive of the product:

Elixir Aspiral offers the better way of prescribing aspirin.

This statement, however, was discontinued in respondent's advertising in June 1936. On the cartons in which respondent's product is displayed for sale to the purchasing public, appears the name "Aspiral" in large and conspicuous type.

PAR. 3. For a number of years there have been many persons, firms, and corporations, competitors of the respondent, who have manufactured, distributed, and sold a certain pharmaceutical preparation known as acetyl salicylic acid, commonly designated as aspirin. Through use over a period of many years, this product has become well and favorably known to the drug trade and to the purchasing public under the designation "Aspirin." Aspirin has been and is now generally used in the treatment of certain ills and conditions of the human body for relieving the pain attendant to said ills and conditions of the human body. The word "Aspirin" when used in connection with pharmaceutical preparations means, and the public well understands it to mean, that the product being referred to is an acetyl salicylic acid preparation and is of recognized merit and value.

PAR. 4. Respondent's product "Aspiral" is sold only in liquid form, and although pure acetyl salicylic acid may have been used in its preparation, nevertheless, when this acid was mixed with the liquid vehicle the acetyl salicylic acid was broken up into free salicylic acid, a sodium aspirin, sodium salicylate acetic, and sodium acetate, the result being that after this break-down less than 50 percent true acetyl salicylic acid remained. In truth and in fact the respondent's product

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designated by it as "Aspiral" is neither true acetyl salicylic acid nor aspirin, and the use by the respondent of the name "Aspiral" together with the representation that "Elixir Aspiral offers the better way of prescribing aspirin" has the capacity and tendency to mislead and deceive a substantial number of the purchasing public into the erroneous or mistaken belief that said product is aspirin and is designed and intended for the treatment of the same ills and conditions of the human body as aspirin and that said product contains all the ingredients contained in aspirin, and has caused a substantial portion of the purchasing public to purchase a substantial volume of respondent's product on account of such belief.

PAR. 5. There are among the competitors of the respondent many persons, firms, and corporations who manufacture, sell, and distribute acetyl salicylic acid products such as aspirin in commerce among and between the various States of the United States and in the District of Columbia, who in no wise misrepresent the composition, nature, quality, or effectiveness of their products.

PAR. 6. The designation by the respondent of its product as "Aspiral" and the representation by it that "Elixir Aspiral offers the better way of prescribing aspirin" are misleading and untrue and have caused an unfair diversion of trade from, and otherwise substantially injured, competitors of respondent in commerce.

CONCLUSION

The acts and practices of the respondent are all to the prejudice of the public and the competitors of the respondent 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 coming on for final hearing by the Federal Trade Commission upon the record, including the complaint of the Commission, the answer of the respondent admitting all of the material allegations to be true, and waiving the taking of further evidence and of other intervening procedure, and a stipulation as to the facts, and the Commission having made its findings as to the facts and conclusion that said respondent, Eastern Pharmacal Company, Inc., a corporation, 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 now ordered, That the respondent, Eastern Pharmacal Company, Inc., a corporation, its officers, representatives, agents, and employees in connection with the offering for sale, sale, and distribution in interstate commerce and in the District of Columbia of its pharmaceutical preparation known as "Aspiral" forthwith cease and desist from:

Using the name "Aspiral" or any word or words containing the letters "Aspir" as a trade name or designation for its product unless said product is aspirin or acetyl salicylic acid at the time of its sale.

It is further ordered, That the respondent, Eastern Pharmacal Company, Inc., a corporation, its officers, representatives, agents, and other employees, in connection with the offering for sale, sale, and distribution in interstate commerce or in the District of Columbia of its pharmaceutical preparation known as "Aspiral," do forthwith cease and desist from representing directly or indirectly in advertising matter, circular letters, by means of radio broadcasting, or by any other means:

1. That "Aspiral" is aspirin.

2. That Elixir Aspiral offers the better way of prescribing aspirin.

It is further ordered, That the said respondent within 90 days from and after the date of service upon it of this order, shall file with the Commission a report 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 as hereinabove set forth.

IN THE MATTER OF
FAIRFIELD DISTILLING COMPANY

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

Docket 2447. Complaint, June 20, 1935—Decision, July 20, 1937

Where a corporation engaged, as rectifier of distilled spirits, in purchasing, rectifying, and blending whiskies, gins, and other spirituous beverages, and in producing gin with a still used therefor by redistillation of purchased alcohol, not produced by it, over juniper berries and other aromatics, and in selling its aforesaid various products among the various states to wholesaler-purchasers thereof, in substantial competition with those engaged in the manufacture by true distillation of whiskies, gins and other spirituous beverages from mash, wort, or wash, 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 by original and continuous distillation from mash, wort, or wash, through closed pipes and vessels until manufacture is complete, of whiskies, gins, and other spirituous beverages sold by them, truthfully use 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 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 its corporate name, on its stationery, mailing cards, and invoices, and on the labels attached to the bottles in which it sold and shipped its said products, that it was a producer of distilled spirits from raw materials, and so represented 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 and other spirituous beverages contained in such bottles were by it made through process of distillation, as aforesaid, from mash, wort or wash, notwithstanding fact it did not thus distill said various beverages, thus bottled, labelled, sold, and transported by it, through aforesaid process of original and continuous distillation, 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 by process of distillation from mash, wort, or wash, 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 and other spirituous beverages sold by it were by it made and distilled from mash,