

Syllabus

IN THE MATTER OF
SUNNYLAND 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 2479. Complaint, June 28, 1935—Decision, Aug. 2, 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 the sale of its aforesaid various products to wholesaler purchasers thereof in States other than State of origin of its said shipments, 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 continuous 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 wholesalers 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, labeled, 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, wort, or

Complaint

25 F. T. C.

wash, and with capacity and tendency to induce dealers and purchasing public, acting in such beliefs, to buy its said whiskies and other spirituous beverages bottled and sold by it, and of thereby diverting trade to it from its competitors who did not, by their corporate or trade names or in any other manner, misrepresent that they were manufacturers by distillation from mash, wort, or wash of whiskies or other spirituous beverages; 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. DeWitt T. Puckett for the Commission.

Mr. L. D. Greene, of Louisville, Ky., 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 Sunnyland Distilling Co., Inc., 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 Kentucky, with its office and principal place of business in the city of Louisville, 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, 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 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, and other alcoholic 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. 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 "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. 3. In the course and conduct of its business as aforesaid by the use of the word "Distilling" in its corporate name, printed on its stationery, catalogs, 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 it is a distiller and that the said whiskies, gins, 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 production of gin, 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 manufac-

tured 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, 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 28, 1935, issued, and on July 1, 1935, served its complaint in this proceeding upon respondent Sunnyland Distilling Company, a 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 the said complaint were introduced by DeWitt T. Puckett, attorney for the Commission, before John L. Hornor, an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. No testimony or other evidence in opposition to the allegations of the complaint were introduced by R. E. Gordon, president of the Sunnyland Distilling Company, appearing for respondent. 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 (no brief in opposition thereto having been filed and no oral argument having been made): and the Commission having duly considered the foregoing and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is a Kentucky corporation organized February 7, 1934, and has been engaged since May 1934, in the distilled spirits rectifying business. During said period respondent has operated under a basic rectifier's permit from the Government known as "R-381" a rectifying establishment at 2119 West Main Street, Louisville, Ky., rectifying whiskies, using distilled spirits purchased from Brown-Forman and other distillers. Upon its premises, 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.

Since May 1934, the respondent has been engaged in the business of purchasing, rectifying, and blending whiskies, gins, and other spirituous beverages in its aforesaid plant under its said permit, and in the sale thereof in constant course of trade and commerce between and among the various States of the United States. In the course and conduct of its said business, it caused its said products when sold to be transported from its place of business in Louisville, Ky., into and through various States of the United States to the purchasers thereof, consisting of wholesalers located in States of the United States other than the State of origin of said shipments.

In the course and conduct of its business as aforesaid, respondent has been and is in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by true distillation of whiskies, gins, and other spirituous 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 has been and is 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 in rectifying plants under rectifiers' permits, 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.)

Many distillers operate a separate establishment 500 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 distillers 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 the distillery or at any rectifying plant, appear the words "Bottled" or "Blended" (as the case may be) "be 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, the distiller may and does put "Distilled and Bottled by ----- Company." If, in the distiller's rectifying plant, other spirits have been blended or rectified, he puts on the bottle "Blended 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, viz, "D" for a distiller and "R" for a rectifier, the number following said letter corresponding with the distiller's or rectifier's permit. Thus, "R-381" designates this respondent. A distiller who also operates a

rectifying plant, having both kinds of permits, may use either symbol, depending upon whether the liquor contained in the bottle was produced and bottled under his distiller's or his rectifier's permit. This number is placed on the bottle to identify the bottler.

Knowledge of these details is not widespread among the retail trade and is very limited among the general public. All whiskies, whether coming from a distillery or rectifier, are generally conceded to be "distilled" products. Therefore, it is not possible to determine from the presence of the phrase "Blended and Bottled by" alone, or the phrase "Bottled by" alone on the label whether the package was bottled by a rectifier who is a distiller, or by a rectifier who is not a distiller.

This respondent does not now and never has produced or manufactured distilled spirits of any kind from mash or raw materials, although its charter would authorize it so to do. Its rectifier's permit authorizes it to engage in the business of rectifying and blending, and is conditioned upon compliance by respondent with all applicable regulations made pursuant to law, which are or may hereafter be in force.

PAR. 3. The evidence adduced in this case from approximately eight competitive trade witnesses (both rectifiers and distillers) and nineteen members of the purchasing public shows, and the Commission finds, that for a long period of time the word "distilling," when used in connection with the liquor industry and the products thereof, has had and still has a definite significance and meaning to the minds of the wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, the manufacturing of such liquors by the process of original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is completed; and a substantial portion of the purchasing public prefers to buy spirituous liquors prepared and bottled by distillers.

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

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 or by the general public.

Findings

25 F. T. C.

PAR. 4. This respondent, by the use of the word "distilling" in its corporate name on its stationery, mailing cards, invoices, and on the labels attached to the bottles in which it sold and shipped its products in interstate commerce, represented itself as a producer of distilled spirits from raw materials, and was so regarded, by virtue of said representations, by the trade and purchasing public. It thus represented to its customers and furnished them with the means of representing to their vendees, both wholesalers and the ultimate consuming public, that it was a distiller and that the whiskies and other spirituous beverages in said bottles contained were by it manufactured by the process of distillation from mash, wort, or wash, as aforesaid, when, as a matter of fact, respondent is not now and never was a distiller, does not now and never did distill the said whiskies, or other spirituous beverages, by it so bottled, labeled, sold and transported, and does not now and never did own, operate, or control any place or places where such beverages are or were manufactured by the process of distillation from mash, wort, or wash.

PAR. 5. There were among the competitors of respondent engaged in the sale of spirituous beverages as mentioned in paragraph 1 hereof corporations, firms, partnerships, and individuals who manufactured and distilled from mash, wort, or wash, as aforesaid, whiskies, gins and other spirituous beverages sold by them and who truthfully used the words "distillery," "distilleries," "distilling," or "distiller" 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 sold and shipped such products. There were also among such competitors, corporations, firms, partnerships, and individuals engaged in the business of purchasing, rectifying, blending, bottling, and selling whiskies, gins, and other spirituous beverages who did not use the words "distillery," "distilleries," "distilling," "distiller" or "distillers" as a part of their corporate or trade names, on their stationery or advertising, or on the labels attached to the bottles in which they sold and shipped their said products.

PAR. 6. Representations by the respondent as hereinabove set forth had the capacity and tendency to and did mislead and deceive dealers and the purchasing public into the belief that respondent was a distiller, and that the whiskies and other spirituous beverages by it sold were manufactured and distilled by it from mash, wort, or wash, and had the capacity and tendency also to induce dealers and the purchasing public, acting in such beliefs, to purchase the whiskies and other spirituous beverages bottled and sold by the respondent, thereby diverting trade to respondent from its competitors who did

637

Order

not by their corporate or trade names, or in any other manner, misrepresent that they were manufacturers by distillation from mash, wort, or wash of whiskies or other spirituous beverages. Thereby respondent did 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 by redistillation of alcohol over juniper berries and other aromatics from the prohibitions of its order.

CONCLUSION

The aforesaid acts and practices of the respondent Sunnyland Distilling Company, are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, within the intent and meaning of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, 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 the said complaint brief filed herein by DeWitt T. Puckett, counsel for the Commission (no testimony or other evidence having been offered on behalf of respondent, and no brief having been filed on behalf of respondent, and no oral argument having been made), 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, Sunnyland Distilling Company, its officers, representatives, agents, and employees, in connection with the offering for sale, or sale and distribution by it, in interstate commerce or in the District of Columbia of whiskies, gins, or other spirituous beverages (except gins produced by it through a process of rectification whereby alcohol purchased but not produced by

Order

25 F. T. C.

respondent is redistilled over juniper berries and other aromatics), do cease and desist from:

Representing through the use of the word "distilling" in its corporate name, on its stationery, advertising, or on the labels attached to the bottles in which it sells and ships said products, or in any other way by word, or words of like import (a) that it is a distiller of whiskies, gins, or other spirituous beverages; or (b) that the said whiskies, gins, or other spirituous beverages were by it manufactured through the process of distillation; or (c) that it owns, operates, or controls a place or places where any such products are by it manufactured by a process of original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is completed, unless and until respondent shall actually own, operate, or control such a place, or places.

It is further ordered, That the said 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.

Complaint

IN THE MATTER OF

ADOLPH WEIN, TRADING AS AMERICAN TOY WORKS

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

Docket 3117. Complaint, Apr. 26, 1937—Decision, Aug. 2, 1937

Where an individual engaged in sale and distribution, to retailers and direct to consuming public, of toys which were not of domestic origin, but which were made in or imported from Japan and other foreign countries, in substantial competition with those engaged in manufacture and distribution of like and similar products and in sale thereof in commerce among the various States and in the District of Columbia, and including among such competitors those who truthfully advertise and represent their products, and many importers of like and similar products who do not in any manner misrepresent the country of origin thereof—

Placed or caused to be placed upon containers of many of the toys sold and distributed by him, words and letters "Made in U. S. A.," notwithstanding fact many of such toys thus sold and distributed by him were not of domestic origin, but were made in or imported from Japan and other foreign countries, and many of said toys thus containered and labeled had imprinted thereon words "Japan" or "Made in Japan";

With effect of misleading and deceiving a substantial portion of purchasing public in the several States and in said District, and causing them erroneously to believe that toys thus packaged, labeled, sold, and distributed by him were made in the United States, and of causing substantial part of such public, because of such erroneous belief, to buy products offered, sold, and distributed by him, and with result thereby of unfair and substantial diversion of trade to him from his competitors; to their injury and that of the public:

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

Mr. S. Brogdyne Teu II for the Commission.

Mr. Joseph C. Kadane, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Adolph Wein, trading and doing business as American Toy Works, hereinafter designated as respondent, is now and has been using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows: