

IN THE MATTER OF

LIONEL DISTILLED PRODUCTS, INC.

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 2417. Complaint, May 27, 1935—Decision, Aug. 12, 1937

Where a corporation engaged, as rectifier and wholesaler of liquors, in purchasing and bottling whiskies, gins, and other spirituous beverages, and in making (1) gin, with a still which it used therefor, by redistillation of purchased alcohol, not produced by it, over juniper berries and other aromatics, and (2) cordials of various kinds by processes of distillation, percolation, and maceration, and compounding, and in using small still in connection with some of aforesaid, and in selling its aforesaid various products to wholesaler and retailer purchasers in various States and in the District of Columbia, in substantial competition with those engaged in manufacture by distillation of whiskies, gins, and other spirituous beverages and in sale of 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 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, and bottling such various products, do not use aforesaid words as above set forth—

- (a) Represented, through use of words "Distilled Products" in its corporate name, printed on its stationery and on the labels attached to the bottles in which it sold and shipped its said products, and in various other ways, and through such statements on its stationery as "Ask for Lionel Products" and through labels reading "Bottled by Lionel Distilled Products, Inc.," or "Made by" or "Prepared by" Lionel Distilled Products, to its customers, and furnished them with a means of representing to their vendees, both retailers and ultimate consuming public, that the whiskies, gins, and other spirituous beverages contained in such bottles were by it made through process of distillation from mash, wort, or wash, notwithstanding fact it did not distill said various beverages, thus bottled, labeled, sold, and transported by it, through process of original and continuous distillation from mash, wort, or wash and through continuous closed pipes and vessels until manufacture is complete, as long definitely understood from words "Distilled Products" 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 aforesaid process, and was not a distiller, for the

¹ Count 2 of the complaint, under National Industrial Recovery Act, dismissed.

Complaint

purchase of the bottled liquors of which there is a preference on the part of a substantial portion of the purchasing public; and

- (b) Advertised "The world's largest independent producers of distilled spirits. Daily capacity 10,000 cases * * * Now join hands with Lionel Distilled Products. Middleman's profit smashed. Direct distillery * * * Retailer contract now insures sensationally low prices," and thereby represented to ultimate consumer, and as an inducement to buy its said products, that a saving had been effected by reason of its being a distiller of such products thus offered, and that middleman's profit or mark-up had thus been eliminated, facts being it was at all times itself a middleman, and no such saving had been effected or was passed on to ultimate purchaser, but profit to distiller on sale of latter's distilled products to it, its own profit and those of wholesaler and retailer were included in those States and territories in which its products were distributed;

With effect of misleading and deceiving dealers and purchasing public into the beliefs that it was a distiller or distilling company in the ordinarily accepted sense of the terms, and that the whiskies, gins, and other spirituous beverages sold by it were by it made or distilled from mash, wort, or wash by one continuous process, and that, by purchasing its said products they were effecting the saving of a middleman's profit, and of inducing dealers and purchasing public, acting in such beliefs, to buy its said whiskies, and other beverages, rectified and bottled by it, and with distinct tendency to give it an unfair competitive advantage over those of its competitors who did not, through 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 consumer, was a distillery-bottled package, and with tendency thereby to divert trade to it 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 an unfair method of competition.

Before *Mr. John L. Hornor*, trial examiner.

Mr. PGad B. Morehouse for the Commission.

Mr. Stanford Clinton of Pritzker & Pritzker, of Chicago, Ill., 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 Lionel Distilled Products, 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 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:

Complaint

25 F. T. C.

Count 1

PARAGRAPH 1. Respondent is a corporation organized, existing, and doing business under the laws of the State of Illinois, with its office and principal place of business in the city of Chicago, in said State. It is now, and for more than one year last past has been, engaged in the business of a rectifier and wholesaler of liquors, purchasing and bottling whiskies, gins, and other spirituous beverages and selling the same at wholesale in constant course of trade and commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its said business, it causes its said products when sold to be transported from its place of business aforesaid into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers, some located within the State of Illinois and some 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 distillation of whiskies, gins, and other spirituous beverages and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia; and in the course and conduct of its business as aforesaid respondent is, and for more than one year last past has been, in substantial competition with other corporations and with individuals, firms, and partnerships engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. For a long period of time the words "Distilled Products" when used in connection with the liquor industry have had and still have a definite significance and meaning in the minds of the wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, spirituous beverages prepared and bottled at a distillery by the distillers thereof, who have manufactured such beverages 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; and a substantial portion of the purchasing public prefers to buy spirituous liquors prepared and bottled by the actual distillers and manufacturers thereof.

PAR. 3. In the course and conduct of its business as aforesaid, by the use of the words "Distilled Products" in its corporate name, printed on its stationery and on the labels attached to the bottles in which it sells and ships its said products, and in various other ways, respondent represents to its customers and furnishes them with the means of representing to their vendees, both retailers and the ultimate consuming public, that the whiskies, gins, and other spirituous beverages therein contained were by it manufactured through the process of distillation from mash, wort, or wash, as aforesaid, when, as a matter of fact, respondent is not a distiller, does not distill the said whiskies, gins, or other spirituous beverages by it so bottled, labeled, sold and transported, and does not own, operate, or control any place or places where such beverages are manufactured by the process of distillation from mash, wort, or wash.

PAR. 4. In the course and conduct of its business as aforesaid respondent has advertised to assist its customers in disposing to the ultimate consumer of the whiskies, gins, and other spirituous beverages by it so sold as aforesaid, as follows:

The world's largest independent producers of distilled spirits. Daily capacity ten thousand cases * * * Now join hands with Lionel Distilled Products. Middleman's profit smashed. Direct distillery * * * Retailer contract now insures sensationally low prices.

thereby representing to the ultimate consumer as an inducement to buy respondent's product that a saving has been effected by reason of respondent's being a distiller of products so offered for sale, and that a middleman's profit or mark up has thus been eliminated, when as a matter of fact respondent is itself a middleman and no such saving has been effected or is passed on to the ultimate purchaser, and the ultimate purchaser believing and relying upon the truth of the aforesaid representations is induced to purchase the whiskies, gins, and other spirituous beverages bottled and sold by the respondent.

PAR. 5. 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, as aforesaid, whiskies, gins, and other spirituous beverages sold by them and who truthfully use the words "distillery," "distilleries," "distillers," "distilling," or "distilled products" as a part of their corporate or trade names and on their stationery, and on the labels of the bottles in which they sell and ship such products. There are also among such competitors corporations, firms, partnerships, and individuals engaged in the business of purchasing, rectifying, blending, and bottling whiskies,

Complaint

25 F. T. C.

gins, and other spirituous beverages who do not use the words "distillery," "distilleries," "distilling," "distillers," or "distilled products" as a part of their corporate or trade names, nor on their stationery, nor on the labels attached to the bottles in which they sell and ship their said products, and who do not misrepresent that a saving of a middleman's profit is being passed on to the consumer.

PAR 6. Representations by respondent, as set forth in paragraphs 3 and 4 hereof, are calculated to and have the capacity and tendency to and do mislead and deceive dealers and the purchasing public in the erroneous beliefs that the whiskies, gins, and other spirituous beverages sold by the respondent are manufactured and distilled by it from mash, wort, or wash, as aforesaid; and that in purchasing respondent's products the purchasers are effecting a saving of a middleman's profit; and are calculated to and have the capacity and tendency to and do induce dealers and the purchasing public, acting in such beliefs, to purchase the whiskies, gins, and other spirituous beverages bottled and sold by the respondent, thereby diverting trade to respondent from its 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, of whiskies, gins, and other spirituous beverages, and thereby respondent does substantial injury to substantial competition in interstate commerce.

PAR. 7. 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.

Count 2

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under the laws of the State of Illinois, with its office and principal place of business in the city of Chicago, in said State. It is now, and for more than one year last past has been, engaged in the business of a rectifier and wholesaler of liquors, purchasing and bottling whiskies, gins, and other spirituous beverages and selling the same at wholesale in constant course of trade and commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its said business, it causes its said products when sold to be transported from its place of business aforesaid into and through various States of the United

States to the purchasers thereof, consisting of wholesalers and retailers, some located within the State of Illinois and some 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 distillation of whiskies, gins, and other spirituous beverages and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia; and in the course and conduct of its business as aforesaid respondent is, and for more than one year last past has been, in substantial competition with other corporations and with individuals, firms, and partnerships engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PARS. 2, 3, 4, 5, and 6. 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, 5, and 6 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, 5, and 6 of count 1 of this complaint are incorporated herein by reference and adopted as the allegations of paragraphs 2, 3, 4, 5, and 6, 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. 7. 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

Complaint

25 F. T. C.

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 1 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 provisions 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 advertising 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. 8. The use by respondent of the words "Distilled Products" in its corporate name, printed upon its stationery and on the labels attached to the bottles in which it sells and ships such products and various other misrepresentations hereinbefore set out, constitute false advertising within the meaning of the aforesaid provision of Article V and tend to and do create the misleading impressions that respondent is engaged in the business of distilling spirits from mash,

wort, or wash, that the spirituous beverages by it so sold and transported have been prepared and bottled by the original distillers thereof, and that the whiskies, gins, and other spirituous beverages sold by respondent have been manufactured and distilled by it from mash, wort, or wash as aforesaid, all contrary to the provisions of Section 1, Article V, of the Code aforesaid.

PAR. 9. The above alleged methods, acts, and practices of the respondent 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 6 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 27, 1935, issued, and on May 28, 1935 served its complaint in this proceeding upon the respondent, Lionel Distilled Products, Inc., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by PGad B. Moorehouse, 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. Stanford Clinton, Esq., of the firm of Pritzker & Pritzker, appeared as counsel for the respondent but no testimony or other evidence was introduced on behalf of respondent in opposition to the allegation of the complaint. 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 arguments having been made; 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, Lionel Distilled Products, Inc., is a corporation incorporated in January 1934, existing and doing business under the laws of the State of Illinois, with its office and principal place of business at 1919-1927 West Pershing Road, Chicago, Ill. Shortly after its incorporation and organization it engaged in the business of a rectifier and wholesaler of liquors, purchasing and bottling whiskies, gins, and other spirituous beverages and selling the same at wholesale 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, from the date of its organization aforesaid up until about December 1936, it caused its said products, when sold, to be transported from its place of business aforesaid into and through various States of the United States, principally Minnesota, Wisconsin, Texas, Louisiana, Missouri, Nebraska, Colorado, Illinois, Kentucky, and Indiana to the purchasers thereof, consisting of wholesalers and retailers, some located within the State of Illinois and some located in other States of the United States and the District of Columbia.

In the course and conduct of its business as aforesaid, respondent was in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by distillation of whiskies, gins, and other spirituous beverages and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia; and in the course and conduct of its business as aforesaid respondent was in substantial competition with other corporations and with individuals, firms, and partnerships engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. Upon the premises of respondent's place of business aforesaid, there was a 200-gallon gin still for use in the production of gins by a process of rectification whereby tax-paid alcohol, purchased but not produced by respondent, was redistilled over juniper berries and other aromatics. Such rectification of alcoholic spirits by respondent did not make or constitute it a distillery or a distiller, as defined by Section 3247 of the Revised Statutes regulating Internal Revenue.

Respondent distilled an average of 300 gallons of such gin a week and this did not constitute over 5 percent of respondent's total business.

Respondent also produced cordials of various kinds by processes of distillation, percolation, and maceration, plus compounding, in connection with some of which a small still was used. Prior to August 15, 1936, at which time the existing regulations of the Federal Alcohol Administration Division of the Treasury Department became effective, it was permissible thereunder for respondent to term and designate such cordials as "distilled." Subsequently thereto such cordials were not allowed to be labeled or advertised as a distilled product although they might be made by the same method. These cordials constituted approximately 30 percent of respondent's business volume and the remaining 65 percent was divided as follows: Straight whiskies purchased in bulk by respondent from other distillers and bottled and sold by it—60 percent; and whiskies purchased in bulk from other distillers and rectified and bottled by respondent—5 percent.

PAR. 3. 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).

All distillers may and many of them do operate an establishment separate from their distillery, usually 600 feet or more away, known as a distillery rectifying plant, in which they carry on the same processes as are carried on by rectifiers who are not distillers and who do not own, control or operate any distillery. However, in such event, the distillers must apply for and obtain a separate and additional permit known as a rectifier's permit, which is the same kind of permit as obtained by any rectifier.

Some distilleries have a tax-paid bottling room on the distillery bonded premises wherein the 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.

If the spirits bottled by the distiller, either at his distillery, in bond after aging, or in his tax-paid bottling room, or in his rectifying plant, are spirits of his own distillation, he may and usually does use his "D" symbol, which is the letter "D" followed by a number, and usually blown into the bottom of the bottle in which said spirits are bottled.

A distiller often does purchase distilled spirits of others and bottle them in his rectifying plant, or blend them with spirits of his own distillation, or with neutral spirits, in which event he uses his "R" symbol which is an "R" followed by the number of his rectifier's permit. The rectifier uses his "R" number on his bottles exclusively, this respondent's symbol number being "R-49."

If the distilled spirits bottled by a distiller are spirits other than of his own distillation, he is required to and does put "Bottled by ----- Company" or "Blended and Bottled by ----- Company" as the case may be, and, if they are spirits of his own distillation, he must put "Distilled and Bottled by ----- Company."

The rectifier, on the other hand, when he bottles his product, is required to and does put "Bottled by ----- Company" or "Bottled and Blended by ----- Company," as the case may be.

Generally speaking the purchasing public is not familiar with all of these details, and many people in the trade are not familiar with them, although the wholesalers and retailers, after the first two years following the repeal of the prohibition amendment became a great deal more familiar with them than they were at the outset, until at the present time the liquor trade generally has come to know who are the rectifiers and who are the distillers and in a general way is more familiar with the nature of these respective businesses.

Respondent, during its conduct of its business as aforesaid, conformed to the provisions and requirements of the Federal Alcohol Administration Act and the regulations from time to time promulgated thereunder as to its labeling and advertising which, like the distiller-bottler's labeling and advertising, must conform to the standards of identity prescribed by the Federal Alcohol Administration. This means that in the case of two bottles of blended whiskey, labeled exactly alike and carrying on their respective labels the identical specifications as to contents, age and kind of spirits—but one bottle emanated from and was bottled by a distiller and the other emanated from and was bottled by a rectifier—the contents of the two bottles would be identical to all practical intents and purposes. Likewise, if a rectifier buys a certain type and age of straight whiskey from a distiller and bottles it without rectification and the same distiller has bottled some of that same whiskey straight, there would be no difference in fact between the two bottles of whiskey by reason of the fact that a rectifier had bottled one and a distiller had bottled the other. It is not possible, however, to determine from the presence of the aforementioned phrases, "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.

With reference to the gin produced by respondent by the redistillation of purchased alcohol over juniper berries and other aromatics, existing regulations promulgated pursuant to the Federal Alcohol Administration Act, approved August 29, 1935 (49 State. 977), provide that rectifiers who redistill purchased alcohol over juniper berries and other aromatics must call such resulting product "distilled gin," and require that the labels state who distilled it. This serves to distinguish between gin produced by such method and "cold" or compound gin prepared by mixing neutral spirits with essential flavoring oils.

PAR. 4. In the course and conduct of its business as aforesaid, by use of the words "Distilled Products" in its corporate name, printed on its stationery and on the labels attached to the bottles in which it sold and shipped its said products, and in various other ways, respondent represented to its customers and furnished them with a means of representing to their vendees, both retailers and the ultimate consuming public, that the whiskies, gins, and other spirituous beverages therein contained were by it manufactured through the process of distillation from mash, wort, or wash as aforesaid, when, as a matter of fact, respondent was not a distiller and did not distill the said whiskies, gins, 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 manufactured by the process of distillation from mash, wort, or wash.

The words "Distilled Products" of and in themselves might not constitute a misrepresentation inasmuch as this respondent was engaged in the business of handling distilled products, namely alcoholic beverages which originated in a distillery and in some cases were not rectified or blended. However, this respondent used its full name "Lionel Distilled Products, Inc." on said labels. On its stationery it advertised "Ask for Lionel Products," plainly indicating and expressing that the distilled products were "Lionel distilled." Some of the labels read "Bottled by Lionel Distilled Products, Inc." Some of the other labels contained the legend "Made by Lionel Distilled Products" and formerly one label on a brand of straight whiskey read "Prepared by Lionel Distilled Products." From these facts the Commission infers a distinct tendency, if not an intention, to mislead and deceive the public, a substantial portion of which prefers to buy spirituous liquors prepared and bottled by distillers.

Findings

25 F. T. C.

Further, in the course and conduct of its business as aforesaid, respondent advertised to assist its customers in disposing to the ultimate consumer of the whiskies, gins, and other spirituous beverages by it so sold as aforesaid:

The world's largest independent producers of distilled spirits. Daily capacity 10,000 cases * * * Now join hands with Lionel Distilled Products. Middleman's profit smashed. Direct distillery * * * Retailer contract now insures sensationally low prices.

thereby representing to the ultimate consumer as an inducement to buy respondent's products that a saving had been effected by reason of respondent's being a distiller of the products so offered for sale, and that a middleman's profit or mark-up had thus been eliminated, when as a matter of fact respondent was at all times itself a middleman and no such saving had been effected or was passed on to the ultimate purchaser.

At one time during the above-described period of its operations respondent distributed its products in Washington, D. C., through a wholesale subsidiary and had warehousing arrangements in the State of New York and in the State of Texas which were in substance its own subsidiaries, but in each of those three instances the local distributor placed a mark-up on respondent's goods over and above its cost price before selling to the retailer. So that at all times, in all the States and territories where respondent's products were distributed, there was first, a profit to the distiller on the sale of the distilled spirits to respondent; second, respondent's profit; third, the wholesaler's profit; and fourth, the retailer's profit; and no middleman's profit was eliminated as represented by respondent.

PAR. 5. Respondent admitted, 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 did not make or constitute this respondent a distilling company in the sense commonly understood by the liquor industry. There were also called a number of witnesses, some being members of the trade and some being members of the purchasing public, who, with few exceptions testified that the word "distilled" or similar words such as "distillers," "distilleries," and "distilling," etc., indicated the initial distilling process of producing spirituous and alcoholic liquors from grain, mash, etc., or the manufacturer thereof. The greater number of these witnesses testified that the use of such words would induce them to purchase the products of the concern using such words in its corporate name or on the label of the bottle containing the prod-

ucts in the belief that a distiller's product would be more uniform and that a manufacturer's name should mean something. They testified that they preferred buying in as direct a manner as practical and considered distillers as being more responsible than a rectifier or bottler of spirituous liquors. It was testified by many of these witnesses that the use of the word "distilled" in the corporate name of the respondent would indicate to them that the respondent was the actual distiller of the product, and they would give preference in purchasing a product which bore a label containing such corporate name in competition with a product bearing a label which did not contain the word "distilled," or any other word indicating a distilling process in the corporate name.

The Commission finds that for a long period of time the words "distilled products," when used as respondent has used them, in connection with the liquor industry and with the products thereof, have had and still have 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. 6. 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, whiskies, gins, and other spirituous beverages sold by them, and who truthfully used the words "distillery," "distilleries," "distillers," or "distilling" as a part of their corporate or trade names and on their stationery, 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, and bottling whiskies, gins, and other spirituous beverages in rectifying plants under rectifiers' permits who did not use the words "distillery," "distilleries," "distilling," "distillers," or "distilled products," as a part of their corporate or trade names, nor on their stationery, advertising, nor on the labels attached to the bottles in which they sold and shipped their said products.

PAR. 7. The representations by respondent as set forth in paragraph 4 hereof had the capacity and tendency to and did mislead and deceive dealers and the purchasing public into the beliefs that

Findings

25 F. T. C.

respondent Lionel Distilled Products, Inc., 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 respondents were manufactured or distilled by Lionel Distilled Products, Inc., from mash, wort, or wash by one continuous process, and that by purchasing respondent's said products they were effecting the saving of a middleman's profit, and had the capacity and tendency to and did 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. The Commission finds that the whole situation in this industry is such that the foregoing representations had a distinct tendency to give respondent what amounted to unfair competitive advantage over those of its competitors who did 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, was a distillery-bottled package and this in turn tended to divert trade to respondent from such competitors and thereby respondent did substantial injury to competition in interstate commerce.

PAR. 8. 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.

PAR. 9. 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 herein before 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.

PAR. 10. It has been represented to the Commission in this proceeding that during the month of December 1936, the respondent's stockholders commenced to wind up the affairs of the company and that all of its assets were completely disposed of by December 31, 1936. However, as of the present time, the company still maintains

766

Order

its corporate existence and the Commission can have no assurance that its plans may not change and that it may not resume the unfair acts and practices hereinbefore set forth.

CONCLUSION

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

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence taken before John L. Hornor, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint, and no testimony having been offered by respondent in opposition thereto, and upon brief filed herein by PGad B. Morehouse, counsel for the Commission (no brief having been filed in opposition thereto by Stanford Clinton, Esq., of Messrs. Pritzker & Pritzker, counsel for respondent, and no oral arguments 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, Lionel Distilled Products, Inc., 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 respondent is redistilled over juniper berries and other aromatics), cease and desist from:

1. Representing through the use of the words "Distilled Products" in its corporate name, on all stationery, advertising, or labels attached to the bottles in which its said products are sold and shipped, or in any other way by word or words of like import, (a) that respondent is a distiller of the said whiskies, gins, or other spirituous beverages; or, (b) that the said whiskies, gins, or other spirituous beverages;

Order

25 F. T. C.

ages were by it manufactured through a process of distillation; or (c) that respondent 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;

2. Representing that in purchasing its said products the purchaser is saving a middleman's profit.

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

It is further ordered, That the said respondent, within 60 days from and after the date of 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.

Syllabus

IN THE MATTER OF
PARAMOUNT DISTILLING CORPORATIONCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2446. Complaint, June 19, 1935—Decision, Aug. 12, 1937*

Where a corporation engaged in rectifying and bottling both rectified and straight distilled spirits, and in making gin, with a still which it used therefor, by redistillation of purchased alcohol, not produced by it, over juniper berries and other aromatics, and in selling its aforesaid products to wholesalers and distributors thereof in various States and in the District of Columbia, in substantial competition with those engaged in the manufacture by true distillation of whiskies, gins, and other spirituous beverages from mash, wort, or wash, and in selling such products 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," "distillers," or "distilling" as a part of their corporate and 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, printed on its stationery and advertising, and on the labels attached to the bottles in which it sold and shipped its said products, and in various other ways, to its customers, and furnished same with a means of representing to their vendees, both retailers and ultimate consuming public, that it was a distiller and that the whiskies, gins, and other alcoholic beverages contained in such bottles were by it made through process of distillation, notwithstanding fact it did not distill said various beverages, thus bottled, labeled, sold, and transported by it, through 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 consuming 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, and plant, equipment, and requirements of which are more elaborate, extensive and burdensome than those of rectifier;

With effect of misleading and deceiving dealers and purchasing public into the beliefs that it was a distiller or distilling company in the ordinarily accepted sense of those terms, and that the whiskies, gins and other