

Complaint

IN THE MATTER OF

HOFFMAN BEVERAGE COMPANY

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

Docket 2819. Complaint, May 26, 1936—Decision, Nov. 2, 1937

Where a corporation engaged in sale of beer, subjected to treatment and process making pasteurization unnecessary, and in distribution of said product in trade and commerce among the various States and in the District of Columbia, in substantial competition with those engaged in similar sale and distribution of such product—

Falsely and misleadingly disparaged products of competitors through representing, in advertising of its said product, that "Heat treating beer during bottling operations spoils the fresh taste," in conjunction with statement that such treating "is necessary in all other American breweries" except its own, and that its product was only unpasteurized bottled beer in America and through such label statements as that, due to avoidance of pasteurization, as above noted, "its fine vat quality is fully retained"; facts being that heat treating does not spoil fresh taste of properly pasteurized beer, as now treated pasteurization flavor is avoided, and ordinary consuming public would not be able to detect difference in taste due to pasteurization between pasteurized and other beer;

With effect of misleading and deceiving dealers and purchasing public into belief that beer products of its competitors were inferior in quality, purity or taste to its own, and with result that such dealers and purchasing public were induced, in reliance upon truth of its aforesaid representations, to purchase its said beer in preference to other products which were competitive as to price, quality, taste, and purity, and with effect of thereby diverting trade to it from its competitors who do not, in the aforesaid or any other manner, falsely disparage competitive products; to the substantial injury of substantial competition in commerce:

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

Before *Mr. John L. Hornor* and *Mr. John W. Norwood*, trial examiners.

Mr. PGad B. Morehouse for the Commission.

Mr. Walter H. Free of Hoguet, Neary & Campbell, of New York City, and *Mr. Edwin L. Gidley*, of Newark, N. J., 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 Hoffman Beverage Company, a corporation, hereinafter referred to as

Complaint

25 F. T. C.

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 in 1913, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business at 402 Grove Street, in the city of Newark, in said State. It now is, and since July 1934 has been, engaged in the sale and distribution of beer 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 business as aforesaid it causes said beer to be bottled and, when sold, to be shipped and transported from its place of business in Newark, N. J., to the purchasers thereof, consisting of wholesalers and retailers located in other States of the United States and in 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 sale and distribution of beer in trade and commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business as aforesaid respondent, in soliciting the sale of and selling its beer, has falsely disparaged the products of its aforesaid competitors through publication and dissemination of the following statements, to wit:

Heat-treating beer during bottling operations spoils the fresh taste. This is necessary in all other American breweries except Hoffman.

The vat-fresh taste of Hoffman Bottled Beer is due to the fact that Hoffman Beer is not heat-treated after bottling. Protection from impurities at every step preserves the fine vat-fresh flavor by making pasteurization unnecessary. You taste the difference at the first sip! The only unpasteurized bottled beer in America.

The difference in taste between draught beer and the usual bottled beer is due chiefly to the fact that bottled beer—with a single exception—is pasteurized (heat-treated) in the bottle * * *

Pasteurization affects the taste of beer.

Hoffman Beer is not pasteurized.

On the labels attached to the bottles in which respondent's beer is sold appears the statement:

Because of extraordinary biological control pasteurizing this beer is avoided. Thus its fine vat quality is fully retained.

By means of the foregoing statements respondent represents that the beer sold by its competitors is stale and inferior in quality, purity, and taste, and in other ways less desirable for human consumption than is the beer of respondent, when in truth and in fact such is not the case.

PAR. 3. The representations by respondent, as set forth in the foregoing paragraph hereof, and each of them, have the capacity and tendency to and do mislead and deceive dealers and the purchasing public into the belief that the beer products of respondent's competitors are inferior in quality, purity and taste to the beer of respondent, and such dealers and purchasing public, relying upon the truth of the aforesaid representations, are thereby induced to purchase Hoffman Beer in preference to other beer products which are competitive as to price, quality, taste, and purity, thus diverting trade to respondent from its competitors who do not in the aforesaid or any other manner falsely disparage competitive products, and thereby respondent does substantial injury to substantial competition in interstate commerce.

PAR. 4. 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 May 26, 1936, issued, and on May 27, 1936, served its complaint in this proceeding upon respondent Hoffman Beverage 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 said complaint were introduced by PGad B. Morehouse, attorney for the Commission, before John L. Hornor, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Walter H. Free, attorney for the respondent, before John W. Norwood, an examiner of the Commission duly designated to take testimony and receive evidence in the place and stead of John L.

Findings

25 F. T. C.

Hornor; and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of counsel aforesaid; 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, Hoffman Beverage Company, is a corporation organized in 1911, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business at 402 Grove Street, in the city of Newark, in said State.

It is now, and since August 1934, has been, engaged in the sale and distribution of beer 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 business as aforesaid, it causes said beer to be bottled and, when sold, to be shipped and transported from its place of business in Newark, N. J., to the purchasers thereof, consisting of wholesalers and retailers located in other States of the United States and in 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 sale and distribution of beer in trade and commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business as aforesaid, respondent, in soliciting the sale of and selling its beer, has made, through publication of advertisements, the following statements:

1. Heat treating beer during bottling operations spoils the fresh taste. This is necessary in all other American breweries except Hoffman;

2. The vat-fresh taste of Hoffman Bottled Beer is due to the fact that Hoffman Beer is not heat treated after bottling. Protection from impurities at every step preserves the fine vat-fresh flavor by making pasteurization unnecessary. You taste the difference at the first sip! The *only* unpasteurized bottled beer in America;

3. The difference in taste between fine draught beer and the usual bottled beer is due chiefly to the fact that bottled beer—*with a single exception*—is pasteurized (heat-treated) in the bottle;

4. Pasteurization affects the taste of beer ;
5. Hoffman Beer is *not* pasteurized ;

On the labels attached to the bottles in which the respondent's beer is sold appears the statement :

6. Because of extraordinary biological control, pasteurizing this beer is avoided. Thus its fine vat quality is fully retained.

The statement contained in subparagraph (1) was not made by respondent subsequent to March, 1935, and was made as a one-time insertion in approximately eight papers, including the New York "Herald Tribune," the said papers having interstate circulation. Statement (2) appeared about May 29th, 1935, in the New York "Journal," "World," "Sun," the Newark "News," and other papers. Statements (3), (4), (5), or (6) were contained in advertisements published in the New York "World Telegram," the Newark, N. J., "Star-Eagle," and other papers, statement (6) being shown on the reproduction of the bottle label appearing in the advertisements.

Respondent's representation, (1), that "heat treating beer during bottling operations spoils the fresh taste" and that "this is necessary in all other American breweries except Hoffman," was and is contrary to fact so far as it might be construed to convey the meaning that all other bottled beer than Hoffman's was stale or of such inferior quality, purity, or taste as to be less fit for human consumption than respondent's beer. It was shown by experts, and is so found, that heat-treating does not ordinarily spoil the fresh taste of beer but does so only when the pasteurization is improperly done by the application of too much heat. Thermostatic control is employed in modern brewing to keep uniform temperatures and prevent spoiling. Beer is now treated in such a way as not to give a pasteurization flavor.

With respect to respondent's representation (2) above, which in substance is that the absence of pasteurization or heat-treating produces a vat-fresh taste in respondent's beer that can be distinguished "with the first sip" and that respondent's is the only unpasteurized bottled beer in America, it was shown (a) that the distinction between pasteurized and unpasteurized beer could not ordinarily be detected by taste, although experts in the science of beer making, notably those in Germany and France, agree that such a difference is appreciable. When beer is improperly pasteurized by the application of too much heat there is a "bread taste," but when pasteurization is properly done the taste is not affected adversely. There is a difference in taste between bottled and draught beer which is not due to pasteurization or the lack of it. Prior to thirty or thirty-five years ago pasteurization affected the taste of beer, such effect

being known as a "pasteurized taste," but that has not been so in recent years. It was agreed that respondent's product, up to the time of the publication of the above advertisements, was the only unpasteurized bottled beer produced in America. Since that date other unpasteurized beers have appeared. Draught beer is not pasteurized.

PAR. 3. That the implication arising from respondent's concurrent use of the representations hereinbefore set out are disparaging to competitive beer products is apparent from the advertisements themselves as well as shown by the testimony to be false or misleading insofar as they might be construed to disparage competing products. By the use of a process known as the Nathan System, respondent's beer is subjected to a filtration treatment whereby yeast and other organisms which might result in later spoiling of the beer after bottling, are removed, and it is not necessary to pasteurize it. At the time of the appearance of the above advertised claims, all other breweries than Hoffman's subjected their beer, after bottling, to pasteurization, i. e., a heat treatment of approximately 145° F., for the purpose of killing the yeast and other organisms so that the beer would keep indefinitely. The Commission finds from the evidence that while some experts might be able to detect a difference in taste due to pasteurization between pasteurized beer and other beer, the ordinary consuming public would not be able to do so.

PAR. 4. The representations by respondent, as set forth in the foregoing paragraph hereof, and each of them, have the capacity and tendency to and do mislead and deceive dealers and the purchasing public into the belief that the beer products of respondent's competitors are inferior in quality, purity or taste to the beer of respondent, and such dealers and purchasing public, relying upon the truth of the aforesaid representations, are thereby induced to purchase Hoffman Beer in preference to other beer products which are competitive as to price, quality, taste and purity, thus diverting trade to respondent from its competitors who do not in the aforesaid or any other manner falsely disparage competitive products, and thereby respondent does substantial injury to substantial competition in interstate commerce.

PAR. 5. The record in this case shows that since 1935 respondent has not repeated the disparaging statements set forth, but in this proceeding it has asserted its legal right to do so, wherefore the Commission can have and has no assurance whatever that in the absence of any inhibition, respondent might not resume such practice.

1283

Order

CONCLUSION

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

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence, taken before John L. Hornor and John W. Norwood, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral arguments by PGad B. Morehouse, counsel for the Commission, and by Walter H. Free, counsel for the respondent, 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 now ordered, That the respondent, Hoffman Beverage Company, a corporation, its officers, agents, representatives, and employees, in the sale and distribution of beer in interstate commerce and in the District of Columbia, do cease and desist from:

Representing that "Heat treating beer during bottling operations spoils the fresh taste" in conjunction with the statement that such heat treating "is necessary in all other American breweries except Hoffman," or in any other manner falsely or misleadingly disparaging competing products.

Provided further, that nothing herein contained shall restrict respondent from making any legitimate claims regarding the desirability or distinctive taste of its beer so long as such claims are not coupled with false or misleading disparaging references to competing products.

It is further ordered, That said respondent shall, within 60 days from the date of service of this order upon it, make a report or reports to the Commission in writing, showing the manner and form of its compliance herewith.

IN THE MATTER OF

EUCATHOL COMPANY, INC.¹

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

Docket 3069. Complaint, Mar. 4, 1937—Decision, Nov. 3, 1937

Where a corporation engaged in manufacture and sale of "Eucathol," compound or medicine for use in treatment of coughs, colds, burns, sunburn, insect bites, hay fever, asthma, influenza, and other afflictions, and as after-shaving cream, through rubbing or massaging same on flesh or through inhalation of vapors thereof, in substantial competition with those engaged in sale or offer to general public of compounds, medicines, salves, and ointments used for purposes for which its said preparation was offered—

Represented, in advertising its said product in newspapers and periodicals of general circulation, and through radio broadcasts, and in pamphlets, and through printed testimonials, photographs, and pictures and legends on cartons containing said compound, and in circulars enclosed in cartons thereof, and through other advertising matter, that use of such "Eucathol" would prevent or cure, or was beneficial in treatment of, insect bites, sunburn, piles, hemorrhoids, asthma, hay fever, catarrh, colds, skin irritations, scalds and burns, skin disorders, influenza, pneumonia, and other ailments, facts being said statements and representations as to the efficacy thereof in the treatment of piles, hemorrhoids, asthma, hay fever, catarrh, influenza (flu) or pneumonia were each and all false and misleading;

With tendency and capacity to induce members of public and prospective purchasers to form mistaken and erroneous belief that said statements and representations were true, and with result that such purchasing public, acting on such erroneous belief, was induced to buy, and bought, its said products, and trade was thereby unfairly diverted to it from its said competitors; to the injury of competition in commerce among the States, and to the injury of the public:

Held, That such acts and practices in sale, offer and advertisement of aforesaid product as a preventive or cure, or as beneficial in treatment of piles, hemorrhoids, asthma, hay fever, catarrh, influenza (flu) or pneumonia, were to the prejudice of the public and competitors and constituted unfair methods of competition in commerce.

Mr. E. J. Hornibrook for the Commission.

Stanard, Carey & Stanard, of Shawnee, Okla., 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 The Euca-

¹ See original findings and order as of June 29, 1937, in this matter, at page 313, *supra*.