

Syllabus

IN THE MATTER OF
PRENDERGAST-DAVIES COMPANY, LTD.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2849. Complaint, June 20, 1936—Decision, Mar. 5, 1938*

Where word "Distilleries," when used in connection with liquor industry and products thereof, had had and still had a definite significance and meaning to minds of wholesalers and retailers and to ultimate purchasing public as designating places where such liquors are made by process of original and continuous distillation from mash, wort, or wash through continuous closed pipes and vessels until manufacture is complete, and substantial portion of purchasing public preferred to buy spirituous liquors prepared and bottled by distilleries; and thereafter a corporation engaged as importer, wholesaler, and retailer of whiskies and other alcoholic beverages, in substantial competition with others similarly engaged—

- (a) Sold bottled whisky, labels on which described same as "Bottled in Scotland, MacNab Distilleries Limited, 266 Clyde St., Glasgow, Scotland. Head Office 11 Waterloo Place, London S. W. 1, England," and thereby represented to customers, and supplied to them means of representing to their retailer-vendees and to ultimate consuming public, that whisky thus contained was made in Scotland by aforesaid "Distilleries";

Notwithstanding fact said concern neither owned, operated, nor controlled any place or places where alcoholic liquors are produced by process of original and continuous distillation from mash, wort, or wash, and did not produce any whisky which went into bottles thus labeled, and whisky in question was made for it under agreement with English distillers, and there were no such distilleries at said Glasgow address; and

Where "Scotch Whisky" had long had and still had definite significance to minds of wholesalers, retailers, and ultimate purchasing public as meaning distinctive product of Scotland, there made, and a substantial portion of purchasing public preferred to buy Scotch whisky made in Scotland; and thereafter aforesaid importer, wholesaler, and retailer—

- (b) Sold whisky in bottles, aforesaid labels of which further represented same as "Sandy MacNab's Old Liqueur Scotch Whiskey, a blend of the finest aged Scotch Whiskey, Produce of Scotland—Bottled in Scotland, MacNab Distilleries Limited," etc., as above set forth, and thereby represented to customers, and supplied to them means of representing to own vendee-retailers and to ultimate consuming public, that whisky thus contained was a true Scotch Whisky, distinctive product of Scotland, and there made by the MacNab Distilleries;

Notwithstanding fact said liquor was not a distinctive product of Scotland, nor there made nor bottled, and was neither "Scotch Whisky" in fact nor in accordance with standards of identity for distilled spirits established by Federal Alcohol Administration;

With effect of misleading and deceiving dealers and purchasing public into erroneous beliefs that Scotch whisky sold by it was product of an actual distillery in Scotland and was a distinctive product of said country, there

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made, and genuine Scotch whisky imported from Scotland, and of inducing dealers and purchasing public, in such beliefs, to buy said Sandy Mac-Nab Scotch whisky, and thereby divert trade to it from competitors, among whom there are those who sell as Scotch whisky, whisky made and bottled in Scotland and distinctive product of that country and truthfully labeled as product of actual distilleries there located, and competitors who sell as blended, Scotch type whisky, mixture or blend made outside of Great Britain and do not falsely represent its place of distillation on labels attached to bottles in which liquor is sold and shipped, and with capacity and tendency so to mislead, deceive, and induce; to the substantial injury of substantial competition in interstate 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 J. Keenan*, trial examiner.

Mr. PGad B. Morehouse for the Commission.

Mr. George J. Feldman, of Washington, D. C. and *Weissman & Maretz*, of New Haven, Conn., 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 Prendergast-Davies Company, Ltd., 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 New York, with its principal office and place of business at 601 West 26th Street, in the city of New York in said State. It is now, and for more than 1 year last past has been, engaged in the business of an importer, wholesaler, and retailer of whiskies and other alcoholic beverages, purchasing, importing, and selling the same at both wholesale and retail in constant course of trade and commerce between the various States of the United States and in the District of Columbia. In the course and conduct of its said business it causes the aforesaid alcoholic beverages when sold to be transported from its place of business aforesaid, into and through the various States of the United States to the purchasers thereof, located in other States of the United States and in the District of Columbia. In the course and conduct of its business aforesaid, respondent is now and has been, for more than 1 year last past, in substantial competition with other corporations and with individuals,

partnerships, and firms, engaged in the purchase, importation, and sale at wholesale and retail of whiskies and other alcoholic beverages in trade and commerce between and among the various States of the United States and the District of Columbia.

PAR. 2. For a long period of time the word "Distilleries" 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 places where such liquors are manufactured 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 distilleries. Further, "Scotch Whiskey" for a long time has had and still has, a definite significance to the minds of wholesalers, retailers, and to the ultimate purchasing public, to wit: a distinctive product of Scotland, manufactured in Scotland, and a substantial portion of the purchasing public prefers to buy Scotch whiskey manufactured in Scotland.

PAR. 3. In the course and conduct of its business as aforesaid, respondent has heretofore sold and is now selling, a whiskey in bottles with labels attached thereto containing the following representations, to wit:

Sandy MacNab's
Old Liqueur Scotch
Whiskey

A blend of the finest aged Scotch Whiskey
Produce of Scotland—Bottled in Scotland

MacNab Distilleries Limited

266 Clyde St.,
Glasgow, Scotland
Head Office

11 Waterloo Place,
London S. W. 1,
England

By the use of the aforesaid designation "Scotch Whiskey" on said labels, together with the phrases "MacNab Distilleries, Ltd.," "Bottled in Scotland" and the address "266 Clyde Street, Glasgow, Scotland" on the aforesaid labels in which it sells and ships the aforesaid whiskey, 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 whiskey in said bottles contained is a true Scotch whiskey, a distinctive product of Scotland and manufactured in Scotland by the MacNab Distilleries, Ltd., when as

a matter of fact the MacNab Distilleries, Ltd., is an English company with its principal office in the city of London, England, and does not own, operate, or control any place or places where alcoholic liquors are produced by the process of original and continuous distillation from mash, wort, or wash and does not produce or manufacture any whiskey or whiskies which go into the bottles so labeled as aforesaid; the so-called "Sandy MacNab Scotch Whiskey" is produced by W. H. Holt and Sons, Ltd., distillers of Chorlton-Cum-Hardy, England, under an agreement with the aforesaid MacNab Distilleries, Ltd., of London, England, and said whiskey is not a distinctive product of Scotland and is neither manufactured nor bottled in Scotland, and is neither "Scotch Whiskey" in fact, nor in accordance with the standards of identity for distilled spirits established by Article II of Regulation No. 5 of the Federal Alcohol Administration, effective May 1, 1936, duly enacted and promulgated pursuant to the authority of the Federal Alcohol Administration Act, 49 Stat. 977, approved August 29, 1935. There are no MacNab Distilleries at 266 Clyde Street, Glasgow, Scotland.

PAR. 4. There are among the competitors of respondent engaged in the sale of Scotch Whiskey, as mentioned in paragraph 1 hereof, corporations, firms, partnerships, and individuals, who sell at wholesale and retail as Scotch whiskey, whiskey which is manufactured and bottled in Scotland and is a distinctive product of that country and which whiskey is truthfully labeled as the product of actual distilleries located in Scotland. There are also among the competitors of respondent as aforesaid, corporations, individuals, firms, and partnerships, who sell "blended Scotch Type Whiskey," a mixture or blend made outside of Great Britain and who do not falsely represent its place of distillation on the labels attached to the bottles in which such liquor is sold and shipped.

PAR. 5. The representations by respondent, as set forth in paragraph 3 hereof for each of them have the capacity and tendency to and do mislead and deceive dealers and the purchasing public into the erroneous beliefs that the "Scotch Whiskey" by it sold is the product of an actual distillery located in Scotland, and that it is a distinctive product of Scotland, manufactured there, and is otherwise genuine Scotch whiskey, imported from Scotland and have the capacity and tendency and do induce dealers and the purchasing public acting in such beliefs to purchase the Sandy MacNab "Scotch Whiskey" sold by respondent, thereby diverting trade to respondent from its competitors who do not so misrepresent the Scotch whiskies and blended Scotch type whiskies by them sold 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 20, 1936 issued, and later served its complaint in this proceeding upon the respondent, Prendergast-Davies Company, Ltd., 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, the Commission, by order entered herein, granted respondent's request for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of the complaint to be true, and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the substitute answer, briefs and oral arguments of counsel having been waived, and the Commission having duly considered the same and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. This respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York. Its office and principal place of business is located at 601 West 26th Street, in the city of New York, in said State. For more than 1 year last past it has been engaged in the business of an importer, wholesaler, and retailer of whiskies and other alcoholic beverages, purchasing, importing, and selling the same at both wholesale and retail in constant course of trade and commerce between the various States of the United States and in the District of Columbia. In the course and conduct of its said business it causes the aforesaid alcoholic beverages when sold to be transported from its place of business aforesaid, into and through the various

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States of the United States to the purchasers thereof, located in other States of the United States and in the District of Columbia. In the course and conduct of its business aforesaid, respondent is now and has been, for more than 1 year last past, in substantial competition with other corporations and with individuals, partnerships, and firms, engaged in the purchase, importation, and sale at wholesale and retail of whiskies and other alcoholic beverages in trade and commerce between and among the various States of the United States and the District of Columbia.

PAR. 2. For a long period of time the word "Distilleries" 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 places where such liquors are manufactured 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 distilleries. Further, "Scotch Whiskey" for a long time has had and still has, a definite significance to the minds of wholesalers, retailers and to the ultimate purchasing public, to wit: a distinctive product of Scotland, manufactured in Scotland, and a substantial portion of the purchasing public prefers to buy Scotch whiskey manufactured in Scotland.

Pursuant to the authority conferred upon him by the act of August 29, 1935 (49 Stat. 977) the Federal Alcohol Administrator promulgated regulations No. 5, article II of which became effective as of May 1, 1936. Said article II establishes certain official standards of identity for distilled spirits, including Scotch whiskey. The standard of identity thus established is as follows:

"Scotch whiskey" is a distinctive product of Scotland, manufactured in Scotland in compliance with the laws of Great Britain regulating the manufacture of Scotch whiskey for consumption in Great Britain, and containing no distilled spirits less than three years old: *Provided*, That if in fact such product as so manufactured is a mixture of distilled spirits, such mixture is "Blended Scotch whiskey" (Scotch whiskey—a blend). "Scotch whiskey" shall not be designated as "straight."

PAR. 3. In the course and conduct of its business as aforesaid, respondent has heretofore sold and is now selling, a whiskey in bottles with labels attached thereto containing the following representations, to wit:

Sandy MacNab's
Old Liqueur Scotch
Whiskey

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A blend of the finest aged Scotch Whiskey
Produce of Scotland—Bottled in Scotland
MacNab Distilleries Limited

266 Clyde St.,
Glasgow, Scotland

Head Office
11 Waterloo Place,
London, S. W. 1,
England

By the use of the aforesaid designation "Scotch Whiskey" on said labels, together with the phrases "MacNab Distilleries, Ltd.," "Bottled in Scotland" and the address "266 Clyde Street, Glasgow, Scotland" on the aforesaid labels in which it sells and ships the aforesaid whiskey, 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 whiskey in said bottles contained is a true Scotch whiskey, a distinctive product of Scotland and manufactured in Scotland by the MacNab Distilleries, Ltd., when as a matter of fact the MacNab Distilleries, Ltd., is an English company with its principal office in the city of London, England, and does not own, operate, or control any place or places where alcoholic liquors are produced by the process of original and continuous distillation from mash, wort, or wash and does not produce or manufacture any whiskey or whiskies which go into the bottles so labeled as aforesaid; the so-called "Sandy MacNab Scotch Whiskey" is produced by W. H. Holt and Sons, Ltd., distillers of Chorlton-Cum-Hardy, England, under an agreement with the aforesaid MacNab Distilleries, Ltd., of London, England, and said whiskey is not a distinctive product of Scotland and is neither manufactured nor bottled in Scotland, and is neither "Scotch Whiskey" in fact, nor in accordance with the standards of identity for distilled spirits established by article II of regulations No. 5 of the Federal Alcohol Administration, effective May 1, 1936, duly enacted and promulgated pursuant to the authority of the Federal Alcohol Administration Act, 49 Stat. 977, approved August 29, 1935. There are no MacNab Distilleries at 266 Clyde Street, Glasgow, Scotland. At the time of the issuance of the complaint and for a long period of time thereafter, the company known as "MacNab Distilleries, Ltd.," did not own, operate, or control any distilleries whatever. All sale of "Sandy MacNab Scotch Whiskey" by respondent was discontinued in February 1937.

PAR. 4. There are among the competitors of respondent engaged in the sale of Scotch whiskey, as mentioned in paragraph 1 hereof,

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corporations, firms, partnerships, and individuals, who sell at wholesale and retail as Scotch Whiskey, whiskey which is manufactured and bottled in Scotland and is a distinctive product of that country and which whiskey is truthfully labeled as the product of actual distilleries located in Scotland. There are also among the competitors of respondent as aforesaid, corporations, individuals, firms, and partnerships, who sell "blended Scotch Type Whiskey," a mixture or blend made outside of Great Britain and who do not falsely represent its place of distillation on the labels attached to the bottles in which such liquor is sold and shipped.

PAR. 5. The representations by respondent, as set forth in paragraph 3 hereof, and each of them have the capacity and tendency to and do mislead and deceive dealers and the purchasing public into the erroneous beliefs that the "Scotch Whiskey" by it sold is the product of an actual distillery located in Scotland, and that it is a distinctive product of Scotland, manufactured there, and is otherwise genuine Scotch whiskey, imported from Scotland, and have the capacity and tendency to and do induce dealers and the purchasing public acting in such beliefs to purchase the Sandy MacNab "Scotch Whiskey" sold by respondent, thereby diverting trade to respondent from its competitors who do not so misrepresent the Scotch whiskeys and blended Scotch type whiskeys by them sold, and thereby respondent does substantial injury to substantial competition in interstate commerce.

CONCLUSION

The aforesaid acts and practices of the respondent, Prendergast-Davies Company, Ltd., 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 and the answer filed herein on the 28th day of February 1938 by respondent, admitting all the material allegations of fact contained in the complaint to be true, waiving hearing on the charges set forth in the said complaint, and stating that without further evidence or other intervening pro-

cedure the Commission may issue and serve upon it findings as to the facts and conclusion drawn therefrom, and an order to cease and desist from the violations of law charged in the complaint, 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, Prendergast-Davies Company, Ltd., a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of "Sandy MacNab" brand whiskey in interstate commerce or in the District of Columbia, do cease and desist from:

1. Representing, through the use of the word "Distilleries" in the trade or corporate name of the bottler of said "Sandy McNab" whiskey as shown on all stationery, advertising or labels attached to the bottles in which said "Sandy McNab" whiskey is sold and shipped, or in any other way by word or words of like import, (a) that said bottler is a distiller of the said "Sandy McNab" whiskey; or (b) that the said "Sandy McNab" whiskey is by said bottler manufactured through a process of distillation; or (c) that said bottler owns, operates, or controls a place or places where such "Sandy MacNab" whiskey is by said bottler 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 such bottler shall actually own, operate, or control such a place or places.

2. Representing that a product imported into this country and resold by said respondent, which product as of June 1936, was designated and labeled "Sandy MacNab Old Liqueur Scotch Whiskey" is either a blend of the finest aged Scotch whiskey or that it is a product of Scotland, or that there are in existence any distilleries known as "MacNab Distilleries," unless and until the corporation known as MacNab Distilleries, Ltd., shall actually own, operate, or control a place where, in a continuous process of distillation from mash, wort, or wash, spirits shall be by it produced by distillation and said spirits shall be distinctive products of Scotch manufacture in Scotland, in compliance with the laws of Great Britain regulating the manufacture of Scotch whiskey for consumption in Great Britain and containing no distilled spirits less than 3 years old; provided that if in fact such products by said distilleries so manufactured are mixtures of distilled spirits,

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such mixture may be called "Blended Scotch Whiskey" or "Sotch Whiskey—a Blend."

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.

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IN THE MATTER OF

TOSTO FOODS, INC., AND WILLIAM C. MITHOEFER

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

Docket 3290. Complaint, Jan. 3, 1933—Decision, Mar. 5, 1938

Where a corporation and an individual, vice president, secretary, and treasurer thereof, engaged in sale and distribution of salted peanuts to wholesalers, jobbers, and retailers, in competition with others similarly engaged in sale and distribution of salted nuts, confections, and candy—

Sold its so-called "Strange As It Seems" nuts, packed in individual, small, sealed, 5-cent cartons, within a few of which there were concealed, in accordance with notice on individual cartons thereof advising ultimate purchaser "You may find 5 cents, 25 cents, 50 cents, or \$1," some such sum, as determined through selection and breaking of carton, and thereby supplied to and placed in hands of others means of conducting lotteries in sale of their said product as displayed and sold by retail purchasers thereof, in accordance with such plan or game of chance and in violation of public policy of the common law and criminal statutes and contrary to that of the United States Government;

With result that many dealers in and ultimate purchasers of such products were attracted by element of chance involved in sale thereof, and thereby induced to buy same, thus packed and sold, in preference to nuts or candy of competitors who are not willing to and do not offer and sell their products so packed, assembled or otherwise arranged as to involve game of chance and refrain therefrom, and with tendency and capacity thereby to divert to themselves trade and custom from competitors who do not use same or equivalent method, and to exclude from said trade all aforesaid unwilling competitors and lessen competition therein and create a monopoly of said trade in themselves and in such other distributors as use same or an equivalent method, and to deprive purchasing public of benefit of free competition in said trade and eliminate or exclude therefrom, as case may be, all actual or potential competitors who do not adopt and use such methods;

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

Mr. Henry C. Lank and Mr. P. C. Kolinski for the Commission.

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 Tosto Foods, Inc., a corporation, and William C. Mithoefer, an individual, hereinafter referred to as respondents, have been and are using unfair