

IN THE MATTER OF
RATHJEN BROS., INC.

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

Docket 3909. Complaint, Oct. 4, 1939—Decision, Feb. 29, 1940

Where a corporation engaged as rectifier and wholesaler of whiskies, gins, rum, brandy, and liquors in sale of its said merchandise to purchasers in the several other states and in the District of Columbia, in competition with others engaged in manufacture and distillation of whiskies, gins, and other alcoholic beverages who truthfully use word "distilling" or words of similar import or meaning as part of their corporate or trade name or on their stationery, labels and other advertising matter and with those engaged as wholesalers and distributors of such products who do not thus use said word or words—

Represented through use of word "distilling" in trade name employed by it on labels and letterheads that it was a distiller and that the whiskies, gins, and other alcoholic beverages offered by it and by it described by such statements as "Waldens Royal Toddy * * * manufactured by United States Distilling Company, etc.," "Waldens No. 100 Liqueur * * * Made by United States Distilling Company, etc.," "Old Braddock Brand * * * Bottled by United States Distilling Company," were by it made through process of distillation from mash, wort, or wash;

Notwithstanding fact it did not distill said various products sold and distributed by it as aforesaid nor operate or control any places where alcoholic beverages are manufactured by process of 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 wholesale and retail trade and by ultimate purchasing public, and it was not a distiller, for the purchase of the alcoholic liquors of which, direct, there is a preference on the part of a substantial portion of purchasing public as affording, in its belief, elimination of middleman's profit and other advantages;

With effect of misleading and deceiving members of purchasing public into erroneous and mistaken belief that it was distiller of the whiskies, gins, and other alcoholic beverages sold and distributed by it, and into the purchase of substantial quantities of said product because of such erroneous and mistaken belief, and with result that trade and commerce was diverted unfairly to it from its said competitors who do not falsely represent themselves as distillers of their respective products; to the substantial injury of competition in commerce:

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

Mr. Clark Nichols for the Commission.

Sefton & Quattrin, of San Francisco, Calif., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Rathjen Bros., Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Rathjen Bros., Inc., is a corporation organized and doing business under and by virtue of the laws of the State of California and having its office and principal place of business at 135 Berry Street in the city of San Francisco, State of California. Respondent is now, and has been for several years last past, engaged in the business of a rectifier and wholesaler of whisky, gin, rum, brandy, and liqueurs, which it sells under the trade name of United States Distilling Co. Respondent causes said products, when sold by it, to be transported from its place of business in the State of California to the purchasers thereof at their respective points of location in various States of the United States other than the State of California and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in commerce in said products among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its aforesaid business, respondent is now, and has been during all the times mentioned herein, in substantial competition with other corporations and with firms, individuals and partnerships engaged in the manufacture by distillation of whiskies, gin, rum, and other alcoholic beverages from mash, wort, or wash, and in the sale and distribution thereof in commerce among and between the various States of the United States and in the District of Columbia. In the course and conduct of its aforesaid business, respondent is now, and has been during all the times mentioned herein, in substantial competition with other corporations and with individuals, firms, and partnerships engaged in the business of rectifying, blending, and bottling whiskies, gins, and other alcoholic beverages and in the sale and distribution thereof in commerce among and between the various States of the United States and in the District of Columbia. In the course and conduct of its aforesaid business, respondent is now, and has been during all the times mentioned herein, in substantial competition with other corporations and with individuals, firms, and partnerships engaged in the business

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of selling and distributing whiskies, gins, and other alcoholic beverages in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its aforesaid business and in furtherance of the sale of said products, the respondent has made false and misleading representations that it is the distiller of the products which it sells and distributes as aforesaid. Among and typical of said false and misleading statements and representations appearing on labels attached to the containers of said products are the following:

WALDENS Royal Toddy,

contains rum and brandy and neutral spirits, manufactured by United States Distilling Company, San Francisco, California.
90 proof

WALDENS NO. 100 LIQUEUR

90 proof
Made by United States Distilling Company
San Francisco, California

OLD BRADDOCK BRAND

Straight Bourbon Whiskey
90 proof
Bottled by United States Distilling Company
San Francisco, California

OLD GLENDON Brand

90 proof
Straight Bourbon Whiskey
Bottled by United States Distilling Company
San Francisco, California

KENTUCKY MASTER

Kentucky Straight Bourbon Whiskey
Bottled by United States Distilling Company
San Francisco, California

KENTUCKY GRAND

Kentucky Straight Bourbon Whiskey
Bottled by United States Distilling Company
San Francisco, California

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BRIAR CLUB

90 proof

Straight Bourbon Whiskey

Bottled by United States Distilling Company

San Francisco, California

ACE HIGH

Special Reserve

90 proof

Straight Bourbon Whiskey

Bottled by United States Distilling Company

San Francisco, California

FORUM CLUB

Special Reserve

93 proof

Kentucky Straight Bourbon Whiskey

Bottled by United States Distilling Company

San Francisco, California

DON GALVEZ Brand

90%

Kentucky Straight Bourbon Whiskey

Bottled by United States Distilling Company

San Francisco, California

LORD BRIGHTON

Distilled Dry Gin

90 proof

Bottled by United States Distilling Company

San Francisco, California

BRIAR CLUB

85 proof

Distilled Dry Gin

Bottled by United States Distilling Company

San Francisco, California

BIRKSHIRE

90 proof

Distilled London Dry Gin

Bottled by United States Distilling Company

San Francisco, California

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PAR. 4. Through the use of the aforesaid statements and representations, including the use of the word "distilling" in respondent's trade name United States Distilling Company, and other statements and representations of similar import or meaning not herein set out, the respondent represents that it is a distiller and that said whiskies, gins, and other alcoholic beverages were manufactured by respondent through the process of distillation from mash, wort, or wash. In truth and in fact, respondent is not a distiller and does not distil the said whiskies, gins, and other alcoholic beverages sold and distributed by it as aforesaid. Respondent does not operate or control any place or places where alcoholic beverages are manufactured by a process of original and continuous distillation from mash, wort, and wash.

PAR. 5. The word "distilling" when used in connection with the liquor industry and with the products thereof has had, and now has, a definite significance in meaning to the minds of wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, the manufacturing of alcoholic 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 alcoholic liquors direct from the distilleries thereof in the belief that elimination of the middleman's profit and various other advantages may be obtained thereby.

PAR. 6. There are among the competitors of respondent described in paragraph 2 hereof, corporations, firms, and individuals who manufacture and distill from mash, wort, or wash as aforesaid, whiskies, gins, and other alcoholic beverages and who truthfully use the word "distilling" or other words of similar import or meaning as a part of their corporate or trade names or on their stationery, labels, or other printed matter. There are also among such competitors corporations, firms, and individuals engaged in the business of rectifying, blending, bottling, and selling whiskies, gins, and other alcoholic beverages and who do not use the word "distilling" or words of similar import or meaning as a part of their corporate or trade names or on their stationery, labels, or other advertising matter. There are also among such competitors of respondent, corporations, firms, and individuals engaged in business as wholesalers and distributors of whiskies, gins, and other alcoholic beverages and who do not use the word "distilling" or words of similar import or meaning as part of their corporate or trade names or on their stationery, labels, or other advertising matter.

PAR. 7. The use by the respondent of the aforesaid false and misleading statements and representations has the tendency and capacity

to, and does, mislead and deceive members of the purchasing public into the erroneous and mistaken belief that respondent is the distiller of the whiskies, gins, and other alcoholic beverages which it sells and distributes and into the purchase of substantial quantities of said products because of said erroneous and mistaken belief. As a direct result thereof, trade in commerce among and between the various States of the United States and in the District of Columbia has been diverted unfairly to the respondent from its said competitors who do not falsely represent that they are the distillers of their respective products. In consequence thereof, substantial injury is being and has been done by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on the 4th day of October 1939, issued and served its complaint in this proceeding upon the respondent, Rathjen Bros., Inc., 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 by respondent of its answer dated November 15, 1939, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts, 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 substitute answer, and the Commission having duly considered the matter, 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, Rathjen Bros., Inc., is a corporation organized and doing business under and by virtue of the laws of the State of California and having its office and principal place of business at 135 Berry Street in the city of San Francisco in the State of California. Respondent is now and has been for several years last past engaged in the business of a rectifier and wholesaler of whiskies, gins, rum, brandy, and liquors, a portion of which it sells under the trade name of United States Distilling Co.

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PAR. 2. The respondent, in the conduct of such business, has caused said merchandise when sold to be shipped to purchasers thereof located at various points in the several States of the United States other than the State from which said shipments are made, and in the District of Columbia.

PAR. 3. In the course and conduct of such business the respondent is and has been in competition with other persons and with corporations, firms, and partnerships, engaged in the manufacture and distillation of whiskies, gins, and other alcoholic beverages and who truthfully use the word "distilling" or words of similar import or meaning as a part of their corporate or trade names or on their stationery, labels, and other advertising matter. There are also among such competitors of respondent, corporations, firms, and individuals engaged in business as wholesalers and distributors of whiskies, gins, and other alcoholic beverages and who do not use the word "distilling," or words of similar import or meaning as part of their corporate or trade names or on their stationery, labels, or other advertising matter.

PAR. 4. In the course and conduct of its aforesaid business and in furtherance of the sale of said products, the respondent has made on its labels and its letterheads representations which would lead the purchasing public to believe that the respondent distills the whiskies, gins, and other alcoholic beverages which it sells. Among and typical of said statements and representations are the following:

WALDENS Royal Toddy,
contains rum and brandy and neutral spirits, manufactured by
United States Distilling Company, San Francisco, California.
90 proof

WALDENS NO. 100 LIQUEUR

90 proof
Made by United States Distilling Company
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Findings

KENTUCKY MASTER

Kentucky Straight Bourbon Whiskey
Bottle by United States Distilling Company
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Kentucky Straight Bourbon Whiskey
Bottled by United States Distilling Company
San Francisco, California

BRIAR CLUB

90 proof
Straight Bourbon Whiskey
Bottled by United States Distilling Company
San Francisco, California

ACE HIGH

Special Reserve
90 proof
Straight Bourbon Whiskey
Bottled by United States Distilling Company
San Francisco, California

FORUM CLUB

Special Reserve
93 proof
Kentucky Straight Bourbon Whiskey
Bottled by United States Distilling Company
San Francisco, California

DON GALVEZ Brand

90 %
Kentucky Straight Bourbon Whiskey
Bottled by United States Distilling Company
San Francisco, California

LORD BRIGHTON

Distilled Dry Gin
90 proof
Bottled by United States Distilling Company
San Francisco, California

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85 proof
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San Francisco, California

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BIRKSHIRE

90 proof

Distilled London Dry Gin

Bottled by United States Distilling Company

San Francisco, California

PAR. 5. Through the use of the aforesaid statements and representations, including the use of the word "Distilling" in respondent's trade name, United States Distilling Company, and other statements and representations of similar import or meaning not herein set out, the respondent represents that it is a distiller and that said whiskies, gins, and other alcoholic beverages were manufactured by respondent through the process of distillation from mash, wort, or wash. Respondent is not a distiller and does not distil the said whiskies, gins, and other alcoholic beverages sold and distributed by it as aforesaid. The respondent does not operate or control any place or places where alcoholic beverages are manufactured by a process of original and continuous distillation from mash, wort, and wash. The word "Distilling," when used in connection with the liquor industry and with the products thereof, has had and now has a definite significance in meaning to the minds of wholesalers and retailers in such industry and to the ultimate purchasing public, viz, the manufacturing of alcoholic liquors by an original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is complete. A substantial portion of the purchasing public prefers to buy alcoholic liquors direct from the distillers thereof in the belief that the elimination of the middleman's profit and various other advantages may be obtained thereby.

PAR. 6. The use by the respondent of the aforesaid false and misleading statements and representations has the tendency and capacity to and does mislead and deceive members of the purchasing public into the erroneous and mistaken belief that respondent is the distiller of the whiskies, gins, and other alcoholic beverages which it sells and distributes and into the purchase of substantial quantities of said products because of said erroneous and mistaken belief. As a direct result thereof, trade in commerce among and between the various States of the United States and in the District of Columbia has been diverted unfairly to respondent from its said competitors who do not falsely represent that they are distillers of their respective products. In consequence thereof substantial injury is being and has been done by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of the respondent Rathjen Bros., Inc., a corporation, are all to the prejudice of the public and to respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of the respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that it waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Rathjen Bros., Inc., a corporation, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of whiskies, gins, and other alcoholic beverages in interstate commerce or in the District of Columbia do forthwith cease and desist from:

1. Using the word "Distilling" on the labels of any of its products, on its letterheads, or any other form of advertising matter, or in its corporate or trade name, or any other word or words of similar import or meaning, unless and until it is actually engaged in the manufacture of such alcoholic beverages by an original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is complete.

2. Representing, through the use of the word "Distilling" on its stationery, advertising, or on the labels attached to the bottles in which it sells and ships said products, or in any way by a word or words of like import, (a) that respondent is a distiller of the said whiskies, gins, or other alcoholic beverages; or (b) that the said whiskies, gins, or other alcoholic beverages were manufactured by it through a process of distillation; or (c) that respondent owns, operates, or controls a place or places where such products are 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 complete, unless and until respondent actually owns, operates, or controls such a place or places.

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It is further ordered, That the respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

Syllabus

IN THE MATTER OF

UNIVERSAL STUDIOS, INC., AND HARRY I. SMITH,
SANDER R. SMITH, AND LORRAINE H. SMITH

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

Docket 3684. Complaint, Jan. 6, 1939—Decision, Mar. 1, 1940

Where a corporation and two individuals, partners and former incorporators and shareholders thereof, and successors to business thereof, engaged, with studios in several cities, in mail order photography and in sale and distribution of photographs in commerce among the various States, and in causing their said product, when sold, to be transported from their finishing office and principal place of business to purchasers in various other States, in substantial competition with others also engaged in sale of photographs in commerce as aforesaid;

In carrying on their aforesaid business under practice by which (1) they sent advance agent or crew manager to various towns in proposed itinerary to distribute to various local merchants, for distribution free of charge to latter's customers, free coupons giving such customers opportunity to acquire photographs of themselves for 59 cents or 69 cents, as case might be, upon presentation of coupon on specified date and place, at which time and place employee photographer and assistant photographed those presenting coupon and paying amount called for, (2) negatives were shipped by photographer to their said place of business and developed, and (3) proofs were mailed to employee-salesman or "proof-passer", who made appointments with customer for selection of proof desired and attempted to sell each as many photographs additional as possible, (4) coloring of photograph was done at said office and finishing studio, and (5) advance agent and "proof-passer" salesman were compensated on commission basis wholly and in accordance with sittings and photographs sold—

- (a) Represented and described as "hand painted" or "paintings" colored or tinted photographs or photographic enlargements thus offered and called for, and applied thereto such terms as "portraits in oil colors," "oil portraits," "gold tone oil paintings," and "oil colored portraits," facts being products in question were not paintings or, in ordinarily accepted meaning, or likeness, image, or scene depicted with paints and without photographic aid, nor portrait or picture of person drawn from life, nor likeness or oil painting done by hand with brushes in plastic oil colors on canvas or other material without such aid, but photographic enlargements of small negatives, tinted or colored by cotton or paper swab and smearing of transparent oils over uncolored original; and
- (b) Represented that so-called "portraits" or "paintings" offered and described in coupons distributed as above set forth, had value of \$5.00 and were offered for 59 cents or 69 cents, as case might be, together with certificate represented as being worth \$4.41, and entitling holder to one of their regular "\$5.00 Oil Portraits," facts being said tinted enlargements did not have any such value, were not reasonably worth more than 59 cents or 69 cents paid therefor by customer, products in question were usually and customarily sold for said amounts, and advertising coupons did not have value of \$4.41 or any such