

IN THE MATTER OF
WHITEWATER BREWING COMPANY, AND ALEX WEIN-
GART, INDIVIDUALLY AND AS MANAGER THEREOF

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

Docket 4188. Complaint, July 13, 1940—Decision, Dec. 3, 1941

Where a corporation with principal place of business in Whitewater, Wis., and the manager of its Chicago warehouse and branch office, who directed and controlled its acts, policies and practices; engaged in the brewing and competitive interstate sales and distribution of its "Cream Top" beer and also in bottling, labelling and selling half gallon bottles of its "Badger" beer, brewed by a Chicago concern which delivered it in barrels to said corporation at its Chicago branch, and itself bottled and labelled all other cans and bottles of such "Badger" beer—

Made use of depiction of a badger holding a plaque on which appeared an outline of the State of Wisconsin and the word "Wisconsin" and in large type the words "Badger Beer" and "The Pride of Wisconsin", on placards distributed by them for use in the sale of their "Badger" beer, and employed similar depictions on labels on bottles and containers, and on which also appeared name and Wisconsin address of said corporation but not the words "The Pride of Wisconsin"; and subsequently made use on placards, window streamers, cards and labels of depictions of a badger, words "Badger Beer" in large type, and corporate name and Wisconsin address, along with, in the most recent labels, in much smaller and less conspicuous type, "Bottled by Chicago Branch", etc., and in very small type, the words "Brewed by Manhattan Brewing Co., Chicago, Ill."; and upon letterheads employed by it for a time displayed aforesaid depiction of the badger together with its name and Wisconsin address, while failing, in invoices of "Badger beer, containing its said name and address, to make any reference to such Chicago brewing company or the fact that said beer was not brewed by them;

When in fact, as above indicated, the beer in question was not brewed in the State of Wisconsin, law of which imposes certain requirements with respect to brewing not found in other States and beer of which State is markedly preferred by a substantial portion of the purchasing public as superior, in their belief, to beer brewed elsewhere;

(With effect of causing a substantial portion of the purchasing public to believe that such beer was brewed in Wisconsin, with result that substantial quantities thereof were purchased by it and trade was unfairly diverted to them from competitors who do not misrepresent the place of origin of their product; to the substantial injury of competition in commerce:

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

Before *Mr. Charles A. Vilas*, trial examiner.
Mr. DeWitt T. Puckett for the Commission.

Mr. Herbert J. Patrick of *McHale, Arthur & Myers*, of Indianapolis, Ind., for respondents.

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 Whitewater Brewing Co., a corporation, and Alex Weingart, individually and as manager of Whitewater Brewing Co., hereinafter referred to as respondents, have violated the provisions of the 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, Whitewater Brewing Co., a corporation organized under the laws of the State of Wisconsin, is now and for more than 3 years last past has been engaged in the brewing and in the sale and distribution of beer, with its brewery and principal office located at 200 North Jefferson Street, Whitewater, Wis. Respondent also maintains a warehouse and branch office at 2150 South Western Avenue, Chicago, Ill.

Respondent, Alex Weingart, an individual, likewise is now and for more than 3 years last past has been engaged in the sale and distribution of beer, with his principal office and place of business located at 2150 South Western Avenue, Chicago, Ill. Said respondent is associated with the respondent Whitewater Brewing Company in the sale and distribution of beer, and is manager of the Chicago office and warehouse of said Whitewater Brewing Co. The said Alex Weingart directs, controls, and dominates the acts, policies, and practices of the corporate respondent with respect to that phase of the business of the corporate respondent herein referred to.

The respondents have acted in conjunction and cooperation with each other in carrying out the practices and methods hereinafter set forth.

In the course and conduct of their business as aforesaid respondents cause and for more than 3 years last past have caused their said product, when sold, to be transported from their respective places of business in the States of Wisconsin and Illinois to the purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained a course of trade in their said product in commerce between and among the various States of the United States and in the District of Columbia.

Complaint

34 F. T. C.

PAR. 2. The respondents are now and at all times mentioned herein have been in substantial competition with other corporations and individuals and with firms and partnerships engaged in the sale and distribution of beer in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. Among the various brands of beer sold and distributed by the respondents as aforesaid, is a brand known as the "Badger" brand. The respondents cause and have caused to be attached to the containers in which said beer is displayed and sold to the public labels bearing the picture of a badger and the legend: "Badger Beer, Whitewater Brewing Co., Whitewater, Wis." Representations of a similar nature have also been made by the respondents by means of window displays and by leaflets distributed among prospective purchasers.

Other advertising material which has been used by the respondents featured a picture of a badger holding a plaque on which appeared an outline of the State of Wisconsin with the word Wisconsin written across the outline. The respondents have also used on certain of their advertising material the legend "The Pride of Wisconsin." The badger is one of the emblems of the State of Wisconsin and the State is generally known and frequently referred to as the "Badger State."

PAR. 4. The use by the respondents of the aforesaid words, legends and pictures in connection with their said product, without any accompanying words sufficiently disclosing the correct origin of said product, has the tendency and capacity to cause the purchasing public to believe that said beer is brewed in the State of Wisconsin. In truth and in fact said beer is not brewed in Wisconsin but is brewed in the city of Chicago, Ill., by a brewing concern located in that city and is purchased by the respondents from such concern.

PAR. 5. There is a marked preference on the part of a substantial portion of the purchasing public for beer brewed in the State of Wisconsin, such preference being due in part to a belief on the part of the public that such beer is superior in quality to beer brewed elsewhere. Contributing to such belief is the fact that there exist in the State of Wisconsin certain statutory requirements with respect to the brewing of beer which do not obtain in other States.

PAR. 6. Among the competitors of respondents referred to in paragraph 2 hereof are many who do not misrepresent the place of origin of their products.

PAR. 7. The use by the respondents of the acts and practices herein set forth has the tendency and capacity to and does mislead and deceive a substantial portion of the purchasing public into an erroneous and mistaken belief as to the place of origin of respondents' product and into the purchase of substantial quantities of said product because of

such erroneous and mistaken belief. In consequence trade has been diverted unfairly to the respondents from their competitors, with the result that substantial injury has been done and is being done by respondents to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 8. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice and injury of the public and of respondents' 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on July 13, 1940, issued and thereafter served its complaint in this proceeding upon the respondents, Whitewater Brewing Co., a corporation, and Alex Weingart, individually and as Manager of respondent corporation, charging them with unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of the provisions of said act. After the issuance of the complaint and the filing of respondents' answer, evidence in support of the allegations of the complaint was introduced by DeWitt T. Puckett, attorney for the Commission, and testimony in opposition to the complaint was introduced by Herbert J. Patrick, attorney for respondents, and a stipulation as to the facts was entered into between said attorneys, before Charles A. Vilas, a duly appointed trial examiner of the Commission designated by it to serve in this proceeding. The testimony and other evidence introduced and the stipulation as to the facts were duly recorded and filed in the office of the Commission. Thereafter, the proceedings regularly came on for final hearing before the Commission upon the complaint, the answer thereto, the testimony and other evidence, the stipulation as to the facts, the report of the trial examiner and exceptions thereto, briefs filed by the attorney for the Commission and the attorney for respondents, and oral argument. 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. Respondent, Whitewater Brewing Co., is a corporation, organized under the laws of the State of Wisconsin, with its

Findings

34 F. T. C.

principal place of business located in Whitewater, Wis. Respondent also maintains a warehouse and branch office in Chicago, Ill.

PAR. 2. Respondent, Alex Weingart, is an individual, having his principal office and place of business in Chicago, Ill., and is manager of the Chicago office and warehouse of the corporate respondent; he directs, controls, and dominates the acts, policies, and practices of the corporate respondent with respect to the business affairs of the corporation as hereinafter set out.

PAR. 3. Respondent, Whitewater Brewing Co., since 1934, has been engaged in the brewing and in the sale and distribution of beer known as "Cream Top" beer, and in the sale and distribution of a beer known as "Badger" beer. In the course and conduct of their business as herein described, respondents cause and for more than 3 years last past have caused their said products, when sold, to be transported from their places of business in the States of Wisconsin and Illinois to the purchasers thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in their said products in commerce between and among various States of the United States.

PAR. 4. Respondents are now, and at all times mentioned herein have been, in substantial competition with other corporations, individuals, firms, and partnerships engaged in the sale and distribution of beer in commerce between and among various States of the United States.

PAR. 5. The beer sold and distributed by respondents known as "Badger" is not brewed by respondents, or either of them, but is and at all times has been brewed by the Manhattan Brewing Co., at its brewery located in the city of Chicago, State of Illinois, and is purchased by respondents from said concern. The beer sold by respondent under the brand "Badger" is sometimes delivered in barrels at the Chicago place of business of respondent corporation, and in case of the half gallon bottles it is bottled and labeled by the respondents in their Chicago place of business. All other cans and bottles of "Badger" beer are bottled and labeled by the Manhattan Brewing Co., at Chicago, Ill.

The respondents have acted in conjunction and cooperation with each other in carrying out the practices and methods hereinafter set forth.

PAR. 6. Prior to December 16, 1937, but not after that date, respondents, in connection with the sale of "Badger" beer distributed placards to be used in connection with its sale, on which placard is

depicted a badger holding a plaque on which appears an outline of the State of Wisconsin and the word "Wisconsin," and in large type the words "Badger Beer" and "The Pride of Wisconsin."

During the year 1938, respondents, in the manner aforesaid, distributed placards upon which appeared the picture of a badger and, in large type, "Badger Beer" and "Whitewater Brewing Co., Whitewater, Wis."

Respondents also distribute, in the manner aforesaid, window streamers advertising their product. On said streamer is depicted a badger and in large type the words "Badger Beer." These streamers are now in current use.

On a carton currently used by respondents in shipping their "Badger Beer" appears in large type, "Badger Beer, Whitewater Brewing Co., Whitewater, Wis."

On one of the placards in current use by respondents is depicted a badger, and in very large type are the words, "Badger Beer."

Prior to December 16, 1937, but not since said date, the labels used by respondents on the bottles and containers depicted a badger holding a plaque on which appeared an outline of the State of Wisconsin and the word "Wisconsin," and in large letters, "Badger Beer" and "Whitewater Brewing Co., Whitewater, Wis."

On the label used by respondents subsequent to December 16, 1937, and up to about June 1939, is depicted a badger, and in large type, "Badger Beer" and "Whitewater Brewing Co., Whitewater, Wis."

On the labels used by respondent since about June 1939, and in current use by them on the half-gallon bottles, is depicted a badger, and in large type, "Badger Beer, Whitewater Brewing Co., Whitewater, Wis.," while near the bottom of the label, in much smaller and less conspicuous type, are the words, "Bottled by Chicago Branch, 2150 Southwestern Avenue, Chicago, Ill.," and on the extreme right-hand margin, so indistinct as to be hardly discernible, are the words, "Brewed by Manhattan Brewing Co., Chicago, Ill."

On another label used by respondents since about June 1939, is depicted a badger and in large type are the words "Badger Beer, Whitewater Brewing Co., Whitewater, Wis.," and in very small type, "Brewed and bottled by Manhattan Brewing Co., Chicago, Ill."

On another label in current use by respondents on the half-gallon bottles where the beer is bottled by the Manhattan Brewing Co. is depicted a badger, and in large type, "Badger Beer, Whitewater Brewing Co., Whitewater, Wis.," and in small type and hardly discernible, on the extreme right-hand margin of the label are the words, "Brewed and bottled by Manhattan Brewing Co., Chicago, Ill."

Another label now used by respondent depicts a badger, and in large type appear the words, "Badger Beer," and in heavy and fairly large type the words, "Whitewater Brewing Co., Whitewater, Wis.," and in much smaller and lighter type are the words, "Brewed and bottled by Manhattan Brewing Co., Chicago, Ill."

The invoices used by respondents in connection with their sale of "Badger Beer" contain the corporate respondent's name and address, but do not contain any reference to the Manhattan Brewing Co., nor do they indicate that this beer is not brewed by the respondents.

A typewritten communication addressed to the Commission, under date of May 6, 1938, is on a letterhead of the corporate respondent, upon which is depicted a badger holding a plaque on which appears an outline of the State of Wisconsin and the word "Wisconsin," and the word "Badger" and respondent's name and address. It was stipulated that this letter was inadvertently used and that this style of letterhead has not been in use by respondents since December 16, 1937, except as scratch paper.

PAR. 7. The use by respondents of the phrase or designation, "The Pride of Wisconsin" and the plaque containing an outline of the State of Wisconsin with the word "Wisconsin," as set forth in paragraph 6 hereof, has the tendency and capacity to cause the purchasing public to believe that respondents' beer known as "Badger Beer" is brewed in the State of Wisconsin, when in fact it is not so brewed, but is brewed in the city of Chicago, State of Illinois, by the Manhattan Brewing Co., from whom it is purchased by respondents. The Commission finds that it is not feasible to select qualifying words for use with these representations which will be effective to eliminate the deception caused by such representations.

PAR. 8. The badger is an emblem of the State of Wisconsin and that State is generally known and referred to as "the Badger State." The use by respondents, as set forth in paragraph 6 hereof, of the word "Badger," and the depiction of a badger without accompanying words sufficiently disclosing the character and origin of their product known as "Badger Beer," or where any such explanatory words are so inconspicuously placed and so indistinct as to be almost imperceptible, has the tendency and capacity to cause the purchasing public to believe that respondents' "Badger Beer" was brewed in the State of Wisconsin, when in fact said beer is not so brewed; but is brewed in the city of Chicago, Ill.

PAR. 9. There is a marked preference on the part of a substantial portion of the purchasing public for beer brewed in the State of Wisconsin, such preference being due in part to the belief on the part of

Order

the public that such beer is superior in quality to beer brewed elsewhere. Contributing to such belief is the fact that there exists in the State of Wisconsin certain statutory requirements with respect to the brewing of beer which do not exist in other States.

PAR. 10. Among the competitors of respondents referred to in paragraph 4 hereof are many who do not misrepresent the place or origin of their products.

PAR. 11. The acts and practices of respondents as herein set forth have the tendency and capacity to, and do, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that respondents' "Badger" brand beer is brewed in Wisconsin, and because of such erroneous and mistaken belief, substantial quantities of said product have been purchased by the public, and trade has been thereby unfairly diverted to respondents from competitors who do not misrepresent the place of origin of their product, with the result that substantial injury has been and is being done by respondents to competition in commerce between and among various States of the United States.

CONCLUSION

The aforesaid acts and practices of the respondents are all to the prejudice and injury of the public and of respondents' 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, the answer of respondents, the testimony and other evidence, the stipulation as to the facts, the report of the trial examiner and exceptions thereto, briefs filed by the attorney for the Commission and by the attorney for respondents, and oral arguments, and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act:

It is ordered, That respondent Whitewater Brewing Co., a corporation, its officers, directors, representatives, agents, and employees, and respondent Alex Weingart, individually and as manager of respondent corporation Whitewater Brewing Co., jointly or severally, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of their "Badger" beer, or any other

beer not brewed in Wisconsin, in commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from—

1. The use of the term "Pride of Wisconsin," or of an outline of the State of Wisconsin, or any other term, symbol, or representation indicating or implying that said beer is brewed in Wisconsin;

2. The use of the word "Badger," or any depiction of a badger, to designate or describe said beer when or if accompanied by any word, picture, or designation which indicates or implies that the beer so designated is brewed in Wisconsin, provided, however, that this provision shall not apply to the use of the word "Wisconsin" to designate or describe an address of the respondents in the State of Wisconsin if qualified as provided in paragraph 3 hereof;

3. The use of the word "Wisconsin" in any way to refer to, designate, or describe said beer, or the use of such word in connection with any such designation or description unless such word is used only as part of respondents' address in the State of Wisconsin and there is stated in immediate conjunction with respondents' name and address, in letters of equal size and conspicuousness, the locality wherein said beer is brewed or that said beer is not brewed in the State of Wisconsin;

4. Representing in any manner that beer which is not brewed in Wisconsin is brewed in Wisconsin.

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

Syllabus

IN THE MATTER OF
CHOCOLATE PRODUCTS COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4371. Complaint, Nov. 8, 1940—Decision, Dec. 4, 1941*

Where a corporation engaged in the manufacture, and in the interstate sale and distribution of a chocolate syrup product, formerly called "Stillicious Vitamin A, B, D" and thereafter "Stillicious Vitamin," allegedly containing vitamins A, B, D, and G, to wholesalers and retailers in small cans or containers for resale to public, and in large quantities to dairies which made use thereof in making bottled chocolate drinks sold to the public under the trade name "Stillicious," pursuant to agreements with said corporation; directly or by implication—

Represented that said chocolate drinks made by dairies, were made with milk, and that its product, because of its vitamin A content, helped to build resistance to colds and infection, through such advertising as "MY Goodness [picture of cow head] MORE Vitamin B. STILLICIOUS Vitamin B. Chocolate Contains Dextrose and Levulose [picture of milk bottle and glass, both with 'Stillicious' thereon]," "And now, with Stillicious Vitamin A, B, D Chocolate Syrup, we offer today's big Vitamin bargain. A 20-oz. tin * * * contains an extra supply of Vitamin A to help build resistance to colds and infection";

The facts being the chocolate beverage in question did not contain milk as understood by the purchasing public, i. e., milk from which no part of the cream had been removed, but contained skim milk or a mixture of whole and skim milk, and its said products did not help build resistance to colds or infection, even in exceptional cases involving a recognizable deficiency of vitamin A, quantity of which in its product was insufficient to overcome such deficiencies or afford any substantial assistance in building resistance to colds or infection;

With effect of misleading and deceiving a substantial portion of the purchasing public with respect to the properties of said product and the content of beverages made therewith, and thereby inducing it to purchase substantial quantities of said product and beverages made therefrom, and with further effect of placing in the hands of uninformed or unscrupulous dealers and dairies means and instrumentalities whereby they were enabled to mislead and deceive the public;

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

Before *Mr. Andrew B. Duvall*, trial examiner.

Mr. Maurice C. Pearce and *Mr. John M. Russell* for the Commission.

Mr. John B. Hosty, of Chicago, Ill., for respondent.