

IN THE MATTER OF

MANHATTAN BREWING COMPANY

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

Docket 4572. Complaint, Aug. 20, 1941—Decision, Sept. 7, 1943

Where a corporation, engaged at Chicago in the brewing of ale and beer, including its "Canadian Ace Brand Beer" and "Canadian Ace Brand Ale," and for a time its "Old Wisconsin Lager Brand Beer," and in competitive interstate sale and distribution of its products to wholesalers and retailers, restaurants, taverns, and other purchasers—

- (a) Featured the word "Canadian" or the words "Canadian Ace" in extensively advertising said brand of beer and ale in point-of-sale advertising—supplied to retailer for display or distribution to the public, including menu covers and sheets, table display cards, place cards and coasters, paper table napkins, leaflets, booklets; and large show window placards—and also, to a limited extent, in radio advertising and in a trade journal, and featured said words likewise in labels on bottles or other containers in which its said beer was packaged and sold;

The facts being, its said products were not, as thus represented, imported Canadian brewed, preferred by a substantial portion of the purchasing public over such products brewed in the United States, particularly so in those states nearest Canada, but, like its other products, were brewed in Chicago; and inconsistent and contradictory legends "Made in U. S. A.," and in small type "Brewed and Bottled by Manhattan Brewing Co., Chicago, Illinois" later displayed on its labels and in some advertising, were incapable of explaining or qualifying word "Canadian" so as to prevent deception or confusion in the minds of the public; and

- (b) Falsely represented, through use of word "Wisconsin" as a part of one of its aforesaid brand names, that its Chicago-made product was a Wisconsin brewed beer, preferred by a substantial portion of the purchasing public over beers originating in other States; and
- (c) Falsely represented for a time that it was a Royal Warrant holder enjoying the patronage of the British Royal family or some member thereof, and therefore entitled to display the British Royal coat of arms on its products, through use, in connection with sale of its said Canadian Ace Brand Beer and Ale, of a crest simulating said royal coat of arms, and through displaying same also on the labels of the bottles involved;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public in aforesaid respects, and with result of causing it to purchase substantial quantities of products in question as a result of said erroneous belief; whereby trade was diverted unfairly to it from its competitors, many of whom did not use aforesaid practices and methods:

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

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

Mr. DeWitt T. Puckett for the Commission.

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McHale, Arthur, Myers & Patrick, of Indianapolis, Ind., 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 Manhattan Brewing Co., a corporation, hereinafter referred to as respondent, has 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, Manhattan Brewing Co., is a corporation, organized under the laws of the State of Illinois, is now and for several years last past has been engaged in the brewing and in the sale and distribution of beer and ale, with its brewery and principal office located at 3901 Emerald Avenue, Chicago, Ill.

In the course and conduct of its business as aforesaid, respondent causes and for several years last past has caused its said product, when sold, to be transported from its said place of business in Chicago, Ill., to the purchasers thereof located in various States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce between and among the various States of the United States and in the District of Columbia.

The respondent is now, and at all times mentioned herein has been, in substantial competition with other corporations, and with partnerships and individuals engaged in the sale and distribution of beer and ale in commerce between and among the various States of the United States and in the District of Columbia. Among said competitors are many who do not use the acts, practices, and methods hereinafter alleged.

PAR. 2. In the course and conduct of its business as aforesaid, the respondent has represented and now represents in newspaper advertising circulated among prospective purchasers of its said products, located in the various States of the United States, by means of labels attached to the containers in which its products are offered for sale and sold, by means of placards, napkins, menus, and in various other ways, that some of its beer and ale is imported from Canada and that other of its said products are brewed in the State of Wisconsin. Among and typical of the advertising statements and representations used and disseminated as aforesaid are the following:

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In "The News," a newspaper published in Elmira, N. Y., the following advertisement appeared:

ELMIRA
HAS IT AT LAST!

Your Restaurant Has It!
Your Club and Cafe Serve It!

Your Hotel Has It!
Your Package Store Has It!
Your Home Should Have It!

CANADIAN
Ace Brand
ALE
Extra Pale

(Picture of bottle showing label)

Substantially the same advertisement appeared in the "Boston Daily Record," a newspaper published in the city of Boston, Mass., and substantially the same advertisement concerning respondent's "Canadian Ace Brand Beer" appeared in the "Beer Distributor," a trade publication circulated throughout the United States.

A placard used by respondent in advertising its "Canadian Ace Beer" contains the following:

The Symbol of the Finest Beer

CANADIAN ACE

Beer Brings You

An Outstanding Superiority in Drinking Enjoyment!

All the goodness of choice ingredients plus the skill of expert blending produced Canadian Ace Beer.

Enjoy the uniform, subtle smoothness and delicious flavor of a prime beverage "brewed to your taste"—

Convince yourself by trying a bottle today.

On the reverse side of the placard appears the following:

Get my Companion by Buying

CANADIAN

ACE BEER

The Good Companion for Beer Enjoyment

(Picture of beer bottle which shows in large letters "Canadian Ace Beer" and in small letters the word "Brand".)

On the main or large label affixed to the bottles in which one of respondent's beers is offered for sale and sold is the statement "Old Wisconsin Brand Lager Beer," the word "Brand" being in letters about

half the size of the other words in the statement. The neck label used on said bottle contains only the words "Old Wisconsin."

On the label attached to the bottle in which another of respondent's beers is offered for sale and sold appear the words "Canadian Beer." Diagonally across the bottom of said label appears the word "Imported" followed by the word "Hops" in much smaller and less conspicuous print. The same phraseology appears on the sticker around the neck of said bottle.

Affixed to the bottles in which other of respondent's products are offered for sale and sold appear the expressions "Canadian Ace Brand Ale" or "Canadian Ace Brand Beer." In every instance in which the word "Canadian" appears said word is featured by appearing in bolder type and in the most conspicuous place on the labels or advertising matter.

Table napkins and menus distributed by respondent bear some or all of the above expressions, pictures, and designs.

PAR. 3. Through the use of the aforesaid representations and others of similar import not specifically set out herein, the respondent represents and has represented, directly or by implication, that some of its aforesaid products are imported from the Dominion of Canada and that other of its said products are brewed in the State of Wisconsin. In truth and in fact, respondent's aforesaid products were not and are not imported from the Dominion of Canada or brewed in the State of Wisconsin.

PAR. 4. There is a marked preference on the part of a substantial portion of the purchasing public for beer and ale imported from the Dominion of Canada. There is likewise a marked preference on the part of a substantial portion of the purchasing public for beer and ale brewed in the State of Wisconsin. Such preference is based in part on a belief by said purchasing public that such beer and ale are superior in quality to beer and ale brewed elsewhere.

PAR. 5. A picture of a crest or coat of arms closely resembling the British Royal coat of arms appears in some of respondent's advertising matter used in connection with the sale of its beer and ale as aforesaid.

There is a preference on the part of a portion of the purchasing public for merchandise bearing the British Royal coat of arms. Such preference is based upon a belief that the manufacturer or distributor of such merchandise is a Royal warrant holder and enjoys the patronage of the British Royal family or a member thereof.

PAR. 6. The use by the respondent of the aforesaid words, legends, pictures, and designs, in connection with the sale of its said products, has the capacity and tendency to cause, and has caused, a substantial portion of the purchasing public erroneously to believe that some of

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respondent's said products are imported from the Dominion of Canada and that other of its said products are brewed in the State of Wisconsin. Furthermore, the use by respondent of the aforesaid coat of arms, in the manner set forth above, has the capacity and tendency to cause, and has caused, a substantial portion of the purchasing public erroneously to believe that said respondent is a Royal warrant holder and entitled to use the British coat of arms. As a result of the aforesaid acts and practices, a substantial portion of the purchasing public has been misled and deceived and trade has been diverted unfairly to the respondent from its competitors with the result that substantial injury has been done and is being done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 7. The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair methods of competition 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 August 20, 1941, issued and subsequently served its complaint in this proceeding upon the respondent, Manhattan Brewing Company, a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of that act. After the filing of respondent's answer, a hearing was held before a trial examiner of the Commission theretofore duly designated by it, for the purpose of receiving such testimony and other evidence as might be offered in support of the allegations of the complaint or in opposition thereto. At such hearing, held on May 7, 1942, respondent through its attorney asked leave to withdraw its answer theretofore filed and to substitute therefore an answer admitting all of the material allegations of fact set forth in the complaint and waiving all intervening procedure and further hearing as to the facts, such proposed substitute answer being dictated into the record. On June 22, 1942, the Commission entered its order granting respondent's request for permission to withdraw its original answer and to file such substitute answer. Thereafter, the proceeding came on for hearing before the Commission on the complaint and substitute answer, and the Commission, having heard and duly considered the matter, on July 6, 1942, issued its findings as to the facts and its order requiring respondent to cease and desist from the practices charged in the complaint.

Thereafter, on July 24, 1942, respondent filed a motion setting forth that such substitute answer had been filed under a misapprehension by respondent with respect to the nature and extent of the order to cease and desist which would be issued by the Commission, and requesting that such order be modified by striking certain portions thereof. On August 17, 1942,¹ the Commission, having considered such motion, entered its order vacating and setting aside such findings as to the facts and order to cease and desist, and directing that respondent's substitute answer be stricken from the record, with leave to respondent to file a new answer to the complaint. On September 7, 1942, respondent filed its new answer, and thereafter hearings were held before the trial examiner at which testimony and other evidence in support of the allegations of the complaint were introduced by the attorney for the Commission and in opposition thereto by the attorney for the respondent. Thereafter, the matter again came on for hearing before the Commission on the complaint, the new answer of respondent, testimony and other evidence, report of the trial examiner upon the evidence and the exceptions to such report, briefs in support of and in opposition to the complaint, and oral argument; and the Commission, having duly considered the matter and being 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, Manhattan Brewing Co., is a corporation, organized under the laws of the State of Illinois, with its principal office and place of business located at 3901 Emerald Avenue, Chicago, Ill. Respondent is now and for a number of years last past has been engaged in the brewing of beer and ale, and in the sale and distribution of such products to wholesale and retail dealers, restaurants, taverns, and other purchasers.

PAR. 2. In the course and conduct of its business respondent causes and has caused its products, when sold, to be transported from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States. Respondent maintains and has maintained a course of trade in its products in commerce among and between various States of the United States.

PAR. 3. Respondent is and at all times mentioned herein has been in substantial competition with other corporations and with partnerships and individuals engaged in the sale and distribution of beer and ale in commerce among and between various States of the United States.

¹ See 35 F. T. C. 828.

PAR. 4. Among the various brands of beer and ale brewed and sold by respondent is a beer designated by respondent as "Canadian Ace Brand Beer" and an ale designated by respondent as "Canadian Ace Brand Ale." The beer was placed on the market in 1939 and the ale in the early part of 1941. Respondent formerly sold another brand of beer designated by it as "Old Wisconsin Lager Brand Beer." This beer was placed on the market in September 1939, but was discontinued in the spring of 1941.

PAR. 5. Respondent advertises its Canadian Ace Brand beer and ale extensively, most of the advertising being what is known as point-of-sale advertising, that is, advertising supplied to the retail seller for display or distribution to the public. The various advertising media used include menu covers and sheets, table display cards, place cards and coasters, paper table napkins, leaflets, booklets, and large show window placards. Radio advertising has also been employed to a limited extent, and at least one advertisement was inserted in a trade journal having general circulation among beer distributors. In all of this advertising the word "Canadian" or the words "Canadian Ace" have been featured. These words are also featured in the labels on the bottles or other containers in which the beer is packaged and sold.

PAR. 6. The Commission finds that the use by respondent of the word "Canadian" as a part of the brand or trade name for these products constitutes a representation that the products are of Canadian origin, that is, that they are brewed in the Dominion of Canada and imported into the United States. Not only does this conclusion necessarily result from a consideration of the word itself, but it is supported also by the testimony of a number of witnesses at the hearings, including both persons in the trade and members of the purchasing public. Neither the beer nor the ale is in fact brewed in Canada, both being brewed by respondent at its place of business in Chicago along with various other products. The evidence further shows, and the Commission finds, that there is a preference on the part of a substantial portion of the purchasing public for beer and ale which is brewed in Canada over that brewed in the United States, this preference being found particularly in those States of the United States which lie nearest the Dominion of Canada.

PAR. 7. Early in 1940 respondent began placing on its labels the words "Made in the U. S. A.," these words appearing at the lower right-hand corner of the label and being imprinted in white on a red background. In the lower left-hand corner of the label there appear in small type the words "Brewed and Bottled by Manhattan Brewing Co., Chicago, Illinois." Also in some of its advertising material re-

spondent has inserted certain expressions such as "Made in the U. S. A.," and "An American beer in the best Canadian tradition." Some of the advertising also carries a picture of the bottle showing the current label.

It is urged by respondent that the use of these words on the labels and in the advertising, particularly the use on the labels of the words "Made in the U. S. A.," is sufficient to correct any erroneous impression which might otherwise be conveyed through the use of the word "Canadian," and that in consequence, there is no deception of the public. The Commission is of the opinion, however, and finds that these legends are inconsistent with and contradictory of the word "Canadian," and that therefore they are incapable of explaining or qualifying the word so as to prevent deception or confusion in the mind of a substantial portion of the public.

PAR. 8. The Commission finds further that the former use by respondent of the word "Wisconsin" as a part of the brand name for one of its products constituted a representation that the beer so designated was brewed in the State of Wisconsin. This beer was not in fact brewed in Wisconsin but was brewed by respondent at its place of business in Chicago. There is a preference on the part of a substantial portion of the purchasing public for beer which is brewed in Wisconsin over that having its origin in other States of the United States.

PAR. 9. In connection with the sale of its Canadian Ace Brand beer and ale, respondent has also made use of a crest simulating the British Royal coat of arms, such crest being displayed both in certain of respondent's advertising material and in the labels of the bottles. The use of this crest constituted a representation that respondent was a Royal warrant holder, enjoying the patronage of the British Royal Family or some member thereof, and was therefore entitled to display the British Royal coat of arms on its products. Respondent has not at any time been a Royal warrant holder and was not authorized to make use of such crest. There is a preference on the part of a substantial portion of the purchasing public for merchandise bearing the British Royal coat of arms. In 1942 respondent made material changes in the crest, with the result that the similarity between the crest and the British Royal coat of arms was eliminated.

PAR. 10. The Commission finds further that the use by respondent of the word "Canadian" and the word "Wisconsin" in designating and describing its products, and the use of the crest simulating the British Royal coat of arms, as herein set forth, has or has had the tendency and capacity to mislead and deceive a substantial portion of the pur-

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chasing public with respect to the origin of such products and with respect to respondent's business identity and status, and the tendency and capacity to cause such portion of the public to purchase substantial quantities of respondent's products as a result of the erroneous and mistaken belief so engendered. In consequence thereof, substantial trade has been diverted unfairly to the respondent from its competitors, among whom are many who do not use the practices and methods herein described.

CONCLUSION

The acts and practices of the respondent as herein found are all 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 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 respondent, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and the exceptions to such report, briefs in support of and in opposition to the complaint, and oral argument; and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent, Manhattan Brewing Co., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of respondent's beer and ale in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using any brand or trade name containing the word "Canadian," or any simulation thereof, to designate, describe, or refer to any beer or ale which is not brewed in Canada; or otherwise representing, directly or by implication, that beer or ale which is not brewed in Canada is brewed in that country.

2. Using any brand or trade name containing the word "Wisconsin," or any simulation thereof, to designate, describe, or refer to any beer which is not brewed in the State of Wisconsin; or otherwise representing, directly or by implication, that beer which is not brewed in Wisconsin is brewed in that State.

3. Representing, directly or by implication, that beer or ale brewed in the United States is imported from any foreign country.

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4. Using any pictorial representation which simulates in appearance the British Royal coat of arms:

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.

It is further ordered, That respondent's motion to dismiss this proceeding be, and it hereby is, denied.

IN THE MATTER OF

MODERN MARKETING SERVICE, INC., ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (c) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY ACT OF JUNE 19, 1936

Docket 3783. Complaint, May 6, 1939—Decision, Sept. 8, 1943

Where a purchasing corporation, owned by wholesale grocers in various parts of the United States, and which, following its organization—

- (1) Secured from one of its stockholders exclusive license to the latter's "Red and White" brand and label and to enter into franchise agreements whereby jobber licensees were granted exclusive right to sell "Red and White" goods, were required to purchase annually specified amount thereof, because stockholders of the corporation, and entered into arrangements with said wholesalers' "Red and White" retail grocer customers, who were authorized and obligated to sell and feature the "Red and White" goods; and
- (2) Acted as purchasing agent for its said jobber licensees, keeping them currently advised as to market conditions, etc., and rendering valuable advertising services including advertisements in periodicals of national circulation, the supplying of newspaper matrix service, and point of sale advertising such as handbills, window display bulletins, etc., and also the supplying of its "store development" or "field" service directed to promoting affiliation of retail grocery stores with the jobber licensees and assisting latter with respect to appearance, etc., of the "Red and White" retail stores—
 - (a) Received and accepted from sellers brokerage or commission on orders thus placed through it for its said stockholder buyers and licensees, as well as on their orders independently placed; and transmitted it to them in dividends and services, as aforesaid; and
 - (b) Received and accepted, and transmitted in dividends or otherwise, annual payments of \$30,000 made to it by a corporation subsequently created by certain of its former officers and key employees and by it licensed exclusively to carry on aforesaid purchasing and other activities; and

Where, to avoid inhibitions of the Robinson-Patman Price Discrimination Act, a corporation organized following enactment thereof and officered and owned by four individuals, former officers and key employees of aforesaid buyer-owned corporation, in conjunction with the moving spirit in the original organization thereof, and licensed to carry on exclusively the activities above described (excepting only the "store development" or "field" service, which said buyer-owned corporation continued to carry on—

- (c) Received and accepted from sellers brokerage or commission on orders thereafter placed through it by the stockholder buyers and licensees of aforesaid buyer-owned corporation, as well as on orders placed by them directly with the sellers, and transmitted same to such stockholder-buyers and licensees in the various services above described, and in the aforesaid \$30,000 paid annually to said buyer-owned corporation in consideration of its exclusive license therefrom; and

Where six corporations, wholesale grocers and stockholders in said buyer-owned corporation, along with other wholesale grocer and jobber licensee stockholders therein—