

IN THE MATTER OF
FOSTER-MILBURN COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 2711. Complaint, Feb. 3, 1936—Decision, Aug. 27, 1936¹

Where a corporation engaged in manufacture and sale of an extensively advertised medicinal, kidney preparation, under designation "Doan's Pills"; in advertising said medicine—

- (a) Represented that having trouble with too frequent bladder passages, with scanty amount causing burning and discomfort, meant that the 15 miles of kidney tubes needed washing out and that such passage might be a danger signal and mean loss of vitality, through statements contained in advertising headed "WASH OUT 15 MILES OF KIDNEY TUBES, Win back pep—vigor—vitality"; and
- (b) Represented that if kidney did not empty three pints every day and get rid of four pounds of waste matter body would take up such poison and cause serious trouble and "may knock you out and lay you up for many months", and that its said preparation would give quick relief and wash out said 15 miles of tubes;

Facts being that backaches, leg pains, and various symptoms described in its said advertisements might not be produced by failure of kidney to excrete a definite volume of urine, but be traced to causes other than diseases of kidney, and statement as to daily excretion was decidedly exaggerated and said tubes cannot be washed out, and medicine at most may cause stimulation of activities thereof, with result that they will be flushed, and claim that said preparation will enable patient to win back pep, vigor, and vitality was likewise exaggerated, since while regular functions of kidney may increase person's well being it will not bring about such conditions in sense understood from said words by average person in everyday life;

With effect of misleading and deceiving purchasing public into belief that said preparation had curative properties as claimed, and was a remedy for or gave relief in diseases and ailments named, without qualification or limitation, and with tendency and capacity so to do, and induce members of public to purchase and use such preparation because of erroneous belief engendered as above set forth, and to divert trade to it from competitors, among whom there are those who in no wise misrepresent therapeutic results of their competing products, and with effect of so diverting, to substantial injury of competitors and that of the public:

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

Before *Mr. Robert S. Hall*, trial examiner.

Mr. William L. Pencke for the Commission.

Denning & Cross, of Washington, D. C., for respondent.

¹ Order published as modified as of Sept. 5, 1936.

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 Foster-Milburn Company, a corporation, hereinafter referred to as the 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. Foster-Milburn Company is a corporation, organized and existing under the laws of the State of New York, with its office and principal place of business located in the city of Buffalo within said State. Respondent is now, and for more than two years last past has been, engaged in manufacturing, advertising, and selling a medicinal preparation, designated "Doan's Pills" which is represented as "a stimulant diuretic to the kidneys". In the course and conduct of its business respondent causes said medicinal preparation, when sold, to be transported from its place of business in the State of New York, into and through various States of the United States and the District of Columbia to the purchasers thereof located in other States of the United States and the District of Columbia. In the course and conduct of its business aforesaid, respondent is now and for more than one year last past has been, in substantial competition with other individuals, partnerships, and firms and with corporations engaged in the business of manufacturing and selling diuretic medicines in commerce between and among the various States of the United States and the District of Columbia.

PAR. 2. In the course and conduct of its business, respondent has made, and is making, false and misleading statements and representations in advertisements inserted in various publications and newspapers published in every State of the United States and the District of Columbia, including "The Lorain Journal and Times-Herald", Lorain, Ohio, issue of September 13, 1934, and otherwise, as follows:

"WASH OUT
15 MILES OF
KIDNEY TUBES
Win back pep—vigor—vitality

Medical authorities agree that your kidneys contain 15 MILES of tiny tubes or filters which help to purify the blood and keep you healthy.

If you have trouble with too frequent bladder passages with scanty amount causing burning and discomfort, the 15 MILES of kidney tubes need washing

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out. This danger signal may be the beginning of nagging backache, leg pains, loss of pep and vitality, getting up nights, lumbago, swollen feet and ankles, rheumatic pains and dizziness.

If kidneys don't empty three pints every day and get rid of four pounds of waste matter, your body will take up these poisons causing serious trouble. It may knock you out and lay you up for many months. Don't wait. Ask your druggist for DOAN'S PILLS. . . . a doctor's prescription . . . which has been used successfully by millions of kidney sufferers for over forty years. They give quick relief and will help to wash out the 15 MILES of kidney tubes.

But don't take chances with strong drugs or so-called "Kidney cures" that claim to fix you up in 15 minutes, for they may seriously injure and irritate delicate tissues. Insist on DOAN'S PILLS . . . the old reliable relief that contains no "Dope" or habit-forming drugs. Be sure to get DOAN'S PILLS at your druggist."

In truth and in fact said statements and representations were and are false and misleading in that said product will not wash out 15 miles of kidney tubes; it will not win back pep, vigor, and vitality; if a person has trouble with too frequent bladder passage with scanty amount, said pills will not relieve or cure such condition; and backache, leg pains, loss of pep and vitality, lumbago, swollen feet and ankles, rheumatic pains, and dizziness are not symptoms of kidney disorders. Said representations are further false and misleading in that they give the impression that said Doan's Pills are a cure for the conditions described, whereas in truth and in fact no diuretic is a cure for kidney troubles, and the symptoms enumerated in said advertisement might not indicate a condition for which a diuretic would be prescribed by a qualified physician. The statement, "don't take chances with strong drugs or so-called 'Kidney cures' that claim to fix you up in fifteen minutes, for they may seriously injure and irritate delicate tissues", contained in said advertisement, is misleading in that it tends to lead the purchaser of said Doan's Pills to believe that said pills contain no injurious or irritating drugs, when in truth and in fact said pills do contain drugs which are irritating to the kidney tissues.

Said statements and representations have the capacity and tendency to, and do, mislead and deceive the purchasing public into buying said medicinal preparation, in the erroneous belief that they are true, and that the use of said preparation will accomplish the results set out or indicated in said advertisement.

PAR. 3. In the course and conduct of its business as hereinabove described, respondent is and has been in competition with corporations, partnerships, firms and individuals engaged in the sale and shipment in interstate commerce of medicinal preparations used for the treatment of ailments similar to those for which respondent

recommends its "Doan's Pills", which said competitors do not misrepresent and have not misrepresented the therapeutic effects of said competitive medicinal preparations. As a result of the aforesaid false and misleading statements and representations by the respondent with respect to its product, trade has been unfairly diverted to it from its said competitors, whose ability to successfully compete with respondent has been and is lessened and injured by the methods of respondent hereinabove set forth.

PAR. 4. The acts and things above alleged to have been done and the false representations alleged to have been made by respondent are to the prejudice of the public and the competitors of respondent and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission on the 3rd day of February 1936, issued its complaint and on the 5th day of February 1936, caused the same to be served upon the respondent, Foster-Milburn Company, a corporation. Respondents filed answer to the complaint with the Commission on the 25th day of February 1936.

After the issuance of said complaint, and the filing of respondent's answer thereto, testimony and evidence in support of the allegations of said complaint were introduced by William L. Pencke, attorney for the Commission, before Robert S. Hall, an examiner of the Commission, theretofore duly designated by it, and in defense of the allegations of the complaint by William I. Demming, attorney for the respondent.

Thereafter the proceeding regularly came on for final hearing before the Commission on said complaint, the answer of respondent thereto and the testimony and evidence, briefs and oral arguments of both counsel having been waived; and the Commission having duly considered the same, makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

Respondent, Foster-Milburn Company, is a corporation organized and existing under the laws of the State of New York, with its office

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and principal place of business located in the city of Buffalo within said State. The respondent is engaged in the manufacture and sale of a medicinal preparation designated "Doan's Pills" which is represented as "a stimulant diuretic to the kidneys." The preparation is extensively advertised in newspapers, magazines, and otherwise, throughout the United States. Respondent is in competition with similar concerns manufacturing medicinal preparations which are sold and offered to the public largely through the medium of magazine and newspaper advertising. In advertising said medicine respondent has made certain statements and claims of which the following is an example.

"WASH OUT
15 MILES OF
KIDNEY TUBES

Win back pep—vigor—vitality

Medical authorities agree that your kidneys contain 15 MILES of tiny tubes or filters which help to purify the blood and keep you healthy.

If you have trouble with too frequent bladder passages with scanty amount causing burning and discomfort, the 15 MILES of kidney tubes need washing out. This danger signal may be the beginning of nagging backache, leg pains, loss of pep and vitality, getting up nights, lumbago, swollen feet and ankles, rheumatic pains and dizziness.

If kidneys don't empty three pints every day and get rid of four pounds of waste matter, your body will take up these poisons causing serious trouble. It may knock you out and lay you up for many months. Don't wait. Ask your druggist for DOAN'S PILLS . . . a doctor's prescription . . . which has been used successfully by millions of kidney sufferers for over forty years. They give quick relief and will help to wash out the 15 MILES of kidney tubes.

But don't take chances with strong drugs or so-called "Kidney cures" that claim to fix you up in 15 minutes, for they may seriously injure and irritate delicate tissues. Insist on DOAN'S PILLS . . . the old reliable relief that contains no "Dope" or habit-forming drugs. Be sure to get DOAN'S PILLS at your druggist."

The advertisement quoted in the preceding paragraph is exaggerated and misleading in several respects. The suggestion is conveyed to the reader that backaches, leg pains, and the other symptoms mentioned in the advertisement may be produced by the failure of the kidney to excrete a definite volume of urine containing a definite amount of waste products, and further that a person may suffer seriously if the kidneys do not empty three pints every day and get rid of four pounds of waste matter. The advertisement is headed "WASH OUT 15 MILES OF KIDNEY TUBES, Win back pep—vigor—vitality". The fact is that the several pains and symptoms

described in the advertisement without qualification may not be produced by the failure of the kidney to excrete a definite volume of urine, but may be traced to causes other than to a disease of the kidney. Likewise, the statement as to the quantity to be excreted every day is exaggerated. The volume of urine excreted per day may vary within wide limits, depending on several conditions, the average being about two pints. The advertisement states that the kidneys should get rid of four pounds of waste matter, which is in fact impossible. Waste matter constitutes about five percent of the fluid, so that the statement as to four pounds of waste matter to be excreted is decided an exaggeration, unless it is clearly shown that the whole volume of fluid includes the waste matter. Experiments further show that kidney tubes cannot be washed out. At most a medicine may cause a stimulation of the activities of the kidneys with the result that they will be flushed. The claim that the said "Doan's Pills" will enable the patient to win back pep, vigor, and vitality is likewise exaggerated. While the regular function of the kidney may increase the well-being of a person, it will not bring pep, vigor, and vitality in the sense that these words are understood by the average person in everyday life.

The Commission, therefore, finds that said representations of respondent in regard to the therapeutic effects of said medicinal preparation were exaggerated and misleading and did not truthfully and accurately state the therapeutic effect thereof.

The said representations of respondent as to the therapeutic value of its product, have had the capacity to and did mislead and deceive the purchasing public into the belief that said kidney pills have the curative properties claimed in said advertisements and that they are a remedy for, or will give relief in, the diseases and ailments named in said advertisements without qualification or limitation. Said representations of respondent had the tendency and capacity to induce members of the public to purchase and use said medicinal preparation because of the erroneous beliefs engendered as above set forth, and to divert trade to respondent from competitors engaged in the sale in interstate commerce of products similar in kind and as to purposes of use to that of respondent.

There are among the said competitors of respondent in the sale of said medicinal preparations those who in no wise misrepresent the therapeutic effects of their competing products and respondent's acts and practices as hereinbefore set forth tend to and do divert business to respondent from its said competitors to the substantial injury and prejudice of such competitors and to the injury of the public.

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While the respondent has modified its advertisements from time to time, conforming to reputable medical opinion, there is no assurance that the practices complained of may not be repeated unless an appropriate order to cease and desist is entered against respondent.

CONCLUSION

The aforesaid acts and practices of said respondent, under the conditions and circumstances described in the foregoing findings, were all to the injury and prejudice of the public and of respondent's competitors, and constituted unfair methods of competition in commerce and were in violation 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."

MODIFIED ORDER TO CEASE AND DESIST¹

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and evidence taken before Robert S. Hall, an examiner of the Commission theretofore duly designated by it, in support of the charges of said complaint and in opposition thereto, and William I. Denning, counsel for the respondent having waived the filing of brief and the Commission having made its findings as to the facts and its conclusion that said respondent had 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," and the Commission on the 27th day of August 1936, having made and issued its order to cease and desist in this proceeding;

Now, upon reconsideration of the aforesaid findings as to the facts, conclusion and order to cease and desist, *It is hereby ordered* that the said order to cease and desist be, and the same is hereby, modified so that, as modified, the aforesaid order to cease and desist shall and does hereby order that the respondent, Foster-Milburn Company, a corporation, its agents, representatives, and employees, in connection with the sale or offering for sale in interstate commerce and in the District of Columbia, of a medicinal preparation designated as "Doan's Pills", or any other pills, compounds or preparations possessing similar properties, do forthwith cease and desist from representing directly or indirectly through advertisements, trade promotion literature or in any other manner whatsoever, that:

¹ Published, as modified, as of Sept. 5, 1936.

(a) Having trouble with too frequent bladder passages with scanty amount causing burning and discomfort means that the 15 miles of kidney tubes need washing out;

(b) Too frequent bladder passages with scanty amount may be a danger signal and mean the loss of vitality;

(c) If kidneys do not empty three pints every day and get rid of four pounds of waste matter, the body will take up these poisons, causing serious trouble. It may knock you out and lay you up for many months.

(d) "Doan's Pills" give quick relief and will wash out 15 miles of kidney tubes.

Nothing in this order shall be construed as preventing respondent from making proper therapeutical claims or recommendations which are based upon reputable medical opinion or recognized medical or pharmaceutical literature.

And it is further ordered, That said respondent shall, within 30 days from the day of the date of the service upon it of this order, file with this Commission a report in writing stating in detail the manner and form in which it has complied with this order.

IN THE MATTER OF
CAMPBELL'S DISTILLERIES, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 2471. Complaint, June 28, 1935—Decision, Aug. 28, 1936

Where a corporation engaged in purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages, and in selling its aforesaid products to wholesalers and retailers in various States and the District of Columbia, in substantial competition with (1) other corporations, individuals, and firms engaged in manufacture, by true distillation, of whiskies, etc., from mash, wort, or wash, and in sale thereof, and (2) other corporations, etc., engaged in purchasing, rectifying, etc., whiskies, gins, and other spirituous beverages dealt in by them, and in sale thereof as aforesaid, and which, respectively, as manufacturers and distillers from mash, wort, or wash, or owners or operators of places where spirituous liquors are made by process of original distillation from such mash, wort, or wash through continuous closed pipes and vessels until manufacture thereof is complete, as long understood by wholesale and retail liquor trade and ultimate consuming public from word "distilleries," truthfully used said word or words "Distillery," "Distilling," or "Distillers," as part of their corporate or trade names and on their stationery, catalogs, and advertising, and on their labels attached to the bottles in which they sell and ship their products; or as purchasers, rectifiers, etc., of the whiskies, etc., dealt in by them, do not use such various words as above set forth—

Represented through use of word "Distilleries" in its corporate name, printed on its stationery, catalogs, advertising, and on labels attached to the bottles in which it sold and shipped its said products, and otherwise, to its customers and furnished same with means of representing to their retailer-vendees and consuming public that it was a distiller and that the whiskies, etc., contained by it were by it made through process of distillation from mash, wort, or wash, notwithstanding fact it never was a distiller and did not distill said whiskies, etc., nor own, operate, or control any place where spirituous liquors were made by process of original and continuous distillation from mash, wort, or wash;

With effect of misleading and deceiving dealers and purchasing public into belief that it was a distiller and that said whiskies, etc., were made or distilled by it from mash, etc., by one continuous process, and of inducing dealers and purchasing public, in such belief, to buy such whiskies, etc., rectified and bottled by it, and of thereby diverting trade to it from competitors who did not, by their corporate or trade names or in any other manner, misrepresent themselves as distillers, and with capacity and tendency so to mislead and deceive; to the substantial injury of substantial competition in commerce;

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