

Syllabus

IN THE MATTER OF
SUTTON LABORATORIES, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2739. Complaint, Mar. 7, 1936—Decision, Nov. 19, 1936*

Where a corporation engaged in the manufacture of a proprietary preparation called "Linoil" for the treatment of skin diseases and in the sale thereof to retail drug stores, jobbing houses, over the counter, and directly through the mails to the purchasing and consuming public in various States—

- (a) Represented in newspaper and radio advertising and through billboards, counter display cards, and circulars distributed by retailers to their customers, generally and without qualification, that said preparation was an effective treatment for various skin conditions known as athlete's foot, ringworm, eczema, and similar infections, the facts being that some of the conditions for which it thus offered its said preparation were fungus infections, the nature of the effective treatment of which varied with the nature of the disease and the progress of the disorder, depending on the cause thereof and whether in an acute, subacute or chronic state, and required, if the disease was the result of metabolic disorder, treatment of the cause as well as the external evidences of the disease, and that diagnosis by a qualified practitioner was necessary to determine cause and proper treatment for each disease, including eczema, which might be result of metabolic disorders or be a purely local disaffection or congestion from use of drugs, and was not a fungus disease and called for a much milder preparation than in the case of the other, and said corporation's aforesaid unqualified representations that said preparation was an effective remedy in all cases of said various ailments or conditions, irrespective of the cause or stage of the disorder and whether acute, subacute or chronic, were untrue; and

- (b) Displayed its corporate name, including words "Laboratories" and "Durham, N. C.," upon counter display cards and labels attached to the jars in which said preparation was packed and sold and in circulars and match folders, notwithstanding fact that it did not own or operate a laboratory in Durham, N. C., but product in question was made elsewhere in the prescription department of the drug store of its president, who personally compounded said preparation in the same place in which prescriptions were filled, and no special equipment was employed in manufacture thereof;

With result of creating in the minds of the public false impression as to the size and nature of its business and of causing such public to believe that it maintained a laboratory in which said preparation was manufactured at aforesaid North Carolina city, and with capacity and tendency to confuse, mislead, and deceive a substantial number of the purchasing public into the erroneous belief that said product was an effective remedy or cure for eczema and efficacious in all cases of ringworm and similar fungus infections, irrespective of the cause or the stage of the disease, and of causing such public, in reliance upon such representation, to purchase substantial quantity of its aforesaid preparation and of unfairly diverting thereby trade to it from competitors who likewise manufacture and sell proprietary

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preparations designed as remedies for skin diseases and who do not in any way misrepresent the therapeutic value of their competing products nor the nature or size of their business or manufacturing establishment; to their substantial injury and prejudice:

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

Before *Mr. John W. Norwood*, trial examiner.

Mr. DeWitt T. Puckett for the Commission.

Mr. Henry A. Whitfield, of Chapel Hill, N. C., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that the Sutton Laboratories, Inc., a corporation, hereinafter designated as respondent, has been and now is using unfair methods of competition in commerce as "commerce" is defined in 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, Sutton Laboratories, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its principal place of business at Chapel Hill, N. C. It is now, and for several years last past has been, engaged in advertising and selling Linoil, a preparation advertised and sold as a treatment for diseases of the feet, between and among the various States of the United States and in the District of Columbia, and now causes and for more than one year last past has caused such product when sold by it to be shipped from its place of business in Chapel Hill, N. C., to the purchasers thereof, some located in the State of North Carolina, and others located in the various other States of the United States and in the District of Columbia, and there is now, and has been for more than one year last past, a constant current of trade and commerce by the respondent in Linoil between and among the various States of the United States and in the District of Columbia.

Respondent is, and for more than one year last past has been, in substantial competition with other corporations and with individuals, firms, and partnerships engaged in the sale of remedies for diseases of the feet between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent, in soliciting the sale of and selling its Linoil, to purchasers and prospective purchasers thereof, located

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in various States of the United States, represents, and for more than one year last past has represented, in and by its advertising matter, which consists of radio continuities, hand bills, cardboard posters, match folders, and other forms of advertising media, that its remedy, Linoil, will cure or is an effective treatment for athlete's foot, ringworm, eczema, "toe itch," and other skin irritations. Among the advertising claims broadcasted over radio station WPTF are the following:

Are your feet crippled with Athlete's Foot to the extent that you are forced to sit on the side lines while your friends enjoy the fine and exhilarating summer sports? You can get rid of this condition. Go to your druggists and ask for a jar of LINOIL. This preparation was proved exceptionally effective in relieving foot ills, ringworm, eczema, and other skin irritations. LINOIL is made with a vanishing cream base . . . does not stain and has no disagreeable odor.

For successful treatment of Athlete's Foot, Eczema, Ringworm, and other skin irritations and diseases . . . use LINOIL. This famous remedy which has been privately used for several years, is now available to everyone at a very moderate cost. Made with a vanishing cream base, LINOIL has no disagreeable odor and does not stain. It is now on sale at drug stores in 50¢ jars. Get a jar of LINOIL from your druggist today and banish irritations quickly and effectively.

Respondent causes to be circulated among the purchasing public small pasteboard packages of matches. On the outside of said packages appear the following:

For
Athlete's
Foot
LINOIL
Toe Itch
Ringworm
Eczema, etc.

Sutton Laboratories
Durham, N. C.
LINOIL

Arranged at various conspicuous places in respondent's drug store are inclined cardboard posters to each of which it attached a bottle of Linoil. Said posters bear the following advertising:

LINOIL
for—
TOE ITCH
JOCK ITCH
GOLFER'S ITCH
ATHLETE'S FOOT
RINGWORM, ETC.

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Price

50¢

SUTTON LABORATORIES, INC.

DURHAM, N. C.

Respondent also causes to be circulated among the purchasing public, hand bills bearing the following announcement:

LINOIL

FOR

RINGWORM of the FOOT
ITCHING FEET AND TOES

Also Known as

"ATHLETE'S FOOT"

"GYM FOOT"

"GOLFER'S ITCII"

ECZEMA, etc.

For sale

In all Drug & Shoe Stores

SUTTON LABORATORIES

Durham, N. C.

PAR. 3. In truth and in fact respondent's preparation, Linoil, will not cure eczema; is not effective in the treatment of athlete's foot, ringworm, or other fungus infections of the feet, in all cases; nor is Linoil an adequate or safe treatment for "toe itch," of all forms.

PAR. 4. The use by respondent of the representations set forth herein has had and now has the capacity and tendency to lead purchasers and prospective purchasers into the belief that they themselves can diagnose the ailments or diseases of the feet from which they are suffering and thereby determine the cause or causes of said ailments or diseases and to purchase respondent's product in such erroneous belief. Only by a thorough diagnosis, made by a competent physician, can the causes of the various ailments and diseases of the feet be ascertained and successfully treated. Respondent is not a physician and there is no medical doctor connected with respondent's business in any capacity. Purchasers or prospective purchasers of Linoil are not given a medical examination for the purpose of determining the particular disease or diseases from which they are suffering and the cure, if any, for same.

PAR. 5. Respondent clearly implies and represents through the statements contained in its advertising media, and through the use of the word "Laboratories" in its corporate name, and otherwise, that it maintains a laboratory wherein Linoil is compounded, manu-

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factured, or otherwise prepared. Its postoffice address is listed as Sutton Laboratories, Durham, N. C., at which place it rents a post-office lock box. In truth and in fact respondent does not own or operate a laboratory wherein scientific tests are made and experiments conducted. Linoil is made and prepared for shipment in the drug department of respondent's drug store located at Chapel Hill and not at Durham, N. C.

PAR. 6. Respondent clearly implies by the use of the term Linoil that linseed oil is used in the manufacture of its preparation and is a component part thereof. In truth and in fact linseed oil is not present in the preparation.

PAR. 7. The use by respondent of the representations set forth herein has had, and now has, the capacity and tendency to mislead and deceive and does mislead and deceive a substantial portion of the purchasing public into the belief that such representations are true and to purchase substantial quantities of said Linoil from respondent in such erroneous belief. There are, among the competitors of respondent, as mentioned in paragraph 1 hereof, manufacturers and distributors of foot remedies who do not respectively misrepresent in any way the therapeutic values of their products, the material from which their preparations are made, or the existence of a laboratory in connection with their business, who likewise advertise, sell, and distribute remedies for diseases of the feet among the various States of the United States and in the District of Columbia. By the representations aforesaid, trade is diverted to respondent from such competitors, thereby substantial injury is being, and has been, done by respondent to substantial competition in commerce as herein set out.

PAR. 8. The above alleged acts and practices of respondent are all to the injury and prejudice of the public and respondent's competitors 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 March 7, 1926, issued and served its complaint in this proceeding upon respondent Sutton Laborato-

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ries, Inc., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint, and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by DeWitt T. Puckett, attorney for the Commission, before John W. Norwood, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Henry A. Whitfield, attorney for the respondent; and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, brief in support of the complaint, respondent having declined to file brief or apply for oral argument; and the Commission having duly considered the same, and being now fully advised in the premises, finds that this proceeding is in the interest of the public, and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Sutton Laboratories, Inc., is a corporation organized in 1933, and doing business under the laws of the State of North Carolina, having its principal office and place of business at Chapel Hill, N. C.

PAR. 2. Respondent is, and has been at all times since the said date of its incorporation, engaged in the manufacture and sale of Linoil, a proprietary preparation intended and designed to be used in the treatment of skin diseases, to retail drug stores, jobbing houses, over the counter, and directly through the mails, to the purchasing and consuming public located in various States of the United States other than the State of North Carolina. It has caused, and still causes, its said Linoil when so sold to be transported in commerce from its place of business in the city of Chapel Hill, State of North Carolina, into and through various other States of the United States, to the said purchasers thereof.

PAR. 3. At all times since said incorporation the respondent has been in substantial competition in interstate commerce with other corporations, individuals, and partnerships engaged in the manufacture and sale of other proprietary preparations designed and intended for use in treatment of diseases of the skin.

PAR. 4. Linoil is compounded by J. L. Sutton, a registered pharmacist and president of the respondent corporation, in the prescription department of his drug store at Chapel Hill, N. C., in accordance with

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his own secret formula. The product has been on the market ten or twelve years, five years before it was given a name. A qualitative analysis of Linoil follows:

ANALYSIS—NET WEIGHT 1.6 OZS.

Qualitative tests:	Absent:
Salicylic Acid	Heavy metals
Benzoic Acid	Borax
Cinnamic Acid	Phenol
Water	Sulphates
Starch	Chlorides
Present:	
Lanolin	Resorcinol
Sulphur	
Calcium (in ash)	

	Percent
Ash-----	0.12
Water (Xylol Method)-----	17.00
Chloroform Soluble Material-----	82.9
Total Acids (Salicylic, Benzoic, Cinnamic and some fatty acids) calculated as Salicylic Acid-----	10.75
	11.00
	5.29
Salicylic Acid (By bromination of total acids)-----	5.28

Product is a brown salve having a sharp rancidlike and an aromatic odor.

Examination indicates it consists essentially of salicylic acid, starch, and a small amount of sulphur, incorporated in a base of benzoinated lard and lanolin, with the possible addition of a fatty acid.

PAR. 5. In promoting the sale of Linoil, respondent, formerly through newspaper and radio advertising, and recently through billboards, counter display cards, and circulars distributed by retailers to their customers, represented generally and without qualification that Linoil is an effective treatment for various skin conditions known as athlete's foot, ringworm, eczema, toe itch, jock itch, and similar infections. The circulars sent out to retailers for distribution to their customers contain the following statements:

Linoil For Ringworm of the Foot, Itching Feet and Toes
. Also known as "Athlete's Foot", "Golfer's Itch", "Gym Foot", Eczema, etc.

The counter cards read:

Linoil for Toe Itch, Jock Itch, Golfer's Itch, Athlete's Foot, Ringworm, etc. Labels on the jars read: "Linoil used for Toe Itch, Ringworm, Jock Itch, Eczema, etc." In its radio advertising, respondent represents that Linoil "quickly relieves Athlete's Foot, Ringworm, Eczema, Toe Itch and Athletic Supporter Itch", and that "it does kill the germ that causes all this trouble."

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PAR. 6. The foot disaffections commonly known as ringworm, athlete's foot, toe itch, and the other conditions covered by respondent's representations, with the exception of eczema, are fungus infections of a similar nature, some if not all of the terms being interchangeable. According to the weight of the expert medical testimony, the nature of effective treatments for these diseases varies with the nature of the disease and the progress of the disorder, depending on the cause of the disorder and whether it is in an acute, subacute or chronic state. If the disease is the result of a metabolic disorder, the cause must be treated together with the external evidences of the disease. The application of ointments alone is insufficient. The particular conditions, such as ringworm, toe itch, etc., result from the presence of different forms of malignant life—some resulting from animal and some from vegetable parasites. One of these forms of toe itch results from the entrance of the hookworm larvae into the body and such a condition cannot be relieved by the same treatment required for other forms of toe itch. There is a scaly, chronic type of ringworm, comprising a large percentage of the cases, which requires different treatment from the 25 to 40% constituting the non-scaly type. The vegetable parasite is of six or eight varieties. Diagnosis by a qualified practitioner is necessary to determine the cause of and the proper treatment for each disease, and the layman is not competent to make such a diagnosis.

Eczema on the other hand, might be caused from metabolic disorders or it might be a purely local disaffection or congestion from the use of drugs. It is not a fungus disease, and a much milder preparation would be used to allay the itching than would be used in fungus diseases. The proper method of treating eczema involves a determination of the cause of the ailment by a competent medical authority and treatment of the metabolic disorder together with the external evidences of the disease.

Respondent's representations that Linoil is an effective remedy or cure for eczema, or that it will prove efficacious in all cases of ringworm, athlete's foot, jock itch, toe itch, and similar fungus infections, irrespective of the cause or stage of the disorder, whether it be acute, subacute or chronic, are untrue.

PAR. 7. Respondent's counter displays and the labels attached to the jars in which Linoil is packed and sold contained the expression, "Sutton Laboratories, Inc., Durham, N. C.," and its circulars and match folders display the expression, "Sutton Laboratories, Inc., Durham, N. C.," thereby creating in the minds of the public a false impression as to the size and nature of respondent's business, and also causes the public to believe that respondent maintains a laboratory,

in which Linoil is manufactured, at Durham, N. C. In truth and in fact respondent does not own or operate a laboratory in Durham, N. C., but the product, Linoil, is made in the prescription department of the Chapel Hill drug store of J. L. Sutton, president of respondent, who compounds the product himself. The work is done in the same place where prescriptions are filled, and there is no special equipment employed in manufacturing the product.

PAR. 8. It is alleged in the Commission's complaint that respondent implies, by use of the term Linoil, its product includes linseed oil. The product does not include linseed oil, nevertheless, linseed oil is not a particularly desirable ingredient in preparations designed as remedies for fungus infections and other diseases of the skin, and is not so considered by the laity. The Commission, therefore, finds that the evidence does not support the allegation contained in paragraph 6 of the complaint.

PAR. 9. The representations of respondent, as aforesaid, have had and do have the capacity and tendency to confuse, mislead and deceive a substantial number of the purchasing public into the erroneous belief that Linoil is an effective remedy or cure for eczema, and that it is efficacious in all cases of ringworm, athlete's foot, jock itch, toe itch and similar fungus infections, irrespective of the cause or the stage of the disease. Said representations have caused and do cause said purchasing public, relying upon the truth of said representations to purchase substantial quantities of respondent's product, Linoil.

PAR. 10. There are among the competitors of respondent, corporations, firms, and individuals who likewise manufacture and sell proprietary preparations designed as remedies for skin diseases, among the various States of the United States and in the District of Columbia, who do not in any way misrepresent the therapeutic values of their competing products, nor the nature or size of their business or manufacturing establishment. Respondent's acts and practices, as herein above set forth, tend to, and do, unfairly divert trade to respondent from such competitors, to the substantial injury and prejudice of said competitors.

CONCLUSION

The aforesaid acts and practices of the respondent, Sutton Laboratories, Inc., are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, within the intent and meaning of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

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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 John W. Norwood, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief filed herein in support of the complaint, respondent having declined to file brief or apply for oral argument, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is ordered, That the respondent, Sutton Laboratories, Inc., its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of the product known as Linoil or any product of substantially the same composition and ingredients sold under the name Linoil or under any other name in interstate commerce or in the District of Columbia, do forthwith cease and desist from representing, through radio advertising, counter displays, circulars, or through any other method whatever that:

1. Linoil is an effective remedy or cure for eczema;
2. Linoil is an effective remedy for all diseases of the skin;
3. Linoil is an effective remedy for any disease resulting from a metabolic disorder.
4. It maintains a laboratory at Durham, N. C.

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.

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.

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IN THE MATTER OF
IRISH HILLS DISTILLERIES, INC.

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

Docket 2462. Complaint, June 27, 1935—Decision, Nov. 20, 1936

Where a corporation engaged as wholesaler and rectifier of distilled spirits, in purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages and in selling the same to wholesale and retail purchasers in other States and in the District of Columbia, in substantial competition with those engaged in the manufacture by distillation of such beverages and in selling the same as aforesaid, and with those engaged in purchasing, rectifying, blending, bottling, and selling such beverages, and including among its aforesaid competitors those who, as manufacturers and distillers from mash, wort, or wash of whiskies, gins, and other spirituous beverages sold by them, truthfully use words "distillery," "distilleries," "distillers," or "distilling" as a part of their corporate or trade names and on their stationery and advertising and on the labels of the bottles in which they sell and ship such products, and those who, engaged in purchasing, rectifying, blending, bottling, and selling such beverages, do not use such words as aforesaid—

Represented, through use of word "Distilleries" in its corporate name, printed on its stationery and advertising and on the labels attached to the bottles in which it sold and shipped its said products, and in various other ways, to its customers and supplied the same with means of representing to their vendee-retailers and ultimate consuming public that it was a distiller and that the whiskies, gins, and other spirituous beverages contained in such bottles were by it made through process of distillation from mash, wort, or wash, notwithstanding fact it did not thus distill such beverages through continuous closed pipes and vessels until manufacture thereof is complete, as definitely understood and implied to the trade and ultimate purchasing public from word "Distilleries," did not own, operate, or control any place or places where such beverages are made by process of distillation as above set forth, and was not a distiller, the products of which are preferentially bought by a substantial portion of the purchasing public;

With effect of misleading and deceiving dealers and such public into the belief that it was a distiller and that the whiskies, gins, and other spirituous beverages sold by it were by it made and distilled from mash, wort, or wash as aforesaid, and of inducing dealers and purchasing public, acting in such belief, to buy its said whiskies and other said beverages, bottled and sold by it, and thereby divert trade to it from its competitors who do not, by their corporate or trade names or in any other manner, misrepresent that they are manufacturers by distillation as aforesaid of whiskies, gins, and other spirituous beverages; to the substantial injury of competition in commerce: