

Syllabus

IN THE MATTER OF
NODOZ 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 2840. Complaint, June 10, 1936—Decision, July 28, 1937*

Where a corporation engaged in sale and distribution, to wholesale and retail dealers for ultimate resale to public, of "NoDoz Awakeners," vegetable concentrate with caffeine, made for it by the manufacturer in accordance with its formula, and designed to keep users from drowsiness and to keep them awake when sleepy or tired, in general competition with sellers of the class of refreshment and invigorator containing caffains, such as coffee, tea, and coca-cola, and with the same general therapeutic effects, and who do not advertise and otherwise represent their said products as having merit and therapeutic value which they do not have; in soliciting sale of and selling said products through advertisements in newspapers and periodicals, and in other forms of printed matter, and through radio broadcasts, circulated among the various States to members of the public—

- (a) Represented that use of said product would counteract or overcome effects of drinking alcoholic beverages, and would have beneficial effect on persons indulging in use of alcoholics, counteracting "alcoholic effects during the party and the 'morning after'", etc.;
- (b) Represented that said "NoDoz Awakeners" were "tablets made of a pure vegetable concentrate under the U. S. Pure Food and Drug Laws"; and
- (c) Represented that more than a million automobile drivers take said preparation to keep awake and alert in long hours of driving, and that said tablets "Keep awake the sleepy motorist, truck driver," etc.;

Facts being said tablets did not overcome or counteract effects of use of alcoholic beverages or have any beneficial effect on indulgers in use thereof, they were not made under formula approved by Pure Food and Drug Administration, number of users and endorsers of said product was greatly exaggerated, and representations aforesaid were grossly exaggerated, false, misleading, and untrue;

With capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous belief that all of its aforesaid representations were true, and with result that number of the consuming public, as a direct consequence of the mistaken and erroneous beliefs induced by its said acts and representations, purchased a substantial volume of its product, and trade was unfairly diverted to it from competitors likewise engaged in sale and distribution of like and similar caffeine-containing preparations, and who truthfully represent the effectiveness of their products and results to be obtained from use thereof; to the injury of competition in commerce:

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

Before *Mr. Charles P. Vicini* and *Mr. Miles J. Furnas*, trial examiners.

Mr. P. C. Kolinski and *Mr. Joseph C. Fehr* for the Commission.

Elliott, Atkinson & Sitton, of Sacramento, Calif., for respondent.

Complaint

25 F. T. C.

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 NoDoz Laboratories, Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce as "commerce" is defined in said act, and it appearing to 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. Respondent, NoDoz Laboratories, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business located at 307 Mitau Building, in the city of Sacramento, in the State of California. Respondent for more than one year last past has been, and still is, engaged in the manufacture of a pharmaceutical preparation known as "NoDoz Awakeners," made of a mixture of caffeine citrate and sugar of milk, and in offering said product for sale, and selling the same in commerce between the State of California and the several States of the United States and in the District of Columbia. When said product is sold, respondent transports or causes the same to be transported from its place of business in the State of California to the purchasers thereof located in States of the United States other than the State of California and in the District of Columbia. There has been for more than one year last past, and still is, a constant current of trade and commerce in said product so manufactured by respondent, between and among the various States of the United States and in the District of Columbia. Respondent is now and for more than one year last past has been in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture of like and similar products and in the sale thereof 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 aforesaid, the respondent, in soliciting the sale of and selling "NoDoz Awakeners" and for the purpose of creating a demand upon the part of the consuming public for said product, now causes and for more than one year last past has caused advertisements to be issued, published, and circulated to and among the general public of the United States in various periodicals and publications and in other

forms of printed matter, and by radio broadcasting and in other ways. In said ways and by said means respondent makes and has made to the general public many unfair, false, and misleading statements with reference to the alleged therapeutic value of said product and its effect upon the users thereof, a portion of which are as follows:

NoDoz Awakeners—Particularly beneficial, when driving at night, when effects of alcohol are to be overcome, when working at night, when mentally depressed, when keen thinking, accurate and rapid work are important and upon hundreds of other daily occasions.

Counteracts alcoholic effects during the party and the "morning after." Restores energy—when tired or sleepy—when working or playing.

NoDoz Awakeners are tablets made of a pure vegetable concentrate under the U. S. Pure Food and Drug Laws.

Keep awake the sleepy motorist, truck driver—overcome alcoholic depression.

There is a marked stimulation of the intellectual functions, especially those of reason, judgment, and self-control. Muscular strength, speed and accuracy are all increased. A sense of energy and vitality add to one's capacity for work or pleasure without apparent fatigue.

When energy is exhausted. When you've taxed your powers to the limit, and yet have long hours of work ahead, take a NoDoz Awakener and feel the steady, natural return of vitality, the "lift" in morale and general sense of well-being which follows.

Taken before or during indulgence, NoDoz Awakeners will preserve a clear head and perfect poise under the most difficult circumstances. Taken afterwards—NoDoz Awakeners will restore sobriety.

More than a million automobile drivers now take a NoDoz Awakener to keep awake and alert in long hours of driving.

If you feel like dozing, but your job won't let you—NoDoz keeps you fit. But NoDoz doesn't get you.

One little NoDoz Awakener'll keep you bright three, four hours, for driving, working, studying, playing nights.

PAR. 3. The statements and representations set forth in paragraph 2 hereof have the capacity and tendency to mislead and deceive purchasers and prospective purchasers of respondent's product into the belief:

(a) That the use of NoDoz Awakeners will keep one equipped for duties, or awake while driving;

(b) That the use of said preparation will—

1. Put one back on his feet;
2. Put bright ideas in the head;
3. "Conquer" mental dullness or fatigue;
4. Enable one to steer clear of accidents while driving;
5. "Overcome" alcoholic depression;

(c) That said preparation restores energy or "counteracts" alcoholic effects;

(d) That by the use of said preparation—

1. There is a stimulation of "intellectual" powers;

Complaint

25 F. T. C.

2. Muscular strength, speed, accuracy are all increased; or

3. Energy or vitality will be added to one's capacity for work or pleasure without fatigue;

(e) That said preparation taken before or during indulgence will preserve a clear head or perfect poise under the most difficult circumstances;

(f) That by the use of said preparation one may feel the natural return of vitality, the "lift" in morale, or a general sense of well being;

(g) That more than a million automobile drivers, or any other number not established by competent evidence, now take said preparation to keep awake on long hours of driving, or approve the same as the safe, sure way to stay awake while driving;

(h) That said preparation is made under the United States Pure Food and Drug Laws;

(i) That said preparation is a pure vegetable concentrate;

whereas, in truth and in fact, "NoDoz Awakeners" do not keep persons awake when tired or sleepy, or when working or driving automobiles at night; nor do they overcome the effects of the use of alcohol. The number of users and endorsers of this product is greatly exaggerated, and the representation that "NoDoz Awakeners" are manufactured upon a formula conforming to the Pure Food and Drug Law is unauthorized. It is not true, as represented, that a "NoDoz Awakener" is a pure vegetable concentrate. In truth and in fact, the representations made by the respondent with respect to the nature and effect of its pharmaceutical preparation when used, are grossly exaggerated, false, misleading, and untrue, as said preparation will not accomplish in all cases the results claimed for it.

PAR. 4. There are among the competitors of the respondent in interstate commerce manufacturers of like and similar products who truthfully advertise and represent the nature, merit, and therapeutic value of their respective products. There are also among such competitors of the respondent sellers and distributors of like and similar products who do not advertise and otherwise represent that such products have the merit or the therapeutic value which they do not have.

PAR. 5. The above alleged acts and practices of respondent have the capacity to mislead and deceive purchasers and prospective purchasers into the erroneous beliefs described in paragraph 3 hereof and into the purchase of respondent's product in such beliefs. Thereby trade is diverted by respondent from respondent's competitors in interstate commerce referred to in paragraph 4 and as a consequence thereof substantial injury is done by respondent to competition in interstate commerce.

PAR. 6. Said acts and practices of respondent are all to the 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 June 10, 1936, issued and served its complaint in this proceeding upon respondent, NoDoz Laboratories, Inc., a corporation, charging it with the use of unfair methods of competition in commerce, in violation of the provisions of said act. After the issuance of said complaint, and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by P. C. Kolinski, attorney for the Commission, and in opposition to the allegations of the complaint by Wm. A. Sitton, attorney for the respondent, before Chas. P. Vicini and Miles J. Furnas, examiners of the Commission theretofore duly designated by it, and said testimony and other evidence was duly recorded and filed in the office of the Commission. Thereafter this proceeding regularly came on for final hearing before the Commission on said complaint, the answer thereto, testimony and evidence, and brief in support of the complaint (respondent having filed no brief and having not requested 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, NoDoz Laboratories, Inc., is a California corporation, with its principal office and place of business in Sacramento, Calif. Respondent began doing business as a corporation in the month of August 1934. Respondent is now, and ever since August, 1934, has been, engaged in the sale and distribution of a pharmaceutical preparation known as "NoDoz Awakeners."

Respondent's said product, known as "NoDoz Awakeners," is a vegetable concentrate containing caffeine, which is designed to keep users from drowsiness and to keep them awake when sleepy or tired. Respondent sells and distributes its said product to wholesale and retail dealers for ultimate resale to members of the public, and also sells direct to members of the purchasing public located

in the various States of the United States other than the State of California. In the course and conduct of its business, the respondent causes its said product, when sold by it, to be transported in commerce from its place of business in California to, into and through said other States, and in the District of Columbia, to the purchasers to whom said product was sold by the respondent.

PAR. 2. The respondent herein, in soliciting the sale of and in selling said product known as "NoDoz Awakeners," has made use of advertisements inserted in newspapers and magazines and in other forms of printed matter, and broadcasts by radio, which are circulated in and among the various States of the United States to members of the public. Said advertisements contain many misleading and deceptive statements with reference to the alleged therapeutic value of said "NoDoz Awakeners" and their effect upon the users thereof.

Among such statements so used in advertising said "NoDoz Awakeners" are the following:

NoDoz Awakeners—Particularly beneficial, when driving at night, when effects of alcohol are to be overcome, when working at night, when mentally depressed, when keen thinking, accurate and rapid work are important and upon hundreds of other daily occasions.

Counteracts alcoholic effects during the party and the "morning after." Restores energy—when tired or sleepy—when working or playing.

"NoDoz Awakeners" are tablets made of pure vegetable concentrate under the U. S. Pure Food and Drug Laws.

Keep awake the sleepy motorist, truck driver—overcome alcoholic depression.

There is a marked stimulation of the intellectual functions, especially those of reason, judgment and self-control. Muscular strength, speed and accuracy are all increased. A sense of energy and vitality add to one's capacity for work or pleasure without apparent fatigue.

When energy is exhausted. When you've taxed your powers to the limit, and you yet have long hours of work ahead, take a NoDoz Awakener and feel the steady, natural return of vitality, the "lift" in morale and general sense of well-being which follows.

Taken before or during indulgence, NoDoz Awakeners will preserve a clear head and perfect poise under the most difficult circumstances. Taken afterwards—NoDoz Awakeners will restore sobriety.

More than a million automobile drivers now take a NoDoz Awakener to keep awake and alert in long hours of driving.

If you feel like dozing, but your job won't let you—NoDoz keeps you fit. But NoDoz doesn't get you.

One little NoDoz Awakener'll keep you bright three, four hours, for driving, working, studying, playing nights.

PAR. 3. Respondent's "NoDoz Awakeners" are manufactured for it by McKesson-Robbins, of Bridgeport, Conn., and Boericke & Runyan, of San Francisco, Calif., both of which firms are manufacturing

627 .

Findings

pharmacists. Said product is manufactured according to a formula submitted to said manufacturers by the respondent. The formula consists of a mixture of three and one-half grains of caffeine citrate and one and one-half grains of sugar of milk. When manufactured, said product is shipped in bulk by the aforementioned manufacturing pharmacists to respondent's plant in Sacramento, Calif., where it is packaged in two sizes, one containing two tablets, designed to sell for ten cents (10¢) each (or \$3.20 for thirty-two packages), and the other package containing fifteen tablets, designed to sell for fifty cents (50¢) per package (or \$6.00 per dozen packages). Thus packaged, the product is sold and shipped by respondent to wholesale druggists throughout the country, by whom it is resold to retailers who sell and distribute the product to the consuming public. More than eighty per cent (80%) of respondent's said "NoDoz Awakeners" are sold on the Pacific Coast and in the Rocky Mountain States, where the product is well known and has a ready market.

PAR. 4. Several witnesses, two of them doctors of medicine, testified that they had used "NoDoz Awakeners," and that the preparation counteracted sleepiness and drowsiness, without harmful effect. One doctor of medicine testified that the drug caffeine, used by a human, would tend to increase mental invigoration, to stimulate the motor areas of the brain, to increase the motor activities of the spinal cord, and to stimulate the muscles. He further testified that the drug caffeine, applied to humans in tablet form, as prepared in respondent's "NoDoz Awakeners," was not desirable for use by persons who partake of liquor to the point of intoxication. This witness also testified that said "NoDoz Awakeners" act as a diuretic. All witnesses testified that the use of three and one-half grains of citrate of caffeine would and did stimulate the brain and restore vitality.

There is also undisputed medical testimony of record that the use of citrate of caffeine by way of respondent's product by children of the age of five years or over would have no different effect on them than the use of ordinary coffee. One doctor of medicine stated that three and one-half grains of citrate of caffeine are equivalent to the amount of caffeine in an ordinary cup of coffee represented by a tablespoonful of ground coffee, and that three and one-half grains of caffeine citrate would serve to stimulate the individual taking it by increasing his blood supply to the brain, stimulating the action of the muscles and the cord, thereby increasing the flow of blood to the brain. This witness further stated that such an amount of citrate of caffeine would tend to clarify the individual's thinking apparatus and make it function a little more rapidly, and that it would also stimulate the kidneys.

The evidence, however, establishes the fact that caffeine, which is the active ingredient in respondent's product, will not counteract or overcome the effects of alcoholism, as represented by respondent, nor will caffeine sober an individual who has become intoxicated from the use of alcoholic beverages. The use of said preparation does not have any beneficial effect on those persons who indulge in the use of alcoholic beverages.

The testimony of the several medical witnesses was not contradicted by the testimony of any other witness.

PAR. 5. Many of the statements and representations set forth in paragraph 2 hereof have the capacity and tendency to deceive and mislead purchasers and prospective purchasers of respondent's product into the belief that the use of said product—

(a) Will "counteract" alcoholic effects and overcome alcoholic depression;

(b) That said product is made under a formula approved by the United States Pure Food and Drug Administration;

(c) That more than a million automobile drivers, or any other number not established by competent evidence, now take said preparation to keep awake on long hours of driving, or approve the same as the safe, sure way to stay awake while driving.

In truth and in fact, "NoDoz Awakeners" do not overcome or counteract the effects of the use of beverages containing alcohol, nor do they have any beneficial effect on persons indulging in the use of alcoholic beverages. Further, the number of users and endorsers of said product is greatly exaggerated; nor is it true that "NoDoz Awakeners" are manufactured upon a formula approved by the Pure Food and Drug Administration. Insofar as representations made by respondent in connection with the sale and distribution of its pharmaceutical preparation have the effect of misleading and deceiving users of "NoDoz Awakeners" into the beliefs set out in this paragraph, such representations are grossly exaggerated, false, misleading and untrue, as said preparation will not accomplish such results as represented.

PAR. 6. The evidence does not establish the fact that the respondent has any specific competitors manufacturing, selling or distributing a similar drug or pharmaceutical preparation. However, the record of testimony taken does establish the fact that respondent is in general competition with sellers of the class of refreshment and invigorator containing caffeine, such as coffee, tea and coca-cola, having the same general therapeutic effects that respondent's product has, who do not advertise and otherwise represent that such products have merit and therapeutic value which they do not have.

627

Order

PAR. 7. Each and all of the misleading and deceptive statements and representations made by the respondent, as herein set out, in offering for sale and selling its product, had and now have the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous belief that all of said representations are true. Further, as a direct consequence of the mistaken and erroneous beliefs induced by the acts and representations made by the respondent, as hereinabove detailed, a number of the consuming public have purchased a substantial volume of respondent's product, with the result that trade has been and is unfairly diverted to respondent from competitors likewise engaged in the business of selling and distributing like and similar caffeine-containing preparations, and who truthfully represent the effectiveness of their products and the results to be obtained from their use. As a result, injury has been and is now being done by respondent to competition in commerce, as herein set out.

CONCLUSION

The aforesaid acts and practices of the respondent, NoDoz Laboratories, Inc., a corporation, are to the prejudice of the public and of 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."

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 evidence taken before Charles P. Vicini and Miles J. Furnas, examiners of the Commission theretofore duly designated by it, in support of the charges of said complaint and in opposition thereto, and brief on behalf of the Commission filed herein (respondent having filed no brief and having not requested 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 respondent, NoDoz Laboratories, Inc., a corporation, its officers, directors, agents, representatives, servants, and employees, in connection with the offering for sale, sale or distribution in interstate commerce of a pharmaceutical preparation

Order

25 F. T. C.

known as "NoDoz Awakeners," or of said preparation or of any similar preparation containing substantially the same ingredients, sold under the same or under any other name or names, cease and desist, directly or indirectly, from:

Representing in newspapers and magazines, and through circulars, catalogs, or in any other form of printed matter, or by radio broadcasting, or in any other way or manner:

(a) That the use of said product will counteract or overcome the effects of drinking alcoholic beverages, or will have any beneficial effect on persons indulging in the use of alcoholics;

(b) That said product is manufactured under a formula approved by the United States Pure Food and Drug Administration;

(c) That more than a million automobile drivers, or any other number not established by competent evidence, now take said preparation to keep awake on long hours of driving, or approve the same as the safe, sure way to stay awake while driving;

and from making any other representations of similar intent or import.

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

Syllabus

IN THE MATTER OF
SUNNYLAND DISTILLING COMPANY

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

Docket 2479. Complaint, June 28, 1935—Decision, Aug. 2, 1937

Where a corporation engaged as rectifier of distilled spirits, in purchasing, rectifying, and blending whiskies, gins, and other spirituous beverages, and in producing gin with a still used therefor by redistillation of purchased alcohol, not produced by it, over juniper berries and other aromatics, and in the sale of its aforesaid various products to wholesaler purchasers thereof in States other than State of origin of its said shipments, in substantial competition with those engaged in the manufacture by true distillation of whiskies, gins, and other spirituous beverages from mash, wort, or wash, and in selling same in trade and commerce among the various States and in the District of Columbia, and with those engaged in purchasing, rectifying, blending, and bottling such various beverages and similarly selling same, and including among said competitors those who, as manufacturers and distillers by original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until manufacture is complete, 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 their said products, and those who, engaged in purchasing, rectifying, blending, bottling, and selling such various products, do not use aforesaid words as above set forth—

Represented, through use of word "Distilling" in its corporate name, on its stationery, mailing cards, and invoices, and on the labels attached to the bottles in which it sold and shipped its said products, that it was a producer of distilled spirits from raw materials, and so represented to its customers, and furnished same with means of representing to their vendees, both wholesalers and ultimate consuming public, that it was a distiller, and that the whiskies and other spirituous beverages contained in such bottles were by it made through process of distillation, as aforesaid, from mash, wort, or wash, notwithstanding fact it did not thus distill said various beverages, thus bottled, labeled, sold, and transported by it, through aforesaid process of original and continuous distillation, as long definitely understood from word "distilling" used in connection with liquor industry and products thereof in the trade and by the ultimate purchasing public, and did not own, operate, or control any place or places where such beverages are made by process of distillation from mash, wort, or wash, and was not a distiller, for the purchase of the bottled liquors of which there is a preference on the part of a substantial portion of the purchasing public;

With effect of misleading and deceiving dealers and purchasing public into the belief that it was a distiller, and that the whiskies and other spirituous beverages sold by it were by it made and distilled from mash, wort, or