

IN THE MATTER OF
FRYE COMPANY

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

Docket 3741. Complaint, Mar. 21, 1939—Decision, Jan. 25, 1940

Where a corporation engaged in sale and distribution of medicinal preparation under designation and label "Pancreobismuth," "Pancreo Bismuth" and "Pancreobismuth and Pepsin," to purchasers in other States, in substantial competition with others engaged in sale and distribution of similar preparations or other products designed and intended for similar usage, in commerce among the various States and in the District of Columbia; in advertisements in newspapers and other periodicals of general circulation, and in advertising folders and literature which it printed and circulated throughout the several States to customers and prospective customers, and in which it featured name "Pancreo Bismuth and Pepsin"—

- (a) Represented that its said product was effective in treatment of all cases of upset stomach and relieved indigestion due to acid condition of the stomach, and tended to neutralize excess acid and allay irritation, and constituted aid in digestion of starchy foods and helped to give relief from distress caused thereby; and
- (b) Represented, through use of name "Pancreo Bismuth and Pepsin" or "Pancreo Bismuth" or "Pancreobismuth" in connection with its said product, that same possessed physiological or therapeutic value due to presence of pancreatin or pepsin;

Facts being two ingredients in question were rendered physiologically inert when taken internally in preparation involved, active ingredients of which were bismuth subnitrate, sodium bicarbonate, and ginger, and, while product possessed therapeutic value of a simple antacid and carminative tending temporarily to neutralize excess acid and relieve symptoms of distress from gastric hyperacidity, it had no effect on causative factors thereof or systemic causes of excess acid in system, was not effective in treatment of upset stomach or relief of indigestion due thereto, other than as indicated, and statements and representations above set forth were otherwise false, deceptive, exaggerated, and misleading, with respect to therapeutic value of product in question; and

Where said corporation engaged as aforesaid; in advertisements which it disseminated concerning its said product through the mails and through insertion in circulars and other printed or written matter distributed in commerce among the various States, and which were intended and likely to induce purchase of its said product, and which were disseminated as above set forth through various means—

- (c) Represented, through use of trade name "Pancreobismuth," that product in question contained pancreatin as active ingredient thereof, facts being amount thereof was negligible and without physiological value and inert in preparation in question, active ingredients of which were as hereinabove set forth;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that principal active ingredients in product in question were indicated by names "Pancreobismuth," "Pancreo Bismuth," and "Pancreobismuth and Pepsin," and that representations with reference to therapeutic value thereof and results to be obtained from its use were true, and with result of unfairly diverting thereby trade to it from others also engaged in sale and distribution in commerce of similar preparations or other products designed and intended for similar usage, and who truthfully advertise the same:

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

Before *Mr. Webster Ballinger*, trial examiner.

Mr. George Foulkes and *Mr. R. P. Bellinger* for the Commission.
Perry, Saunders & Cheney, of Boston, Mass., 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 Frye 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, Frye Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 36 Pleasant Street, Watertown, Mass.

PAR. 2. Respondent is now, and for more than 1 year last past has been, engaged in the business of selling and distributing a medicinal preparation designated "Pancreo Bismuth & Pepsin" and "Pancreobismuth." Respondent causes said product, when sold, to be transported from its place of business in Massachusetts to purchasers thereof located in other States of the United States and in the District of Columbia. Respondent maintains, and at all times herein mentioned has maintained, a course of trade in said product in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business respondent is in substantial competition with other corporations, and with individuals, firms, and partnerships engaged in the sale and distribution of like

Complaint

30 F. T. C.

and similar products, or other products and treatments intended and used for similar purposes, in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing individuals to purchase its product, respondent has caused advertisements to be inserted in newspapers and other periodicals of general circulation throughout the United States, and has printed and circulated throughout the several States of the United States to customers and prospective customers certain advertising folders and literature, in all of which respondent has caused the name of its product "Pancreo Bismuth & Pepsin" to be prominently and conspicuously displayed, together with the following statements:

For distress due to upset stomach, FRYE'S PANCREO BISMUTH & PEPSIN.

Relieves indigestion due to acid stomach, FRYE'S PANCREO BISMUTH & PEPSIN.

For upset stomach—take PANCREO BISMUTH & PEPSIN.

PANCREO tends to neutralize excess of acid and allay irritation.

FRYE'S PANCREO BISMUTH aids in the digestion of starchy foods—that's how it helps to give you relief from the distress these foods often cause.

In all of its advertising literature respondent represents through statements and representations herein set out, and through statements of similar import and effect, that,

1. Its product is effective in the treatment of all cases of upset stomach.
2. Its product relieves indigestion due to acid stomach.
3. Its product tends to neutralize excess acid and allay irritation.
4. Its product aids in the digestion of starchy foods and helps to give relief from distress caused by starchy foods.

PAR. 5. The statements and representations made by respondent with respect to the therapeutic value of its product are false and misleading and untrue. Such product is not effective in the treatment of all cases of upset stomach and such product does not relieve all cases of indigestion due to acid stomach. While such product possesses the therapeutic value of a simple antacid and carminative which tends temporarily to neutralize excess acid and to relieve the symptoms of distress from gastric hyperacidity, such product does not have any effect on the causative factors of gastric hyperacidity and does not have any effect on the systemic causes of excess acid in the system. Respondent's product does not permanently tend to neutralize excess acid or allay irritation but only tends to give temporary relief from the distress of such symptoms. The product is not an aid in the digestion of starchy foods and does not help to give relief from distress caused by starchy foods.

PAR. 6. In its advertising matter respondent designates its product as "Pancreo Bismuth & Pepsin." The use by respondent of the name "Pancreo Bismuth & Pepsin" in designating its product, has the tendency and capacity to, and does, lead purchasers to believe that pancreatin and pepsin are substantial physiologically active ingredients of said product. In truth and in fact pancreatin and pepsin are not psychologically substantial active ingredients of the product. The principal active ingredients of respondent's product "Pancreo Bismuth & Pepsin" are sodium bicarbonate, bismuth subnitrate and ginger. The sodium bicarbonate in respondent's product prevents any effectiveness by reason of the pepsin contained in the product.

PAR. 7. Each and all of the false and misleading representations made by the respondent in its advertising and newspapers, magazines, and pamphlets in offering for sale and selling its product, as hereinabove set out, had, and now have the tendency and capacity to, and do, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all of said representations are true. As a direct result of this erroneous and mistaken belief a number of the purchasing public has purchased a substantial volume of respondent's product with the result that trade in said commerce has been diverted unfairly to respondent from competitors likewise engaged in the business of selling and distributing like and similar products or other products and treatments intended, designed and used for similar purposes in said commerce who truthfully advertise their products and the effectiveness thereof when used. As a result thereof, 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. 8. In the course and conduct of its aforesaid business, since March 21, 1938, the respondent has disseminated and is now disseminating, and has caused and is now causing the dissemination of, false advertisements concerning its said product by using the name "Pancreobismuth" in designating said product, by United States mails, by insertion in circulars and other printed or written matter, all of which are distributed in commerce among and between the various States of the United States, for the purpose of inducing, and which are likely to induce, directly or indirectly the purchase of its said products; and has disseminated and is now disseminating, and has caused and is now causing the dissemination of, false advertisements concerning Pancreobismuth, by various means, and for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of its said product in commerce, as commerce is defined in the Federal Trade

Commission Act. Among, and typical of the false statements or representations contained in said advertisements, disseminated and caused to be disseminated, as aforesaid, are the following:

A formula—which will materially benefit your patients—Pancreobismuth.

Pancreobismuth

Antacid—Digestant

A formula which will materially benefit your patients.

The use by respondent of the name “Pancreobismuth” in designating its product has the tendency and capacity to, and does, lead purchasers to believe that pancreatin is an active ingredient of the product. In truth and in fact the amount of pancreatin in respondent’s product is negligible, having no physiological value. The active ingredients of Pancreobismuth are sodium bicarbonate, bismuth, subnitrate and ginger.

PAR. 9. The aforesaid acts and practices of 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, and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on the 21st day of March 1939, issued its complaint and thereafter caused the same to be served upon the respondent, Frye Co., a corporation. 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 before Webster Ballinger, an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereupon the proceeding regularly came on for final hearing upon the said complaint, the answer thereto, testimony and other evidence and brief in support of the allegations of the complaint, and the Commission having duly considered the matter, and being fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Frye Co., is a corporation organized in 1935 under the laws of the State of Massachusetts, and has ever since its incorporation maintained its principal office and place of business at 36 Pleasant Street, Watertown, Mass. Respondent is now, and was, for more than 1 year prior to the issuance of the complaint,

engaged in the sale and distribution of a medicinal preparation designated and labelled "Pancreobismuth," "Pancreo Bismuth," and "Pancreobismuth and Pepsin."

PAR. 2. Respondent, being engaged in business as aforesaid, caused said preparation when sold, to be transported from its place of business in Watertown, Mass., to purchasers thereof located at various points in States of the United States other than the State from which said shipments were made. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in commerce in said preparation, distributed and sold by it, between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business, respondent is now, and had been, in substantial competition with other individuals, and with corporations and firms also engaged in the business of selling and distributing similar preparations, or other preparations or products designed and intended for similar usage, in commerce between and among the various States of the United States and in the District of Columbia.

PAR 4. In the course and conduct of its said business, during the time mentioned in paragraph 1, and for the purpose of inducing individuals to purchase its preparation, respondent caused advertisements to be inserted in newspapers and other periodicals of general circulation throughout the United States, and printed and circulated throughout the several States of the United States to customers and prospective customers certain advertising folders and literature, in all of which respondent caused the name of its product "Pancreo Bismuth and Pepsin" to be prominently and conspicuously displayed, together with the following statements:

For distress due to upset stomach, FRYE'S PANCREO BISMUTH & PEPSIN.

Relieves indigestion due to acid stomach, FRYE'S PANCREO BISMUTH & PEPSIN.

For upset stomach—take PANCREO BISMUTH & PEPSIN.

PANCREO tends to neutralize excess of acid and allay irritation.

FRYE'S PANCREO BISMUTH aids in the digestion of starchy foods—that's how it helps to give you relief from the distress these foods often cause.

Through the use of the aforesaid statements and representations and others of similar import or meaning, not herein set out, the respondent represented, directly or by implication, that:

1. Its product is effective in the treatment of all cases of upset stomach;
2. Its product relieves indigestion due to acid stomach;
3. Its product tends to neutralize excess acid and allay irritation;
4. Its product aids in the digestion of starchy foods and helps to give relief from distress caused by starchy foods.

PAR. 5. The use of the said name "Pancreo Bismuth and Pepsin" or "Pancreo Bismuth" or "Pancreobismuth," in connection with said preparation, is deceptive and misleading, and each of the representations set out in paragraph 4 made by respondent with respect to the therapeutic value of its said preparation and the results to be obtained from its use, were, and are, exaggerated, misleading, and untrue.

Respondent's product contains milk sugar, bismuth subnitrate, sodium bicarbonate and small amounts of pepsin, powdered ginger, and pancreatin. Pancreatin and pepsin, the ingredients referred to in the name of the product, are rendered physiologically inert when taken internally in the preparation involved herein. The active ingredients in this preparation are bismuth subnitrate, sodium bicarbonate, and ginger. The name "Pancreo Bismuth and Pepsin" or "Pancreobismuth" or "Pancreo Bismuth" has a tendency to lead prospective purchasers into the erroneous belief that they are going to obtain some physiological effect from the presence of pancreatin and pepsin, whereas in truth and in fact these two ingredients as used in the preparation are rendered physiologically inert.

While said preparation possesses the therapeutic value of a simple antacid and carminative, which tends temporarily to neutralize excess acid and to relieve the symptoms of distress from gastric hyperacidity, said preparation does not have any effect on the causative factors or gastric hyperacidity or the systemic causes of excess acid in the system. Such product is not effective in the treatment of upset stomach or in the relief of indigestion due to acid stomach in excess of being a simple antacid and carminative. Respondent's said preparation does not tend to permanently neutralize excess acid or allay irritation but only tends to give temporary relief from the distress of such symptoms. It is not an aid in the digestion of starchy foods; and it does not help to give relief from distress caused by starchy foods.

PAR. 6. In the course and conduct of its aforesaid business, since March 21, 1938, the respondent, by using the name "Pancreobismuth" in designating said product, has disseminated and is now disseminating, and has caused and is now causing the dissemination of false advertisements concerning its said product by United States mails, by insertion in circulars and other printed or written matter, all of which are distributed in commerce among and between the various States of the United States, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of its said products, and has disseminated and is now disseminating, and has caused and is now causing the dissemination of, false advertisements

concerning Pancreobismuth, by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of its said product in commerce, as "commerce" is defined in the Federal Trade Commission Act. Among, and typical of the false statements or representations contained in said advertisements, disseminated and caused to be disseminated, as aforesaid, are the following:

A formula—which will materially benefit your patients—Pancreobismuth.

Pancreobismuth

Antacid—Digestant

A formula which will materially benefit your patients.

The use by respondent of the name "Pancreobismuth" in designating its product has the tendency and capacity to, and does, lead purchasers to believe that pancreatin is an active ingredient of the product. In truth and in fact the amount of pancreatin in respondent's product is negligible, having no physiological value and being inert in said preparation. The active ingredients of Pancreobismuth are sodium bicarbonate, bismuth subnitrate and ginger.

PAR. 7. The use of the aforesaid deceptive and misleading names, Pancreobismuth, Pancreo Bismuth, and Pancreobismuth and Pepsin, and the aforesaid exaggerated and misleading representations made by respondent, in offering for sale and selling its product, as hereinbefore set out, had, and has, the tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the principal active ingredients in said preparation are indicated by the aforesaid names, and that said representations with reference to the therapeutic value of the preparation, and the results to be obtained from its use, are true. As a result, trade is now, and has been, unfairly diverted to respondent from corporations, copartnerships, firms, and individuals also engaged in the business of selling and distributing in commerce among and between the various States of the United States similar preparations or other products designed and intended for similar usage, and who truthfully advertise their preparations or products.

CONCLUSION

The aforesaid acts and practices of the respondent, as herein found, are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Order

30 F. T. C.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and other evidence taken before Webster Ballinger, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint, brief filed herein by the counsel for the Commission, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Frye Co., a corporation, its officers, agents, representatives, and employees, in connection with the offering for sale, sale and distribution of a medicinal preparation now designated as "Pancreobismuth," "Pancreo Bismuth," or "Pancreobismuth and Pepsin," or any other preparation containing substantially the same ingredients or possessing substantially similar therapeutic properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that said preparation has therapeutic value in the treatment of upset stomach, or in the relief of indigestion due to acid stomach, or in the neutralization of excess acid and allaying of irritation, in excess of being a simple antacid and carminative tending to give temporary relief from distress caused by such symptoms.

2. Representing that said preparation is beneficial in aiding the digestion of starchy foods or in relieving distress caused by starchy foods.

3. Representing that said preparation possesses physiological or therapeutic value due to the presence of pancreatin or pepsin when such ingredients are not present in such amounts and in such form as to be active ingredients thereof.

4. Using the trade names "Pancreobismuth," "Pancreo-Bismuth," or "Pancreobismuth and Pepsin," or any other trade names containing the words "pancreatin" or "pepsin" or any other adaptation of such words, to designate, describe or in any way refer to respondent's present product or any other similar product which does not possess pancreatin and pepsin in such amounts and in such form as to be active ingredients therein.

It is further ordered, That the respondent, Frye Co., a corporation, its officers, agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Disseminating or causing to be disseminated any advertisement by means of United States mails or in commerce, as "commerce" is defined in the Federal Trade Commission Act, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of a medicinal preparation now known or designated by the name of "Pancreobismuth" or any other medicinal preparation composed of substantially similar ingredients or possessing substantially similar therapeutic properties, or disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said medicinal preparation, which advertisements represent, directly or through implication, by the use of the trade name "Pancreobismuth," or any other trade name containing the word "Pancreatin," or any adaptation thereof, or in any other manner, that said preparation contains pancreatin as an active ingredient thereof.

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.

IN THE MATTER OF
 ROY D. BURNSED, TRADING AS SOUTHERN ART STONE
 COMPANY

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

Docket 3697. Complaint, Feb. 2, 1939—Decision, Jan. 26, 1940

Where an individual engaged in manufacture of imitation marble and granite tombstones and memorials which (1) were produced from a mixture of crushed marble or granite, cement and other ingredients, called "Marble-texture" and "Granitexture," respectively, and (2) simulated in shape, design, color and appearance memorials carved from natural marble or granite, and in sale and distribution of said products, depictions of which in his catalogs had general appearance of natural marble and granite memorials similarly pictured, to purchasers, who did not usually see samples thereof until ordered and paid for, and who were situated in other States and in the District of Columbia, in substantial competition in commerce among the various States and in said District with others engaged in sale and distribution of tombstones and memorials made of similar materials and with those engaged in sale and distribution of such products made from natural marble and granite; in advertising his said tombstones and memorials in catalogs, circular letters, mail order solicitations, magazines, and farm papers—

- (a) Represented that they were natural marble or granite, and would retain as high a polish as said substances, and were superior to and would last longer than the natural or ordinary marble or granite, and would not crack, crumble or disintegrate from natural causes, and were everlasting, through such statements as "* * * manufactured from the finest marble and granite * * *," "* * * will outlast ordinary marble and granite," "* * * the marble or granite monument that is so beautiful today, may in a few short years discolor, crumble or crack. * * *," "* * * withstands all the elements, it does not absorb moisture and is not susceptible to influences which so often cause gradual decomposition, loss of polish * * *," etc., facts being his said products were not natural marble or granite, would not take or retain as high a polish as the other or last as long, and were not superior thereto or less porous, etc., but were in fact inferior in every particular and would crack, crumble and disintegrate under ordinary weather conditions; and
- (b) Represented that a footstone was given free by him with every order for tombstone or memorial, and that his products were from 33⅓ percent to 50 percent lower in price, through so stating, and through such statements as "FREE Footstone with Every Order Without additional cost to you, we include with each order a footstone to match," facts being a footstone was not given free, as above set forth, but price thereof was included in that asked for tombstone or memorial, so-called "free" offer was in fact a continuing combination offer regularly made by him, and prices of his said products were not 33⅓ percent to 50 percent lower than those asked by his competitors for products of the same or substantially the same quality and weight, but were approximately the same;