

Syllabus

IN THE MATTER OF

S. M. LABORATORIES COMPANY

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

Docket 4062. Complaint, Mar. 12, 1940—Decision, May 13, 1940

Where a corporation engaged in compounding, selling and distributing medicinal and therapeutic preparations, including its "Neofem Liquid," "Neofem Capsules," and "Cerene," to purchasers in various other States and in the District of Columbia, in advertisements thereof which it disseminated and caused to be disseminated through the mails, by insertion in newspapers and periodicals having general circulation, and in circulars and other printed or written matter distributed in commerce, and by various means and otherwise, and which were intended and likely to induce, directly or indirectly, purchase of its said products—

(a) Represented, directly and by implication, that its said "Neofem Capsules," "Neofem Liquid," and "Cerene" were cures or remedies for painful and delayed menstruation, and constituted competent and effective treatments therefor, and that their use constituted safe, sane ways of self-medication and relief from such condition, and that said "Neofem Capsules" were designed to give relief from painful menstruation or slight delay, that said "Neofem Liquid" provided a potent, direct and positive relief for cases of delayed menstruation that were past the first stages, and that said "Cerene" would give relief for stubborn cases of such condition and was dependable where other medicines had been tried and had failed;

Facts being said various preparations were not cures or remedies for said condition, and did not constitute competent and effective treatments therefor, and would not accomplish results which it claimed for them, and were not safe and harmless, by virtue of ergot, oil of savin, and aloin therein contained in quantities sufficient to cause serious and irreparable injury to health if used under conditions prescribed in said advertisements or under such conditions as are customary or usual, and might result in gastrointestinal disturbances such as catharsis, nausea, vomiting with pelvic congestion of the uterus leading to excessive uterine hemorrhage and, in those cases where either of said preparations is used to interfere with normal course of pregnancy, might result in uterine infection with extension to pelvic and abdominal structures and even to the bloodstream, causing condition known as septicemia or blood poisoning; and

(b) Failed to reveal, in aforesaid advertisements, facts material with respect to consequences which might result from use of said preparations under conditions prescribed or under such conditions as are customary or usual;

With capacity and tendency to mislead and deceive substantial portion of purchasing public into erroneous and mistaken belief that said statements, representations and advertisements were true, and to induce portion of such public to purchase said preparations containing drugs because of such erroneous and mistaken belief:

Complaint

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

Mr. A. E. Lipscomb for the Commission.

Allen, Froude & Hilen, of Seattle, Wash., 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 S. M. Laboratories Co., a corporation, hereinafter referred to as respondent, has violated the provisions of 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, S. M. Laboratories Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 2013 Fourth Avenue, Seattle, Wash.

PAR. 2. Respondent is now, and has been for more than 1 year last past, engaged in the business of compounding, manufacturing, selling, and distributing medicinal and therapeutical preparations. Among such preparations are preparations designated as Neofem Liquid, Neofem Capsules, and Cerene. Respondent causes said preparations, when sold by it, to be transported from its aforesaid place of business in the State of Washington to the purchasers thereof located in various other States of the United States, and in the District of Columbia.

Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparations in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its aforesaid business, the respondent has disseminated and is now disseminating, and has caused and is now causing the dissemination of false advertisements concerning its said products, by United States mails, by insertion in newspapers and periodicals having a general circulation and also 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, and by other means in commerce as commerce is defined in the Federal Trade Commission Act, 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 its said products by various means, for the purpose of inducing and which are likely to induce directly or indirectly the purchase of its said products in commerce, as commerce is defined in the Federal Trade Commission Act. Among and typical of the false statements and representations contained in said advertisements, disseminated and caused to be disseminated as aforesaid, are the following:

RELIEF FROM DELAYED MENSTRUATION PERIODS

Nothing causes more distress to mental outlook and physical well-being than painful menstruation and that functional disorder, the uncertain period. Although physicians have found it impossible at times to account for the failure of normal menstruation, there seems to be an agreement that such periods may be due to anemia, unsuitability of employment, change of environment, severe colds, nervous shock, etc.

Neofem Capsules, Neofem Liquid, and Cerene are three reliable products that represent a safe, sane way of self-medication used successfully by thousands of women. To help you choose the one best suited to your particular case the following brief guide is given:

Neofem Capsules. If your problem is primarily a question of painful menstruation or slight delay, Neofem Capsules will give best results with a minimum amount of inconvenience. They are small capsules, just as easy to take as any tablet. They are packed in a small box ready for use and can be carried about in the handbag.

Neofem Liquid. Packaged in a small 3-ounce bottle, it is always ready for instant use and may also be conveniently carried about. In a liquid form, to be taken internally, it has obvious advantages, providing a potent, direct, positive action. We recommend it for use in cases that are past the first stage.

Cerene. For stubborn cases, where other medication has been tried and failed, we recommend Cerene. This is a combination treatment of capsules and a medicated douche. Both powder and capsules are packed together with a special applicator in one package with complete directions for use. Cerene is best described by the word "dependable."

PAR. 4. By the use of the statements and representations hereinbefore set forth, and others similar thereto not specifically set out herein, the respondent represents directly and by implication that its preparations designated "Neofem Capsules," "Neofem Liquid," and "Cerene" are cures or remedies for painful and delayed menstruation and competent and effective treatments therefor and their use constitute safe, sane ways of self-medication and relief of delayed menstruation; that Neofem Capsules are designed to give relief from painful menstruation or slight delay that Neofem Liquid provides a potent, direct and positive relief for cases of delayed menstruation that are past the first stage; that Cerene will give relief for stubborn cases of delayed menstruation and is dependable where other medicines have been tried and have failed.

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PAR. 5. The aforesaid statements, claims, and representations used and disseminated by the respondent, in the manner above described are grossly exaggerated, misleading, and untrue. In truth and in fact the preparations sold and distributed by the respondent as aforesaid, designated "Neofem Capsules," "Neofem Liquid," and "Cerene" are not cures or remedies for painful and delayed menstruation and do not constitute competent or effective treatments therefor. Said preparations will not accomplish the results claimed for them by the respondent. Furthermore, said preparations are not safe and harmless in that said preparations contain ergot, oil of savin, and aloin.

The aforesaid drugs are present in said preparations in quantities sufficient to cause serious and irreparable injury to health if used under the conditions prescribed in said advertisement or under such conditions as are customary or usual. Such use of said preparations may result in gastrointestinal disturbances such as catharsis, nausea, vomiting with pelvic congestion of the uterus leading to excessive uterine hemorrhage and in those cases where either of these preparations is used to interfere with the normal course of pregnancy may result in uterine infection with extension to the pelvic and abdominal structures and even to the bloodstream causing the condition known as septicemia or blood poisoning.

PAR. 6. In addition to the representations hereinabove set forth, the respondent has also engaged in the dissemination of false advertisements in the manner above set forth in that said advertisements so disseminated fail to reveal facts, material with respect to consequences which may result from the use of said preparations under the conditions prescribed in said advertisements, or under such conditions as are customary or usual.

PAR. 7. The use by the respondent of the foregoing false and deceptive statements and representations with respect to its preparations disseminated as aforesaid has had and now has the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements, representations, and advertisements are true and induce a portion of the purchasing public because of such erroneous and mistaken belief to purchase respondent's preparations containing injurious drugs.

PAR. 8. The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice and injury of the public and constitute 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 March 12, 1940, issued and subsequently served, its complaint in this proceeding upon respondent, S. M. Laboratories Co., a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. On March 28, 1940, the respondent filed its answer, in which it admitted, as to its past acts and practices, all of the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearing as to said facts, and stated that it is not now and for some time last past has not been engaged in the acts and practices charged. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint and the answer thereto, and the Commission, having duly considered the matter, 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 S. M. Laboratories Company, is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 2013 Fourth Avenue, Seattle, Wash.

PAR. 2. Respondent has been for more than 1 year prior to March 12, 1940, engaged in compounding and in selling and distributing medicinal and therapeutic preparations. Among such preparations were certain preparations designated as "Neofem Liquid," "Neofem Capsules," and "Cerene." Respondent caused said preparations, when sold by it, to be transported from its aforesaid place of business in the State of Washington to the purchasers thereof located in various other States of the United States, and in the District of Columbia.

At all times mentioned herein respondent has maintained a course of trade in said preparations in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its aforesaid business, the respondent disseminated, and caused the dissemination of false advertisements concerning its said products by United States mails, by insertion of advertisements in newspapers and periodicals having a general circulation, and also in circulars and other printed or written matter, all of which have been distributed in commerce among and between the various States in the United States, and by other means

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

RELIEF FROM DELAYED MENSTRUATION PERIODS

Nothing causes more distress to mental outlook and physical well-being than painful menstruation and that functional disorder, the uncertain period. Although physicians have found it impossible at times to account for the failure of normal menstruation, there seems to be an agreement that such periods may be due to anemia, unsuitability of employment, change of environment, severe colds, nervous shock, etc.

Neofem Capsules, Neofem Liquid and Cerene are three reliable products that represent a safe, sane way of self-medication used successfully by thousands of women. To help you choose the one best suited to your particular case the following brief guide is given:

Neofem Capsules. If your problem is primarily a question of painful menstruation or slight delay, Neofem Capsules will give best results with a minimum amount of inconvenience. They are small capsules, just as easy to take as any tablet. They are packed in a small box ready for use and can be carried about in the handbag.

Neofem Liquid. Packaged in a small three-ounce bottle, it is always ready for instant use and may also be conveniently carried about. In a liquid form, to be taken internally, it has obvious advantages, providing a potent, direct, positive action. We recommend it for use in cases that are past the first stage.

Cerene. For stubborn cases, where other medication has been tried and failed, we recommend Cerene. This is a combination treatment of capsules and a medicated douche. Both powder and capsules are packed together with a special applicator in one package with complete directions for use. Cerene is best described by the word "dependable."

PAR. 4. By the use of the statements and representations hereinabove set forth, and others similar thereto not specifically set out herein, the respondent, prior to March 28, 1940, represented directly, and by implication that its preparations designated "Neofem Capsules," "Neofem Liquid," and "Cerene" are cures or remedies for painful and delayed menstruation, and constitute competent and effective treatments therefor, and that their use constitutes safe, sane ways of self-medication and relief from delayed menstruation; that Neofem Capsules are designed to give relief from painful menstruation or slight delay; that Neofem Liquid provides a potent, direct

and positive relief for cases of delayed menstruation that are past the first stages; that Cerene will give relief for stubborn cases of delayed menstruation and is dependable where other medicines have been tried and have failed.

PAR. 5. The aforesaid statements, claims and representations used and disseminated by the respondent, in the manner above described are grossly exaggerated, misleading, and untrue. In truth and in fact the preparations sold and distributed by the respondent as aforesaid, designated "Neofem Capsules," "Neofem Liquid," and "Cerene" are not cures or remedies for painful and delayed menstruation and do not constitute competent, effective treatments therefor. Said preparations will not accomplish the results which the respondent has claimed for them. Furthermore, said preparations are not safe and harmless in that said preparations contain ergot, oil of savin, and aloin.

The aforesaid drugs are present in said preparation in quantities sufficient to cause serious and irreparable injury to health if used under the conditions prescribed in said advertisements or under such conditions as are customary or usual. Such use of said preparations may result in gastro-intestinal disturbances such as catharsis, nausea, vomiting with pelvic congestion of the uterus leading to excessive uterine hemorrhage and in those cases where either of these preparations is used to interfere with the normal course of pregnancy may result in uterine infection with extension to the pelvic and abdominal structures and even to the bloodstream causing the condition known as septicemia or blood poisoning.

PAR. 6. In addition to the representations hereinabove set forth the respondent also engaged in the dissemination of false advertisements in the manner above set forth in that said advertisements so disseminated failed to reveal facts material with respect to consequences which may result from the use of said preparations under the conditions prescribed in said advertisements or under such conditions as are customary or usual.

PAR. 7. The use by the respondent of the foregoing false and deceptive statements and representations with respect to its preparations disseminated as aforesaid has had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements, representations and advertisements are true and to induce a portion of the purchasing public to purchase respondent's preparations containing drugs because of such erroneous and mistaken belief.

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CONCLUSION

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

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of the respondent, in which answer respondent admits, as to its past acts and practices, all the material allegations of fact set forth in said complaint and states that it waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, S. M. Laboratories 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 the 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 preparations containing drugs now designated by the names of "Neofem Capsules," "Neofem Liquid," and "Cerene," or any other preparations composed of substantially similar ingredients or possessing substantially similar properties, whether sold under the same names or any other names, 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 preparations, which advertisements represent, directly or through implication, that said preparations, "Neofem Capsules," "Neofem Liquid," and "Cerene" are cures or remedies for painful or delayed menstruation or constitute safe, competent, or effective treatments therefor or that their use provides safe or sane ways of self-medication in securing relief from delayed menstruation; that Neofem Liquid provides a potent, direct, and positive relief for cases of delayed menstruation; that Cerene will give relief for stubborn cases of delayed menstruation or that it is de-

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pendable for such use; or which advertisements fail to reveal that the use of such preparations may result in serious and irreparable injury to the health of the user.

It is further ordered, That the respondent shall, within 60 days after the 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
MISSISSIPPI SALES COMPANY, INC., JOBBERS PRODUCE
COMPANY, INC., AND S. O. SCOTT, INDIVIDUALLY, AND
AS PRESIDENT, DIRECTOR, AND MAJORITY STOCK-
HOLDER OF SAID CORPORATIONS, ET AL.

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

Docket 3511. Complaint, July 27, 1938—Decision, May 15, 1940

DISCRIMINATING IN PRICE—CLAYTON ACT, SECTION 2 (c)—BROKERAGE AND COMMISSION PROVISIONS—SELLER TO BUYER PAYMENTS—INTERMEDIARIES—BUYER CONTROLLED BROKERS—BROKERAGE PAYMENTS TO AND RECEIPT BY, ON BUYER PURCHASES.

The payment of brokerage to, and the receipt thereof by, a broker upon the purchases of a buyer possessing the power of control over such broker or in whose behalf such broker acts is a practice which Congress deemed to be an inherently unfair trade practice and specifically and unconditionally prescribed by said paragraph of said act.

DISCRIMINATING IN PRICE—CLAYTON ACT, SECTION 2 (c)—BROKERAGE AND COMMISSION PROVISIONS—SELLER TO BUYER PAYMENTS—INTERMEDIARIES—CORPORATE ENTITIES—WHERE BROKER INTERMEDIARY AND BUYER DISTINCT, BUT SAME CONTROL AND OWNERSHIP COMMON TO BOTH.

The payment of brokerage to, and the receipt thereof by, buyers on their own purchases, whether the same is paid directly to the buyers or transmitted to them through intermediaries, is a practice which Congress deemed to be an inherently unfair trade practice and specifically and unconditionally prescribed by said paragraph of said act, and while corporate broker "M" and corporate buyer "J" may be considered legal entities distinct from the members who compose them, such distinction is a fiction of the law which is disregarded when it is urged to an intent and purpose which is not consonant with the reason and policy of the law, and where the principal party at interest in both broker "M" and buyer "J" was "S," who was president, director, active manager, and owner of 98 percent of the stock of each, payment of brokerage fees or commissions to and receipt thereof by "M" upon the purchases of "J" was in fact and in law payment of brokerage fees or commissions to and receipt thereof by buyer "J" within the meaning of the paragraph in question of the act.

DISCRIMINATING IN PRICE—CLAYTON ACT, SECTION 2 (c)—BROKERAGE AND COMMISSION PROVISIONS—SELLER TO BUYER PAYMENTS—"SERVICES RENDERED" CLAUSE.

The "services rendered" clause of said paragraph of said act does not set up conditions upon which brokerage may be paid by sellers either to buyers or to their intermediaries, agents or representatives, upon the buyers' own purchases. (*The Great Atlantic & Pacific Tea Company v. Federal Trade Commission*, 106 F. (2d) 667 (C. C. A. 3d, 1939), 29 F. T. C. 1591;