SECTIONS OF FEDERAL FOOD, DRUG, AND COSMETIC ACT INVOLVED IN VIOLATIONS REPORTED IN D.D.N.J. NOS. 6581–6620

Adulteration, Section 501(a)(1), the article consisted in part of a filthy substance; Section 501(b), the article purported to be and was represented as a drug, the name of which is recognized in an official compendium (United States Pharmacopeia), and its quality fell below the standard set forth in such compendium; and Section 501(c), the article was not subject to the provisions of Section 501(b), and its strength differed from, or its purity or quality fell below, that which it purported or was represented to possess.

Misbranding, Section 502(a), the labeling of the article was false and misleading; Section 502(b), the article was in package form, and it failed to bear a label containing (1) the name and place of business of the manufacturer, packer, or distributor, and (2) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; Section 502(e), the article was a drug not designated solely by a name recognized in an official compendium, and its label failed to bear (1) the common or usual name of the drug, and (2), in the case where the article was fabricated from two or more ingredients, the common or usual name of each active ingredient; Section 502(f), the labeling of the article failed to bear (1) adequate directions for use, and (2) adequate warnings against use in those pathological conditions, or by children, where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users; Section 502(i)(2), the article was an imitation of another drug; and Section 503(b)(4), the article was a drug subject to Section 503(b)(1), and its label failed to bear the statement "Caution: Federal law prohibits dispensing without prescription."

New-drug violation, Section 505(a), the article was a new drug within the meaning of Section 201(p), which was introduced into interstate commerce, and an application filed pursuant to Section 505(b) was not effective with respect to such drug.

NEW DRUGS SHIPPED WITHOUT EFFECTIVE APPLICATION

6581. Hope's Worm-Rid. (Inj. No. 368.)

COMPLAINT FOR INJUNCTION FILED: 12–28–59, E. Dist. Mo., against the Hope Co., a corporation, Clayton, Mo., Hope J. Anderson, president and treasurer of the Hope Co., and Na-Spra, Inc., Maplewood, Mo.

NATURE OF BUSINESS: The Hope Co. promoted and sold a drug intended for use without a prescription in the treatment of worm infestation in humans. Each 5-cc. teaspoonful of syrup contained piperazine citrate equivalent to 500 mg. piperazine hexahydrate. The Hope Co. and Hope J. Anderson solicited orders for the drug by means of form letters; they prepared and arranged for the printing of all labeling of the drug, and furnished the formula and labels to Na-Spra, Inc. Na-Spra, Inc., manufactured the drug according to the formula supplied by the Hope Co. and Hope J. Anderson, and packaged the drug in 4-oz. bottles to which the labels supplied by the Hope Co. and Hope J. Anderson were affixed. All customer orders for the drug were initially received by the Hope Co. and Hope J. Anderson, and after such receipt instructions were issued by the Hope Co. and Hope J. Anderson pursuant to which shipments of the drug were made to the customers by Na-Spra, Inc., in the name of the Hope Co. Na-Spra, Inc., would inform the Hope Co. and

Hope J. Anderson when the shipments of the drug were made and after receipt of such information the Hope Co. and Hope J. Anderson would bill the customers direct.

CHARGE: The complaint alleged that the article of drug designated by the name of *"Hope's Worm-Rid"* was a new drug within the meaning of 201(p) in that its composition in respect to piperazine hexahydrate was such that the drug was not generally recognized among experts, qualified by scientific training and experience to evaluate the safety of drugs, as safe for use under the conditions prescribed, recommended, and suggested in the labeling of the drug, namely, for use without a prescription in the treatment of worm infestation in humans.

The complaint alleged further that when caused to be introduced and delivered for introduction into interstate commerce by the defendants, the drug was in violation of 505(a) in that the drug so labeled was a new drug for which no application filed pursuant to 505(b) was effective.

The complaint alleged further that the defendants violated 301(d) by their acts of causing the introduction and delivery for introduction into interstate commerce of such drug, so labeled, which was in violation of 505(a).

DISPOSITION: On 12–28–59, a temporary restraining order was issued. On 1–18–60, the defendants appeared and filed an answer denying that the article was a new drug. Subsequently, the defendants filed interrogatories and the Government filed answers.

On 1–21–60 and 1–22–60, the Government's motion for a preliminary injunction was heard and, at that time, the parties stipulated that no new drug application had been filed with respect to this drug and that the record of the hearing for a preliminary injunction would become a part of the record of this suit on final hearing.

On 2–22–60, the defendants filed an amended answer containing the previous denials and further alleging that the Federal Food, Drug, and Cosmetic Act was unconstitutional, especially the provisions relating to new drugs and relating to the United States District Court's jurisdiction to restrain violations of the Act.

On 3–31–60, a preliminary injunction was granted. During a hearing held 6–3–60 and 6–6–60, on the motion for a permanent injunction, the Government's motion to quash the defendant's subpoena of two Food and Drug Administration officials was taken under advisement by the court, and, upon the oral motion of the Government, the court ruled that the defendants were to inform the court within 5 days concerning the testimony that the defendants expected to obtain from the subpoenaed officials.

On 8–16–60, the court sustained the Government's motion to quash and rendered the following memorandum opinion:

WEBER, *District Judge:*

MEMORANDUM

"There is presently pending, and unruled upon, the matter of the issuance of subpoenas to Dr. Ralph G. Smith, Director of the New Drug Branch of the Food and Drug Administration, and Dr. William H. Kessenich, Director of the Bureau of Medicine of the Food and Drug Administration, and the Motion filed by plaintiff to quash said subpoenas. After a hearing upon the Motion to Quash, the Court requested of defendant a statement as to evidence and proof expected from the above witnesses, for the reason that they both reside in

Washington, D.C., and are the heads of governmental departments. Defendant has filed said statement of expected proof and the Court has reviewed same and determines as follows:

"1. Defendant states that their testimony would be of probative value and that from a review of prior statements, testimony and published declarations, it is expected they will testify to facts to sustain defendant's answer to plaintiff's Petition. This is testimony which can be introduced by other witnesses and if prior statements, testimony and published declarations were inconsistent, it would amount to an effort by defendant to impeach its own witness or witnesses. The matter of probative value of the testimony is involved in the remaining statements of expected proof under paragraph 5 thereof and will be dealt with in the succeeding paragraphs of this Memorandum.

"2. Sub-paragraphs (a), (b) and (c) of paragraph 5 of defendant's expected proof call for the testimony of these witnesses to show standards, tests and rules for determining whether or not a drug is safe or a new drug. The statutes determine such standards. See Title 21, §§ 321(p) and 355(a). Therefore, such proof is immaterial as the Court will be guided by the statutory definitions.

"3. Sub-paragraphs (d) and (e) of paragraph 5 of defendant's expected proof do not concern the question at issue in this cause. The issue is not whether the drug could be used upon the market for testing and is not its use in order to determine its known effect, but the question is whether or not the drug in question is generally recognized among qualified experts as safe for use under the conditions prescribed, recommended or suggested on the labeling thereof. Therefore, such proof is incompetent and irrelevant.

"4. Sub-paragraphs (f), (h), (m), (r), (u) and (v) of paragraph 5 of defendant's expected proof are matters which can likewise be proven by other witnesses, and in fact, proof thereon has already been offered in this cause and therefore would be no more than cumulative.

"5. Sub-paragraphs (g), (o) and (w) of paragraph 5 of defendant's expected proof call for matters which are the final conclusion to be passed on by this Court and therefore invade the province of the Court and would be incompetent and irrelevant.

"6. Sub-paragraphs (i), (j), (l), (s) and (t) of paragraph 5 of defendant's expected proof are immaterial to the issue as to whether or not the drug is generally recognized among qualified experts and therefore such evidence is incompetent.

"7. Sub-paragraph (k) of paragraph 5 of defendant's expected proof is inconsistent with sub-paragraph (j) and exactly the reverse thereof and therefore immaterial, incompetent and irrelevant.

"8. The Court has conferred with counsel for the government concerning sub-paragraphs (n), (p) and (q) of paragraph 5 and the government will admit that there has been no report to the Food and Drug Administration of any illness or adverse complaint as a result of the use of Hope's Worm-Rid from the date of its first shipment to the time of the granting of the preliminary injunction herein and that there is no such thing as a drug devoid of any toxic effects to some persons. Sub-paragraph (q) is cumulative to (p) aforesaid.

"Therefore, the Motion to Quash will be sustained."

On 5–12–61, the court made the following findings of fact and conclusions of law:

WEBER, *District Judge:*

STATEMENT

"This matter was tried before the Court upon plaintiff's Complaint for Permanent Injunction. The Complaint alleges that the defendants have caused to be introduced and delivered for introduction into interstate commerce a drug known as 'Hope's Worm-Rid,' in violation of 21 U.S.C. 331(d). A permanent injunction against the continuance of these activities is sought under Section 302 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 332(a)) on the ground that the drug is a 'new drug' for which no new drug

application has been filed pursuant to Section 505(b) of the Act (21 U.S.C. 355(b)).

"The defendants have admitted by their Answer and by stipulation that they are manufacturing, advertising, and selling Hope's Worm-Rid in interstate commerce; that this drug contains, as its active ingredient, piperazine citrate; and that they have not filed an effective application for this drug under section 505(b) of the Act (21 U.S.C. 355(b)). The sole factual issue in dispute is whether this drug is a 'new drug' within the meaning of 21 U.S.C. (p)(1).

"A temporary restraining order was issued herein and upon motion of the plaintiff and the taking of testimony a preliminary injunction was granted. By stipulation the testimony taken at the hearing for the preliminary injunction is included as part of the record of the trial for the permanent injunction.

"The Court, having heard the evidence submitted by the parties and being now fully informed, adopts the following as its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

"1. The defendant, the Hope Company, is a corporation organized and existing under the laws of the State of Illinois and doing business at Clayton, Missouri.

"2. The defendant, Hope J. Anderson, an individual, is the president and treasurer of the Hope Company and is primarily responsible for its policies and activities.

"3. The defendant, Na-Spra, Inc., is a corporation organized and existing under the laws of the State of Missouri and doing business at Maplewood, Missouri.

"4. The defendants have been engaged in the business of preparing, selling, and causing to be introduced and delivered for introduction into interstate commerce an article designated by the name 'Hope's Worm-Rid,' which is manufactured in accordance with the following formula:

Piperazine Hexahydrate	—51.6 lbs.
Citric Acid	—30 lbs.
Methyl Paraben	—43.2 grams
Propyl Paraben	—21.6 grams
Sugar	—270 lbs.
Cherry Flavor	—300 cc.
Amaranth Color	—22.8 grams
Water	—to make 60 gallons

The active ingredient of the final product is piperazine citrate.

"5. The article, Hope's Worm-Rid, when caused to be introduced and delivered for introduction into interstate commerce is, by its labeling, offered for sale over-the-counter to lay persons, without the need for a physician's prescription, for use in the cure and treatment of pin and roundworm disease infections in humans.

"6. Hope's Worm-Rid is an article intended for use in the cure and treatment of diseases in man.

"7. The use of piperazine citrate in the quantities prescribed, recommended or suggested in the labeling of Hope's Worm-Rid may cause a variety of toxic side effects including sensitivity reactions such as hives; serum sickness; neurological disturbances such as disturbances of vision, muscular weakness, staggering, dizziness, and in-co-ordination of movement; and nausea, vomiting and diarrhea.

"8. These toxic reactions may require treatment by a physician with drugs which may be dispensed only on a physician's prescription.

"9. Except in rare instances pinworm and roundworm infections cannot be accurately diagnosed except by a physician.

"10. The symptoms of pinworms and roundworms include one or more of a variety of generalized symptoms such as abdominal pain, headaches, fatigue, nail biting, nervousness, irritability, 'not doing well,' loss of weight, and itching in the anal region. There are a wide variety of other diseases which exhibit one or more of these symptoms which are not amenable to treatment with Hope's Worm-Rid. The distribution of Hope's Worm-Rid, without

the requirement of a physician's prescription may therefore result in its use by many persons not suffering from either pinworms or roundworms. These persons would be subjected to the risk of the toxic effects of piperazine citrate without any medical justification.

"11. On the basis of the facts set out in Findings of Fact 4 through 10, the six highly qualified physicians and pharmacologists who testified for the plaintiff stated that they did not recognize the use of piperazine citrate as prescribed, recommended and suggested on the label and labeling for 'Hope's Worm-Rid' as being safe. This conclusion was reached by balancing the expected benefits to health from unrestricted sales against the dangers involved in such a use. They further testified that this is the consensus of medical and pharmacological opinion.

"12. Witnesses for the defendants stated that piperazine citrate has been safely and effectively used in the treatment of pinworms and roundworms under the supervision of physicians and that it is a safe drug. One witness testified that in his opinion its use as prescribed, recommended and suggested in the labeling of Hope's Worm-Rid is safe and generally recognized as safe.

"13. The testimony of the experts in this case establishes the existence of a difference of expert opinion concerning the safety of Hope's Worm-Rid for use under the conditions prescribed, recommended and suggested in its label. It is not, therefore, generally recognized among experts qualified by scientific training and experience to evaluate the safety of drugs, as safe for use under such conditions.

"14. Defendants have not filed a New Drug Application with the Secretary of Health, Education, and Welfare which has become effective with respect to Hope's Worm-Rid.

"15. The defendants will, unless enjoined, continue to market Hope's Worm-Rid in interstate commerce under its present labeling.

CONCLUSIONS OF LAW

"1. This Court has jurisdiction of the parties and the subject matter of this action under the provisions of 21 U.S.C. 332(a).

"2. The article designated as Hope's Worm-Rid is a 'drug' within the meaning of 21 U.S.C. 321(g).

"3. The existence of a genuine difference of medical opinion among experts, qualified by scientific training and experience to evaluate the safety of a drug, on the question of whether a drug is safe, requires a conclusion that the drug is not generally recognized as safe under such conditions; *The Merritt Corporation* v. *Folsom*, 165 F. Supp. 418 (D.D.C., 1958); *United States* v. *354 Bulk cartons * * * Trim Reducing Aid Cigarettes*, 178 F. Supp. 847 (D.N.J., 1959).

"4. The drug, Hope's Worm-Rid, is a 'new drug' within the meaning of 21 U.S.C. 321(p)(1).

"5. Said 'new drug' when caused to be introduced and delivered for introduction into interstate commerce by the defendants is in violation of 21 U.S.C. 355(a) in that no application filed pursuant to 21 U.S.C. 355(b) is effective.

"6. By causing the introduction and delivery for introduction into interstate commerce of said 'new drug,' without an effective application, the defendants have been violating the provisions of 21 U.S.C. 331(d).

"7. The United States of America is entitled to a permanent injunction restraining the defendants, their officers, agents, servants, employees and representatives and all persons in active concert or participation with them or any of them from introducing or causing to be introduced and delivering and causing to be delivered for introduction into interstate commerce, said drug which is designated as Hope's Worm-Rid, and labeled for use without a prescription in the treatment of worm infestation in humans, or any other drug of similar composition and labeling unless and until an application filed pursuant to 21 U.S.C. 355(b) is effective with respect to such drug under such conditions. An order will be entered granting an injunction as prayed in the Complaint."

On the same day, the court issued a decree of permanent injunction enjoining the defendants from directly or indirectly introducing and causing to be introduced and delivering and causing to be delivered for introduction into

interstate commerce, the drug which was designated as *"Hope's Worm-Rid"* and labeled for use without a prescription in the treatment of worm infestation in humans, or any other drug of similar composition and labeling unless and until an application filed pursuant to 505(b) is effective with respect to such drug.

6582. Dexules timed disintegration capsules and Phenamine tablets. (F.D.C. No. 44896. S. Nos. 21–435/6 R.)

QUANTITY: 97 30-capsule btls. of *Dexules timed disintegration capsules* and 97 90-tablet btls. of *Phenamine tablets*, at Cleveland, Ohio.

SHIPPED: 5–10–60 and 6–1–60, from Syracuse, N.Y., by Approved Pharmaceuticals Corp.

LABEL IN PART: (Btl.) "Timed Disintegration Dexules All Day Appetite Suppressant Approved Pharmaceutical Corp. Syracuse * * * New York Each Capsule Contains: Phenylpropanolamine Hydrochloride 75 mg., Protein Hydrolysate 15 mg. specially prepared to disintegrate over a 8 to 10 hour period for continuous appetite suppression. Dosage * * * Caution * * * 01136" and "30 Day Treatment Phenamine For Appetite Suppression To Aid Weight Reduction Nydegger Pharmacy, 22 Colonial Arcade Dist. Cleveland 14, Ohio Each tablet contains Phenylpropanolamine Hydrochloride 25 mg. Dosage * * * Caution."

LIBELED: 9–20–60, N. Dist. Ohio.

CHARGE: *Dexules timed disintegration capsules*, 502(a)—when shipped, the bottle label of the article contained false and misleading representations that the article was adequate and effective as a treatment for appetite suppression; 502(a)—the statements "Just One Capsule Suppresses Appetite All-Day-Long" and "Just One-A-Day Reduce 5–10–20 Pounds," appearing on the shipping carton label, represented and suggested that the article was adequate and effective as an appetite suppressant, that it would suppress appetite all day long, and that it was adequate and effective to reduce weight, which statements were false and misleading since the article was not adequate and effective for such conditions and purposes; and 505(a)—the article was a new drug which may not be introduced into interstate commerce since an application filed pursuant to 505(b) was not effective with respect to such drug.

Phenamine tablets, 502(a)—when shipped, the bottle label of the article contained false and misleading representations that the article was adequate and effective as a treatment for appetite suppression and weight reduction; and 502(a)—the statements "Reduce," "Eat Less—No Hunger Pangs—Safe Now! Lose Weight Scientifically – A True Appetite Depressant," and "Appetite Depressant Tablets," appearing on the shipping carton label, represented and suggested that the article was adequate and effective as a treatment for appetite suppression and weight reduction, which statements were false and misleading since the article was not adequate and effective as a treatment for such conditions and purposes.

DISPOSITION: Nydegger Pharmacal Co., Cleveland, Ohio, and Approved Pharmaceuticals Corp., Syracuse, N.Y., claimants, filed an answer denying that the articles were misbranded. The Government then served interrogatories upon the claimants. On 6–6–61, the claimants having failed to answer the interrogatories, the court granted the Government's motion for default judgment, and entered a decree of condemnation and destruction.