

3177. Misbranding of Chloresium Tooth Paste. U. S. v. 132 Cartons \* \* \*. Motion filed by claimant to suppress Government's taking of deposition overruled and claim withdrawn. Decree of condemnation. (F. D. C. No. 27219. Sample No. 56325-K.)

**LIBEL FILED:** May 18, 1949, District of Connecticut; amended libel filed March 24, 1950.

**ALLEGED SHIPMENT:** On or about February 25, 1949, from Little Falls, N. J., by Mycoloid Laboratories, Inc., on behalf of Rystan Co., Inc., of Mount Vernon, N. Y.

**PRODUCT:** 132 cartons, each containing 1 tube, of *Chloresium Tooth Paste* and a circular bearing the same name at New Haven, Conn. Examination showed that the product was a green-colored tooth paste.

**NATURE OF CHARGE:** Misbranding, Section 502 (a), the following statements in the labeling of the article were false and misleading since the article was not effective in the treatment of the conditions stated and implied: (Tube and carton) "Healing \* \* \* aid in maintaining normal healthy gingival tissue \* \* \* act as an adjunct to professional treatment of gum infections \* \* \* stimulates healing; helps maintain healthy gums"; (display carton) "Healing"; and (circular in carton entitled "Chloresium Tooth Paste") "healing \* \* \* improve and then maintain healthy gum tissue tone; help prevent gingival infections \* \* \* healing \* \* \* The natural cell-stimulating, antibiotic characteristics of these therapeutic chlorophyll derivatives make Chloresium Tooth Paste particularly valuable in cases of dental pathology \* \* \* to maintain normal healthy gum tissue tone; accelerate healing; control superficial infection \* \* \* will stimulate healing of gingival tissue, control superficial infection \* \* \* Improve and help maintain healthy gum tissue tone \* \* \* Assist in tightening of teeth loosened because of gum infections, by stimulating healthy, normal gum tissue growth \* \* \* Contribute to the healing and repair of gingival tissue after extractions, ulcerations and contraction of the gums \* \* \* Increase gum tissue resistance to infection \* \* \* Supplement regular treatment by the dentist in helping to control and prevent recurrence of gum and mouth infections."

Further misbranding, Section 502 (e) (2), the product was fabricated from two or more ingredients, and its label failed to bear the common or usual name of each active ingredient, namely the bactericidal, abrasive, and detergent ingredients active "in the prophylactic maintenance of oral hygiene," as stated in the labeling of the product.

**DISPOSITION:** Rystan Co., Inc., appeared as claimant and filed an answer to the libel, denying that the product was misbranded. On March 22, 1950, the Government served notice upon counsel for the claimant for taking depositions pursuant to Rule 30 of the Federal Rules of Civil Procedure. A motion was filed on behalf of the claimant to suppress the Government's taking of depositions. A hearing in the matter was held before the court, and on March 27, 1950, the following ruling was made:

**HINCKS, District Judge:** "Contrary to my first impression, I have come to the conclusion that to facilitate its cross-examination of claimant's witnesses and to prepare its rebuttal to claimant's defense the government is entitled to the discovery through the proposed deponents which it names of all matters not privileged. At the hearing hereon, it seemed agreed that the proposed deponents will testify probably as experts for the claimant as to matters of opinion

based on research which they have done at claimant's instance in preparation for trial. Libellant insisted that the discovery was necessary not to elicit their opinions as experts but rather to ascertain the factual scope and nature of the research done so that it possibly may be in a better position to cross-examine these witnesses on trial and prepare a rebuttal to the claimant's defense. Having in mind that the field in question here is one of scientific controversy wherein without prior discovery cross-examination cannot be expected successfully to perform its historic function and effective evidence in rebuttal, though perhaps in existence, cannot be produced forthwith upon the close of the claimant's defense, I feel that here there is sufficient showing of necessity, within the rule of *Hickman v. Taylor* if applicable here, to allow the discovery to proceed.

"I hold also that this court is without power, especially in view of 28 U. S. C. 2412, to condition the government's right of discovery under the rules upon the payment of the claimant's attorneys' fees and expenses incurred in connection with the proposed depositions. If the government is not conditionally chargeable with costs (when its suit is unsuccessful), it seems scarcely consistent to rule that it may be unconditionally subjected to a substantial item irrespective of the outcome of its action."

Before the depositions were taken, the claimant advised that it desired to withdraw its claim. On June 13, 1950, the claimant filed a formal withdrawal of its claim, and on June 27, 1950, judgment of condemnation was entered. Thereupon, the court ordered that the product be delivered to a charitable institution.

**3178. Misbranding of Farador device. U. S. v. 1 Device \* \* \*. (F. D. C. No. 28723. Sample No. 61356-K.)**

**LIBEL FILED:** February 16, 1950, Eastern District of Missouri.

**ALLEGED SHIPMENT:** On or about August 6, 1949, by the E. S. Robbins Forwarding Co., from Englewood, Ohio.

**PRODUCT:** 1 *Farador device* at Moberly, Mo., together with 1 direction booklet. The device consisted of a metallic cylinder closed at both ends. To one end was attached, by means of wires, two metallic plates which were to be applied to various parts of the body while the cylinder was immersed in cold water.

**NATURE OF CHARGE:** Misbranding, Section 502 (a), certain statements in the direction booklet were false and misleading. These statements represented and suggested that the device was adequate and effective for the prevention, treatment, and cure of most of the diseases of the human body, including, but not limited to, appendicitis, blood poison, tuberculosis, syphilis, spinal meningitis, apoplexy, convulsions, sexual debility, epilepsy, gonorrhea, infantile paralysis, malaria, paralysis, and heart disease. The device was not adequate or effective for the prevention, treatment, or cure of the diseases, conditions, and symptoms stated and implied.

**DISPOSITION:** May 22, 1950. Default decree of condemnation. The court ordered that the device and booklet be delivered to the Food and Drug Administration.

**3179. Misbranding of steam cabinet device. U. S. v. 6 Devices, etc. (F. D. C. No. 28501. Sample No. 68350-K.)**

**LIBEL FILED:** January 6, 1950, Western District of Washington.

**ALLEGED SHIPMENT:** On or about November 1, 1949, by the Healthmaster Steamette Co., from Burbank, Calif.

**PRODUCT:** 6 *steam cabinet devices* at Seattle, Wash., together with a number of accompanying leaflets. Examination showed that the device was a portable steam cabinet or Turkish bath. It consisted of plastic stretched over an alumi-