

Syllabus,

IN THE MATTER OF

G. BERNARDI

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

Docket 3857. Complaint, July 21, 1939—Decision, Sept. 7, 1939

Where an individual engaged in sale and distribution of his "Benaris" drug-containing medicinal preparation to purchasers in various other States and in the District of Columbia; in advertisements which he disseminated through the mails and through newspapers and periodicals of general circulation, and through continuities broadcast from radio stations of extrastate audience, and which were intended and likely to induce purchase of his said product—

- (a) Represented, directly and by implication, that said "Benaris" constituted a competent and effective cure or remedy for colds, chronic colds, catarrh, bronchitis, laryngitis, dryness of the throat, irritation and inflammation of the throat, inflamed and enlarged tonsils, hoarseness, rose or hay fever, and congestion of the nasal passages, and was an effective treatment and preventive of rose or hay fever, facts being it was not such a cure or remedy for said various ailments and conditions, nor effective treatment for and preventive of rose or hay fever;
- (b) Represented that said "Benaris" would neutralize the tissues and eliminate colds, and in all cases relieve headaches, and would penetrate the openings to the sinuses and relieve sinus congestion and assure a healthful efficient day, and bring new life and sensation to user thereof, facts being it was not beneficial in relief of headaches which were not due to congestion of mucous membranes of the air passages, sinus openings in many cases are clogged so as to prevent access of such preparation, in which cases it would not penetrate the openings to the sinuses or relieve congestion, and it would not neutralize tissues or eliminate colds, or insure a healthful or efficient day, or bring new life or sensation to user; and
- (c) Represented that by use of said "Benaris" greater diaphragmatic breathing could be obtained, resulting in finer head tones, and that it would increase resonance, volume, and quality of voice, facts being it would not cause such various results, as above claimed;

With effect of misleading and deceiving members of purchasing public into erroneous and mistaken belief that such false and misleading statements and representations were true, and into purchase of his said drug-containing medicinal preparation, and with result, as direct consequence, that trade was diverted unfairly to him from his competitors who truthfully advertise the therapeutic value of their respective products; to the substantial injury of competition in commerce:

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.

Mr. Robert Mathis, Jr. for the Commission.

Baker, Hostetler & Patterson, of Cleveland, Ohio, for respondent.

Complaint

29 F. T. C.

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 G. Bernardi, 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 G. Bernardi is an individual and has his office and principal place of business at 1017 Euclid Avenue in the city of Cleveland, State of Ohio.

PAR. 2. The respondent is now and has been for several years last past, engaged in the business of selling and distributing a medicinal preparation containing drugs designated "Benaris." Respondent causes said preparation when sold, to be transported from his aforesaid place of business in the State of Ohio to the purchasers thereof at their respective points of location in various States of the United States, other than the State of Ohio, and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation 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 his said business respondent is, and has been at all times referred to herein, in competition with other individuals and with corporations, firms, and partnerships also engaged in the sale and distribution in commerce among and between the various States of the United States and in the District of Columbia of products designed and used for the same purposes for which respondent recommends the use of the preparation Benaris.

PAR. 4. In the course and conduct of his aforesaid business, the respondent has disseminated and is now disseminating, and has caused and is now causing the dissemination of false advertisements concerning his said product, 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 continuities broadcast from radio stations which have sufficient power to, and do, convey the programs emanating therefrom to listeners located in various States of the United States other than the State in which said broadcasts originate, 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 his said product; and has disseminated and is now disseminating, and has caused and is now causing the dissemination of, false advertisements concerning his said product, by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of his said product 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:

For colds, chronic colds, catarrh, bronchitis and laryngitis, use that soothing, refreshing formula, Benaris. Benaris, not only helps to cure, but prevents colds. Smokers find that it relieves the tendency to dryness and headaches.

If you're troubled with chronic colds, and nose and throat infections, here's something you should know about. Benaris, spelled B-e-n-a-r-i-s, the development of a well-known concert singer, who for 23 years was unable to carry on his work. For this reason Benaris is especially recommended to those who are dependent on their voices a great deal. People who smoke find that Benaris relieves the tendency to dryness, and headaches. Those having enlarged tonsils, who wish to keep their throats, and voices in good condition should apply a few drops of Benaris on the back part of the tongue, especially in the morning. This refreshes and neutralizes the tissues. Bronchitis and laryngitis may likewise be treated in the same manner.

When a head cold comes on, use Benaris immediately. It acts instantly, relieving headaches, catarrh, bronchitis and laryngitis. Benaris is acclaimed for its remarkable cleansing and healing power. It keeps your nasal passages open, eliminates colds, and results in better health.

Many people suffer unnecessarily from sinus ailments during the cold season—unaware that a new, practical, and lasting preparation, called Benaris, has been developed to give quick relief. Thousands have used this unusual formula, and found that Benaris checks, and relieves colds, headaches, catarrh, bronchitis, and laryngitis. Benaris is compounded from the very finest ingredients—and is acclaimed for its remarkable cleansing power, yet it never irritates. It relieves unpleasant irritation and inflammation of the throat, resulting in an instant improvement in the voice. Benaris will also relieve the difficulties caused by mouth breathing, when due to nasal congestion. In order that your children may have the benefit of soothing, refreshing Benaris, a special formula has been created for them.

Benaris relieves and prevents colds, coughs, eases headaches of those who suffer from sinus ailments, catarrh, or other nasal disturbances. Very soothing and refreshing for people who smoke. People who have an inflamed throat or tonsils should insert a dropperful of Benaris directly into the throat. Very beneficial for those who use their voice.

To Singers, Benaris will prove invaluable in clearing the nasal and accessory passages, thus restoring and increasing the resonance, volume and quality of the voice. Permits greater diaphragmatic breathing, with the result of finer head tones. Benaris aids in eliminating the necessity of forcing the voice, and many forms of hoarseness.

Complaint

29 F. T. C.

To lawyers, speakers, teachers, salesmen, and all those dependent upon their voices in their profession, or anyone desiring to improve his voice, Benaris will be found of great benefit because of its cleansing quality which penetrates the membranes of the nose and the entrance to the sinuses.

Use Benaris every night on retiring to secure natural and comfortable rest. Benaris will loosen a congested nose which causes mouth breathing and prevents relaxation and hinders proper sleep. Use Benaris every morning on rising, to assure a healthful, efficient day.

* * * upon using Benaris they will discover how easy it is to remedy and eliminate the above ailments. Benaris will bring new *life and sensation* such as you have never realized before.

Benaris never fails to relieve sinus congestion.

Benaris is priceless. To ward off rose and hay fever treat mucous membrane frequently before attacking season. * * * Instant relief for headaches especially for over-indulgence.

PAR. 5. Through the use of the aforesaid statements and representations, and others of similar import or meaning not herein set-out, the respondent has represented, directly or by implication, that the preparation "Benaris" is a competent and effective cure or remedy for colds, chronic colds, catarrh, bronchitis, laryngitis, dryness of the throat, irritation and inflammation of the throat, inflamed and enlarged tonsils, hoarseness, rose or hay fever, and congestion of the nasal passages; that said preparation is an effective treatment for and will prevent rose or hay fever; that said preparation will neutralize the tissues and eliminate colds, and will in all cases relieve headaches, penetrate the openings to the sinuses, and relieve sinus congestion; that said preparation will assure a healthful, efficient day and bring new life and sensation to the user thereof, that by the use of said preparation greater diaphragmatic breathing can be obtained, resulting in finer head tones, and that said preparation will increase the resonance, volume, and quality of the voice.

PAR. 6. The aforesaid statements and representations by respondent, used and disseminated in the manner above described, are false and misleading and constitute false advertisements. In truth and in fact, said preparation is not a cure or remedy for colds, chronic colds, catarrh, bronchitis, laryngitis, dryness of the throat, irritation or inflammation of the throat, inflamed or enlarged tonsils, hoarseness, rose or hay fever, or congestion of the nasal passages. Said preparation is not an effective treatment for, nor will it prevent rose or hay fever. Said preparation will not neutralize the tissues or eliminate colds. Said preparation will not in all cases relieve headaches or sinus ailments. The use of said preparation will not insure a healthful or efficient day, or bring new life or sensation to the user thereof. The use of said preparation will not cause greater

diaphragmatic breathing or result in finer head tones, or increase the resonance, volume, or quality of the voice.

Headaches are due to or persist because of various systemic or other disorders or conditions of the human body. Said preparation is not beneficial in the relief of headaches which are not due to congestion of the mucous membranes of the air passages. In many cases the sinus openings are clogged so as to prevent access of said preparation, and in such cases said preparation will not penetrate the openings to the sinuses or relieve sinus congestion.

PAR. 7. The use by the respondent of the aforesaid false and misleading statements and representations has the tendency and capacity to, and does, mislead and deceive members of the purchasing public into the erroneous and mistaken belief that the aforesaid false and misleading statements and representations are true, and into the purchase of respondent's said medicinal preparation containing drugs. As a direct result, trade in commerce among and between the various States of the United States and in the District of Columbia has been diverted unfairly to the respondent from his said competitors who truthfully advertise the therapeutic value of their respective products. In consequence thereof, substantial injury has been, and is now 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. The aforesaid acts and practices of the 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 July 21, 1939, issued and served its complaint in this proceeding upon the respondent G. Bernardi, charging him with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. On August 9, 1939, the respondent filed his answer, in which answer he admitted all the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearing as to said facts. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint and the answer thereto, and the

Findings

29 F. T. C.

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 G. Bernardi is an individual and has his office and principal place of business at 1017 Euclid Avenue in the city of Cleveland, State of Ohio.

PAR. 2. The respondent is now, and has been for several years last past, engaged in the business of selling and distributing a medicinal preparation containing drugs designated "Benaris." Respondent causes said preparation, when sold, to be transported from his aforesaid place of business in the State of Ohio to the purchasers thereof at their respective points of location in various States of the United States, other than the State of Ohio, and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation 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 his said business, respondent is, and has been at all times referred to herein, in competition with other individuals and with corporations, firms, and partnerships also engaged in the sale and distribution in commerce among and between the various States of the United States and in the District of Columbia of products designed and used for the same purposes for which respondent recommends the use of the preparation Benaris.

PAR. 4. In the course and conduct of his aforesaid business, the respondent has disseminated and is now disseminating, and has caused and is now causing the dissemination of false advertisements concerning his said product, 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 continuities broadcast from radio stations which have sufficient power to, and do, convey the programs emanating therefrom to listeners located in various States of the United States other than the State in which said broadcasts originate, 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 his said product; and has disseminated and is now disseminating, and has caused and is now causing the dissemination of, false advertise-

831

Findings

ments concerning his said product, by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of his said product 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:

For colds, chronic colds, catarrh, bronchitis and laryngitis, use that soothing, refreshing formula, Benaris. Benaris not only helps to cure, but prevents colds. Smokers find that it relieves the tendency to dryness and headaches.

If you're troubled with chronic colds, and nose and throat infections, here's something you should know about. Benaris, spelled B-e-n-a-r-i-s, the development of a well-known concert singer, who for 23 years was unable to carry on his work. For this reason Benaris is especially recommended to those who are dependent on their voices a great deal. People who smoke find that Benaris relieves the tendency to dryness, and headaches. Those having enlarged tonsils, who wish to keep their throats, and voices in good condition should apply a few drops of Benaris on the back part of the tongue, especially in the morning. This refreshes and neutralizes the tissues. Bronchitis and laryngitis may likewise be treated in the same manner.

When a head cold comes on, use Benaris immediately. It acts instantly, relieving headaches, catarrh, bronchitis and laryngitis. Benaris is acclaimed for its remarkable cleansing and healing power. It keeps your nasal passages open, eliminates colds, and results in better health.

Many people suffer unnecessarily from sinus ailments during the cold season—unaware that a new practical, and lasting preparation, called Benaris, has been developed to give quick relief. Thousands have used this unusual formula and found that Benaris checks, and relieves colds, headaches, catarrh, bronchitis, and laryngitis. Benaris is compounded from the very finest ingredients—and is acclaimed for its remarkable cleansing power, yet it never irritates. It relieves unpleasant irritation and inflammation of the throat, resulting in an instant improvement in the voice. Benaris will also relieve the difficulties caused by mouth breathing, when due to nasal congestion. In order that your children may have the benefit of soothing, refreshing Benaris, a special formula has been created for them.

Benaris relieves and prevents colds, coughs, eases headaches of those who suffer from sinus ailments, catarrh, or other nasal disturbances. Very soothing and refreshing for people who smoke. People who have an inflamed throat or tonsils should insert a dropperful of Benaris directly into the throat. Very beneficial for those who use their voice.

To singers, Benaris will prove invaluable in clearing the nasal and accessory passages, thus restoring and increasing the resonance, volume and quality of the voice. Permits greater diaphragmatic breathing, with the result of finer head tones. Benaris aids in eliminating the necessity of forcing the voice, and many forms of hoarseness.

To lawyers, speakers, teachers, salesmen, and all those dependent upon their voices in their profession, or anyone desiring to improve his voice, Benaris will be found of great benefit because of its cleansing quality which penetrates the membranes of the nose and the entrance to the sinuses.

Findings

29 F. T. C.;

Use Benaris every night on retiring to secure natural and comfortable rest, Benaris will loosen a congested nose which causes mouth breathing and prevents relaxation, and hinders proper sleep. Use Benaris every morning on rising, to assure a healthful, efficient day.

* * * upon using Benaris they will discover how easy it is to remedy and eliminate the above ailments. Benaris will bring new *life and sensation* such as you have never realized before.

Benaris never fails to relieve sinus congestion.

Benaris is priceless. To ward off rose and hay fever treat mucous membrane frequently before attacking season. * * * Instant relief for headaches especially for over-indulgence.

PAR. 5. Through the use of the aforesaid statements and representations, and others of similar import or meaning not herein set-out, the respondent has represented, directly or by implication, that the preparation "Benaris" is a competent and effective cure or remedy for colds, chronic colds, catarrh, bronchitis, laryngitis, dryness of the throat, irritation and inflammation of the throat, inflamed and enlarged tonsils, hoarseness, rose or hay fever, and congestion of the nasal passages; that said preparation is an effective treatment for and will prevent rose or hay fever; that said preparation will neutralize the tissues and eliminate colds, and will in all cases relieve headaches, penetrate the openings to the sinuses, and relieve sinus congestion; that said preparation will assure a healthful, efficient day and bring new life and sensation to the user thereof; that by the use of said preparation greater diaphragmatic breathing can be obtained, resulting in finer head tones, and that said preparation will increase the resonance, volume, and quality of the voice.

PAR. 6. The aforesaid statements and representations by respondent, used and disseminated in the manner above described, are false and misleading and constitute false advertisements. In truth and in fact, said preparation is not a cure or remedy for colds, chronic colds, catarrh, bronchitis, laryngitis, dryness of the throat, irritation or inflammation of the throat, inflamed or enlarged tonsils, hoarseness, rose or hay fever, or congestion of the nasal passage. Said preparation is not an effective treatment for, nor will it prevent rose or hay fever. Said preparation will not neutralize the tissues or eliminate colds. Said preparation will not in all cases relieve headaches or sinus ailments. The use of said preparation will not insure a healthful or efficient day, or bring new life or sensation to the user thereof. The use of said preparation will not cause greater diaphragmatic breathing or result in finer head tones, or increase the resonance, volume, or quality of the voice.

Headaches are caused by various systemic or other disorders or conditions of the human body. Said preparation is not beneficial in the

831

Order

relief of headaches which are not due to congestion of the mucous membranes of the air passages. In many cases the sinus openings are clogged so as to prevent access of said preparation, and in such cases, said preparation will not penetrate the openings to the sinuses or relieve sinus congestion.

PAR. 7. The use by the respondent of the aforesaid false and misleading statements and representations has the tendency and capacity to, and does, mislead and deceive members of the purchasing public into the erroneous and mistaken belief that the aforesaid false and misleading statements and representations are true, and into the purchase of respondent's said medicinal preparation containing drugs. As a direct result, trade in commerce among and between the various States of the United States and in the District of Columbia has been diverted unfairly to the respondent from his said competitors who truthfully advertise the therapeutic value of their respective products. In consequence thereof, substantial injury has been and is now being, done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

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 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 all the material allegations of fact set forth in said complaint, and states that he waives all intervening procedure and 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, G. Bernardi, an individual, his 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

Order

29 F. T. C.

purchase of his medicinal preparation now designated "Benaris" or any other preparation or preparations composed of substantially similar ingredients or possessing substantially similar therapeutic properties, whether sold under said name or any other name or 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 preparation, which advertisements represent, directly or indirectly:

1. That said preparation is a cure or remedy for colds, chronic colds, catarrh, bronchitis, laryngitis, dryness of the throat, hoarseness, rose or hay fever, irritation or inflammation of the throat, inflamed or enlarged tonsils, or congestion of the nasal passages.

2. That the use of said preparation neutralizes the tissues or eliminates colds or will insure a healthful or efficient day or bring new life or sensation to the user thereof.

3. That the use of said preparation causes greater diaphragmatic breathing, or results in finer head tones or increases the resonance or volume or quality of the voice.

4. That said preparation will relieve headaches unless such representation is limited to headaches which are due to congestion of the mucous membranes of the air passages.

5. That said preparation will penetrate the openings to the sinuses or relieve sinus congestion unless such representations are limited to those cases in which the openings to the sinuses are not clogged so as to prevent the penetration therein of said preparation.

6. That said preparation is an effective treatment for, or will prevent, rose or hay fever.

It is further ordered, That respondent shall, within 60 days after service upon him of this order file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

Syllabus

IN THE MATTER OF

EUGENE H. HUNTER AND RAE LAMARR HUNTER, TRADING AS THE FLORACUBE COMPANY, INC.

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

Docket 3284. Complaint, Dec. 17, 1937—Decision, Sept. 8, 1939

Where two individuals engaged in advertisement, sale, and distribution of medicinal preparation designated as "Floracubes" and, as thus engaged, in selling said product to purchasers in various States and in the District of Columbia, in substantial competition with others engaged in sale and distribution of like medicinal preparations and of preparations designed for treatment of same ills, maladies, and conditions for which their product was recommended, and including many who sell and distribute, in commerce among the various States and in said District, such various preparations and do not misrepresent the properties, therapeutic virtues, and functions, uses, or effects thereof—

Represented, in letters, circulars, pamphlets, and other advertising media published and circulated throughout the country, that preparation in question was a cure or remedy for colitis, digestive disorders, headaches, overacidity, food decay, nervousness, rheumatism, ailments common to old age, high blood pressure, arthritis, heart trouble, weak eyes, and numerous other ailments and conditions, and for all common and annoying diseases, which would eliminate the cause of aforesaid ailments and conditions, facts being said "Floracubes" constituted nothing more than a laxative or purgative, depending upon amount, and therapeutic value thereof was limited to temporary relief of constipation, and it would not prevent, cure, eliminate, or rid the body of any disease, disorder, or malady, or of the causes of said ailments and conditions, and it was not a cure or remedy therefor, as above claimed;

With capacity and tendency to mislead and deceive members of public into erroneous and mistaken belief that said preparation was a competent, adequate, and effective treatment and remedy for constipation, colitis, digestive disorders, and the various other ailments and conditions claimed and indicated as above set forth, including "loss of vitality" and "all common and annoying diseases," and that it would eliminate causes thereof, and to induce members of public to buy and use said preparation because of such erroneous belief thus engendered, and to divert unfairly trade to them from competitors engaged in the sale of competing preparations in commerce:

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

Before *Mr. Charles P. Vicini* and *Mr. John J. Keenan*, trial examiners.

Mr. Joseph C. Fehr for the Commission.

Mr. LeRoy Reames, of Los Angeles, Calif., for respondents.