

Syllabus

IN THE MATTER OF

I. BURMAN, DOING BUSINESS AS BURTLEY COMPANY

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

Docket 3665. Complaint, Dec. 16, 1938—Decision, June 30, 1941

Where an individual engaged in interstate sale and distribution of his "Marrilis" drug or cosmetic preparation for use in the removal of excess weight through application to the body, followed by immersion in a hot bath, and theory of which was that such coating closed the pores and prevented their taking into the body the usual amount of oxygen, and that the result and efforts of the body to supply its own oxygen from the system produced increased heat and heavy perspiration, leading to the burning up of fat and consequent reduction in weight;

In advertising his said product in newspapers of general circulation, advertising circulars and other pieces of advertising literature supplied to and distributed by department stores and other business establishment, to which he furnished demonstrators and sales persons to assist in the sale thereof, and in advertisements placed by said establishments in newspapers for which he supplied the copy or materials—

Represented, directly or by implication, that his preparation constituted an effective means and method whereby substantial reduction in body weight might be obtained, and that particular parts or areas of the body might be reduced in size and weight by application thereto without affecting other parts; and that preparation in question had been prepared or compounded by one of the world's leading cosmetic scientists;

The facts being that aforesaid theory upon which his product was based is not tenable, in that oxygen is not taken into the body through the skin in any appreciable amount, and it is impossible effectively to close or seal the pores through use of said preparation; said product was nothing more than an emollient ointment and possessed no value in removal of excess weight, favorable results apparently accomplished thereby being due to regulation of diet rather than use thereof; and while person referred to was a commercial chemist and consultant for certain cosmetic concerns, such facts did not constitute sufficient basis for representing him as one of the world's leading cosmetic scientists;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to said product and to cause it, because of the erroneous belief so engendered, to purchase substantial quantities thereof, with result that trade was diverted unfairly to him from his competitors:

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. John P. Bramhall*, trial examiner.

Mr. R. A. McQuat for the Commission.

Mr. Maxwell Stettner, of New York City, for respondent.

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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 I. Burman, an individual trading and doing business as Burtley Co., 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. The respondent, I. Burman, is an individual trading and doing business as Burtley Co. with his office and principal place of business at 245 Fifth Avenue, New York, N. Y. For more than 2 years last past, respondent has been, and still is, engaged in the business of preparing for sale and selling, under the trade name of "Marrilis," a drug or cosmetic to be used as an external application for the purpose of reducing weight of the human body. Respondent causes said preparation when sold to be transported from his aforesaid place of business in the city of New York, State of New York, to purchasers thereof at their respective places of location in States of the United States other than the State of New York and in the District of Columbia. Respondent maintains, and during all the times herein mentioned has maintained, a course of trade in said preparation so sold by him in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. Respondent is engaged in substantial competition in commerce between and among the various States of the United States and in the District of Columbia with other individuals, and with firms, partnerships, and corporations selling and distributing medicinal and other preparations and products designed and intended for, and used in, the treatment of obesity and the removal of excess weight from the human body. Among such competitors in said commerce are many who do not in any manner misrepresent their said preparations and products or the therapeutic properties thereof.

PAR. 3. In the course and conduct of his aforesaid business, the respondent has disseminated and is now disseminating, and has and does now cause to be disseminated, false advertisements for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of respondent's said preparation. Said false advertisements were, and are, disseminated by use of the United States mails, and by insertion in newspapers and periodicals having a general circulation, and also in circulars and other printed matter, all of which are distributed in commerce among and between the various States of

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the United States. Various means have been, and are, used by the respondent to disseminate or cause the dissemination of said false advertisements for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase in commerce among and between the various States of the United States of respondent's said preparation. Among, and typical of, the statements and representations contained in said false advertisements so used and disseminated as aforesaid are the following:

"WASH AWAY" Excess Weight

This Amazing New Way

"MARRILIS" Weight Reducer

No Diets—No Exercises—No Massages

No Steam Rooms

It's almost unheard of . . . a really effective reducing preparation at such a minimum expenditure.

Sold with money-back guarantee

MAIL AND PHONE ORDERS FILLED.

* * * No complicated directions, simply apply a thin coat over the entire body or only over the part to be reduced, such as the hips, thighs, legs, chin or any other "spot"—take a warm bath and relax in bed for a short period. *That's all!* * * *

The "Marrilis" Method of Weight Reducing, as prepared by one of the world's leading cosmetic scientists, is remarkable in its ease of application. * * * Elimination of waste matter, fatty particles and excess water by perspiration is a natural function of the body which "Marrilis" speeds up without the weakening results and the high temperatures formerly used. * * * "Marrilis" with the aid of the sun's rays, will bring on perspiration considerably faster, and aid in the elimination of waste and fat through the skin.

* * * Test cases have shown that it is possible to lose from one to four pounds after the first application. That fact, coupled with the additional security that it has been found to be absolutely harmless makes it a boon to those who are looking for a slim, svelte figure and for the special reduction of certain "spots."

PAR. 4. Through the use of said statements and representations hereinabove set forth, and others similar thereto, not herein set out, all of which purport to be descriptive of respondent's preparation and its effectiveness in reducing weight of the human body, respondent has represented that his preparation is prepared by one of the world's leading cosmetic scientists; that it will cause a definite and substantial loss of body weight at the "spot" applied; will reduce weight from 1 to 4 pounds after each treatment by naturally and scientifically eliminating fatty particles, surplus water and waste from the human body through

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the skin; and that tests have been made which demonstrate the truth of the foregoing representations.

PAR. 5. The aforesaid representations used and disseminated by the respondent in the manner above described, are grossly exaggerated, deceptive, misleading, and untrue, and constitute false advertisements, and induce or are likely to induce, directly or indirectly, the purchase of respondent's preparation. In truth and in fact, "Marrilis" is not prepared by any leading cosmetic scientist; the use of said preparation will not cause any reduction in weight anywhere in the human body; the effectiveness of any weight-reducing system, scheme or method is not enhanced in any way by the use of respondent's product. "Marrilis" is composed of spermaceti, paraffin oils, ozokerite, petroleum oils, and petrolatum. Respondent's preparation, when applied to the skin, serves merely as an emollient ointment.

Respondent's claims as to the value of efficacy of said preparation in the treatment of obesity or the removal of excess weight of the human body are grossly exaggerated, false, and deceptive, and greatly exceed any claims as to the value and efficacy of said preparation which might truthfully be made.

PAR. 6. The use by the respondent of the foregoing false, misleading, and deceptive statements, representations, and advertisements disseminated as aforesaid with respect to said preparation has had, and now 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 such false statements, representations, and advertisements are true and that respondent's said preparation possesses the properties claimed and represented and will accomplish the results indicated, and causes a substantial portion of the purchasing public, because of said erroneous and mistaken belief, to purchase substantial quantities of respondent's said preparation.

As a result, trade has been diverted unfairly to the respondent from his competitors in said commerce who truthfully advertise the effectiveness in use of their respective preparations and products, as described in paragraph 2 hereof. In consequence thereof, injury has been, and is now being, done by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 7. 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 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 December 16, 1938, issued and thereafter served its complaint in this proceeding upon respondent I. Burman, an individual, trading and doing business as Burtley Co., 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. After the issuance of the complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of the complaint were introduced by R. A. McQuat, attorney for the Commission, and in opposition to the allegations of the complaint by Maxwell Stettner, attorney for the respondent, before John P. Bramhall, 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. Thereafter, the proceeding regularly came on for final hearing before the Commission on the complaint, the answer thereto, testimony and other evidence, report of the trial examiner upon the evidence and the exceptions thereto, and brief in support of the complaint (respondent not having filed brief and oral argument and not having been requested); 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. The respondent, I. Burman, is an individual trading and doing business as Burtley Co., with his office and principal place of business at 245 Fifth Avenue, New York City, N. Y. He is now, and since 1937 has been, engaged in the sale and distribution of a drug or cosmetic preparation designated as "Marrilis" and intended to be used for the purpose of removing excess weight from the human body.

In the course and conduct of his business, the respondent causes, and since 1937 has caused, his preparation, when sold, to be transported from his place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and since 1937 has maintained, a course of trade in his preparation in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. Respondent is now, and at all times mentioned herein has been, in substantial competition with other individuals and with cor-

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porations, firms, and partnerships engaged in the sale and distribution, in commerce between and among the various States of the United States and in the District of Columbia, of medicinal preparations and other products designed and intended for the removal of excess weight from the human body.

PAR. 3. In the course and conduct of his business, the respondent has advertised his product by various means, including the sending of letters, circulars, and other advertising material through the United States mails. He has also inserted advertisements in newspapers having a general circulation among and between various States of the United States. A further method used by the respondent has been the supplying to department stores and other business establishments of demonstrators and sales persons to assist in the sale of his product by such stores and other establishments. In connection with this method of operation the respondent has supplied such retail establishments with advertising circulars and other pieces of advertising literature, which have been distributed by such establishments among purchasers and prospective purchasers of respondent's product. Respondent has also cooperated with such retail establishments in the placing of advertisements in newspapers, the copy or materials for such advertisements being supplied to such establishments by the respondent. All of the advertisements disseminated and caused by the respondent to be disseminated were for the purpose of inducing and were likely to induce, directly or indirectly, the purchase of respondent's product in commerce, as commerce is defined in the Federal Trade Commission Act.

Certain of the advertising material formerly used by the respondent in promoting the sale of his product was discontinued about March 1938. Among and typical of the representations used by respondent prior to March 1938 are the following:

No Diets, No Exercises, No Massages, No Steam Rooms

We have known women to lose from one to four pounds after each treatment easily, quickly and comfortably by naturally and scientifically eliminating fatty particles, surplus water and waste—the principal cause of excess weight.

Don't envy a SLIM figure. Slenderize healthfully with MARRILIS REDUCING METHOD. It reduces abdomen, double chin, legs, thighs, hips, arms. Test cases prove that it is possible to lose from 1 to 4 pounds after each application of "Marrilis" Ointment . . . and it is as simple as it is effective.

The "Marrilis" Method of Weight Reducing, as prepared by one of the world's leading cosmetic scientists, is remarkable in its ease of application. * * *. Elimination of waste matter, fatty particles and excess water by perspiration is a natural function of the body which "Marrilis" speeds up without the weakening results and the high temperatures formerly used * * *. "Marrilis" with the aid of the sun's rays will bring on perspiration considerably faster and aid in the elimination of waste and fat through the skin.

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It's almost unheard of . . . A really effective reducing preparation at such a minimum expenditure. It's easy and comfortable to use . . . applied externally . . . no special skill necessary. Test cases have shown that it is possible to lose one to four pounds after the first application. It has been found to be absolutely harmless.

For Special Reduction of . . . Hips—Thighs—Abdomen—Legs—Twin Chins & Other "Spots."

It is, of course, best to use "Marrilis" over the entire body and induce elimination in its entirety. But if your problem is one where you merely desire to reduce in spots such as the legs, thighs, a bulging abdomen, the chin, or perhaps only the arms, then apply "Marrilis" to these parts only. Follow the same tub bath procedure as if the treatment was given to the entire body. * * *

With the application of Marrilis system you can discard reducing girdles, corsets, hip reducers, bust reducers, etc. In a much shorter time a youthful figure is obtained with maximum of comfort. Elimination of waste matter, fatty particles and excess water by perspiration is a natural function of the body which "Marrilis" speeds up without the weakening results and the high temperatures formerly used.

Among and typical of the representations used by respondent subsequent to March 1938 are the following:

* * * No complicated directions, simply apply a thin coat over the entire body or only over the part to be reduced, such as the hips, thighs, legs, chin or any other "spot"—take a warm bath and relax in bed for a short period. That's all!

Don't Envy a SLIM Figure! Slenderize Healthfully with MARRILIS REDUCING METHOD

It Reduces

Abdomen	Double Chin
Legs	Thighs
Hips	Arms

Test cases prove that it is possible to lose from 1 to 4 pounds after each application of "Marrilis" Ointment . . . and it is as simple as it is effective.

That fact, coupled with the additional security that it has been found harmless, makes it a boon to those looking for a slim, svelte figure.

Applied to body before taking bath. Why not try it now and lose that excess poundage!

PAR. 4. The Commission finds that through the use of these representations, and others of a similar nature which are not specifically set forth herein, the respondent has represented, directly or by implication, that his preparation constitutes an effective means and method whereby substantial reduction in body weight may be obtained; that by the application of the preparation to particular parts or areas of the body, such parts or areas may be reduced in size and weight without affecting the weight of other parts of the body; and

that the preparation has been prepared or compounded by one of the world's leading cosmetic scientists.

PAR. 5. Respondent's preparation is composed of spermaceti, paraffin oils, ozocerite, petroleum oils, and petrolatum. The directions prescribed by respondent for the use of the preparation are as follows:

Apply sparingly a very thin coat of "Marrilis" all over body, face and legs. Take a tub bath. Make certain the whole body is immersed, including wrists. The water does not have to be too hot . . . just comfortable. In perhaps five to ten minutes you will note that perspiration is freely flowing from the face. Stay in the bath another ten or fifteen minutes. Then, while still wet, wrap yourself in a sheet and go to bed. Keep warmly covered . . . Relax . . . (In which case the perspiration will continue) for about a half hour. After this, cool off gradually . . . You may now take another tub or shower washing off the perspiration and Marrilis from your entire body. Weigh and measure yourself before and after each treatment. For Sun Bathing apply over entire body wearing as little clothes as possible. Follow this with a shower or tub bath.

PAR. 6. The theory upon which respondent bases his claims for his product was outlined substantially as follows by one of the witnesses testifying in his behalf. By coating the body with a film of the preparation the pores of the skin are closed or sealed. The film inhibits or prevents the effective working of the pores and prevents the pores from taking into the body the usual or normal amount of oxygen. The body is compelled to make up for this loss of oxygen and it undertakes to supply its own oxygen from the system. It breaks up its own fat, which it burns as carbohydrates, and in this way supplies its own oxygen. This increased chemical activity produces increased heat in the body. The heart and circulation are stimulated to greater activity. There is a great pouring out of perspiration. It is this pouring out of perspiration and the burning up of the fat which produce the reduction in weight.

PAR. 7. The expert testimony introduced at the instance of the Commission shows, and the Commission finds, that this theory is not tenable. It is at variance with the consensus of generally accepted and recognized medical opinion. Oxygen is not taken into the body through the skin in any appreciable amount. Moreover, it is impossible effectively to close or seal the pores of the skin through the use of respondent's preparation.

PAR. 8. The attempted reduction of weight through the stimulation of perspiration is a frequent occurrence. To generate the heat required to stimulate perspiration, hot baths, steam rooms, electric cabinets, etc., are used. Any reduction of weight obtained in this manner, however, has been found to be only temporary, as an excessive thirst is developed by the patient during the process, and any weight which

may have been lost is restored almost immediately by the drinking of large quantities of water or other beverages.

The consensus of medical opinion is that the external application of preparations such as respondent's is wholly ineffectual in reducing the weight of the body. The Commission is of the opinion from the evidence, and finds, that the use of respondent's preparation adds nothing to any results which might be obtained from the ordinary heat method of stimulating perspiration. The preparation is in fact nothing more than an emollient ointment. It possesses no value in the removal of excess weight from the body or from any particular part or area of the body.

Respondent introduced as witnesses two physicians, two physiotherapists, and a masseuse, all of whom testified that they had used respondent's preparation and had observed its effect upon others, and that the results obtained from its use were more substantial than the results usually obtained from the ordinary method of inducing perspiration through the application of heat alone. Several members of the public also testified that they had used the preparation and had obtained favorable results in the reduction of their weight. In practically all of these cases, however, there was more or less regulation of the diet in addition to the use of respondent's treatment, and the Commission is of the opinion that any reduction in weight obtained by the witnesses was due to the regulation of the diet rather than to the use of respondent's preparation. After careful consideration of this testimony, the Commission is of the opinion, and finds, that its probative value is insufficient to overcome the expert testimony introduced at the instance of the Commission and the consensus of medical opinion as disclosed by the record.

With respect to respondent's representation that his product was prepared or compounded by one of the world's leading cosmetic scientists, the evidence shows that this claim is based entirely upon the fact that the person referred to is a commercial chemist and is consultant for certain cosmetic concerns. The Commission is of the opinion, and finds, that these facts do not constitute a sufficient basis for respondent's claim.

PAR. 9. The Commission therefore finds that the representations of the respondent with respect to his preparation and its effectiveness in use, as set forth in paragraphs 3 and 4 hereof, are grossly exaggerated, false, and misleading, and constitute false advertisements.

PAR. 10. The Commission further finds that the use by the respondent of these representations and advertisements has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to respondent's preparation and

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its effectiveness in use, and to cause such portion of the public to purchase substantial quantities of respondent's preparation as a result of the erroneous and mistaken belief so engendered. In consequence, trade has been diverted unfairly to the respondent from his competitors.

CONCLUSION

The 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, the answer of respondent, testimony and other evidence taken before John P. Bramhall, trial examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, report of the trial examiner upon the evidence and the exceptions thereto, and brief filed by R. A. McOuat, attorney for the Commission (respondent not having filed brief and oral argument not having been requested); and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent I. Burman, individually and trading as Burtley Co., or trading under any other name, his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of his drug or cosmetic preparation designated "Marrilis," or any preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or through inference, that said preparation possesses any value in the removal of excess weight from the human body, or from any particular part or area of the body.

2. Disséminating 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 advertisement contains any of the representations prohibited in paragraph 1 hereof.

It is further ordered, That the respondent, individually and trading as Burtley Co., or trading under any other name, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said preparation, do forthwith cease and desist from:

Representing that said preparation has been prepared or compounded by one of the world's leading cosmetic scientists.

It is further ordered, That the 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.

IN THE MATTER OF
PHILIP R. PARK, INC.

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

Docket 3815. Complaint, June 9, 1939—Decision, June 30, 1941

Where a corporation engaged in the competitive interstate sale and distribution of a dehydrated kelp product in powdered and tablet form designated respectively as "Granular Parkelp" and "Parkelp Tablets"; by advertisements in newspapers and periodicals and by circulars and leaflets, pamphlets and other advertising material and by radio broadcasts—

- (a) Represented that its said preparation was rich in iodine, iron, calcium, and other minerals which were not present in land foods; would correct mineral deficiency, build resistance to mineral deficiency diseases, and furnish food minerals of value in combating goiter, anemia, and other mineral deficiency diseases; and contained iodine, iron, copper, calcium, phosphorus, sodium, potassium, magnesium, sulphur, and other minerals in quantities sufficient to have therapeutic value in the treatment and prevention of diseases or conditions resulting from a deficiency in such minerals, listing various diseases claimed to be thus caused; and
- (b) Represented that the average diet of the American people is deficient in the minerals necessary for the proper functioning and health of the human body, and that vegetables such as lettuce, celery, asparagus, spinach, etc., are deficient in such necessary minerals;

Facts being that the only mineral appearing in its product in an amount that would be of therapeutic value was iodine; therapeutic value thereof was limited to the value of its iodine content, it being beneficial only in conditions resulting from an iodine deficiency and where administration of iodine was indicated; and its said preparation would not correct mineral deficiency, build up resistance to mineral deficiency diseases, or furnish food minerals other than iodine in quantities sufficient to combat such diseases; and, contrary to its claims, all the other minerals listed are present in varying amounts in land foods and their average diet contains as much as health requires;

With capacity and tendency to mislead and deceive purchasers into the erroneous belief that such misrepresentations were true and into the purchase of substantial quantities of its product, with result that trade was unfairly diverted from its competitors to it:

Held, That such acts and practices 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.

As respects effect of seller's dehydrated kelp product on mineral deficiencies or its therapeutic value in the treatment or prevention of anemia or other mineral deficiency diseases in human beings, testimony with reference to certain biological tests made upon rats to determine effect of said product in cases of anemia, was of little or no probative value, it appearing that there was no testimony on the relationship between the effect of such tests upon rats as compared with humans, or the relationship between the amounts ingested by the rats under test as compared with the amount