

Syllabus

IN THE MATTER OF
FRATELLI BRANCA & 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 4828. Complaint, Aug. 31, 1942—Decision, June 9, 1943

Where a corporation engaged in competitive interstate sale and distribution of its "Fernet-Branca" medicinal preparation; by advertisements in Italian and in English in newspapers, periodicals, radio continuities, and other advertising, directly and by implication—

- (a) Represented that use of its said preparation was a remedy and effective treatment for stomach disorders, indigestion, headaches, insomnia, liver ailments, and constipation;
- (b) Represented that it regulated the stomach, bowels, and intestines, relieved overfullness of the stomach, regulated the bodily functions, and aided in digestion;
- (c) Represented that it gave the body resistance to the inclemency of the weather, acted as a digester, was a bile stimulant, and was of value in the treatment of menstrual disturbances; and
- (d) Represented that it was an effective tonic for convalescents; that use thereof would promote, maintain, and improve health generally, and that by taking it regularly all common ailments might be avoided;

The facts being that the product in question—essentially an appetizer, alcoholic stimulant, and laxative when taken as directed—had no therapeutic value as a tonic for convalescents in excess of that afforded by a bitter appetizer, and had no such value in the treatment of constipation in excess of affording temporary relief; and did not justify the other claims above set forth; and

- (e) Failed to reveal facts material in the light of said misrepresentations, or with respect to the consequences which might result from use thereof under usual and prescribed conditions, in that its use in the dosage indicated was potentially dangerous when taken by one suffering from abdominal pains or other symptoms of appendicitis, and in that frequent and continued use thereof might result in dependence on laxatives;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such false representations were true, and into the purchase of substantial quantities of its preparation, with result that trade was diverted unfairly to it from its competitors, many of whom do not misrepresent the therapeutic value and efficiency of their products, to their injury:

Held, That said 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 and unfair and deceptive acts and practices in commerce.

Before *Mr. W. W. Sheppard*, trial examiner.

Mr. William L. Taggart for the Commission.

Frank, Weil & Strouse, of New York City, for respondent.

Complaint

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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 Fratelli Branca & Co., Inc., 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 interest of the public, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Fratelli Branca & Co., Inc., is a corporation, organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business located at 12-14 Desbrosses Street, in the city of New York, State of New York.

PAR. 2. Respondent for some time past has been engaged in the sale and distribution of a medicinal preparation designated as "Fernet-Branca."

Respondent causes its said preparation, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in the 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 preparation in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its said business, respondent is now and has been for more than 5 years last past, engaged in substantial competition with other corporations and with firms, partnerships, and individuals likewise engaged in the business of advertising and selling in commerce, among and between the various States of the United States and in the District of Columbia, various medicinal products and preparations recommended for the treatment of the same diseases and conditions as respondent.

PAR. 4. 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 preparation by United States mails, and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act; and respondent has also disseminated, and is now disseminating and has caused, and is now causing the dissemination of false advertisements concerning its said preparation by various means for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of its said preparation in commerce, as commerce is defined in the Federal Trade Commission Act.

Among and typical of the false, misleading, and deceptive statements and representations contained in said false advertisements, disseminated and caused to be disseminated, as hereinabove set forth, by the United States mails, by advertisements in newspapers and periodicals, by radio continuities and other advertising means, are the following, which are translations of radio continuities and other advertising in the Italian language:

When you have disorder in the stomach a small amount of Fernet-Branca in a cup of hot coffee will relieve you.

Fernet-Branca is the best remedy for overfulness of the stomach and indigestion.

Stimulates the appetite, aids digestion, regulates the bowels.

Has the properties of giving to the organism the resistance necessary to combat the winter snares.

Constant use of F-B helps the digestion and regulates the intestines.

Only Fernet-Branca guarantees its unsurpassed qualities as a digester; its incomparable qualities as a regulator.

Drink it regularly, your health will gain by it.

When you are tormented by poor digestion, headache or insomnia, drink Fernet-Branca—your headache will leave, your insomnia disappear.

R. C. of New York must have a liver complaint since the ordinary medicines to correct gas and acidity don't seem to help. I think he should have his gall-bladder X-rayed. He can take Fernet-Branca with orange juice or salt water.

Fernet-Branca contains some substances which stimulate somewhat the function of the bile.

Mrs. J. P. writes: "I am writing you two lines." And she does write just two lines. She suffers from periodical disturbances. In these cases, it is necessary to know certain things. Has she any children? Has she any pains? Are her menses late or scarce? She should have written me another line and given me a clear picture of her conditions. At any rate, in these cases, gland extracts and hot baths are useful. Also, if she cares, some small glass of Fernet-Branca each morning, taken with orange juice, is useful.

B. V. of Brooklyn has a boy suffering from chronic constipation. He moves his bowels every 8 days. The father who writes to me says that he uses Fernet-Branca for his digestion, to his advantage. Yet it is strange that he has never thought of using it for the boy to correct the constipation.

Mrs. L. E. has had influenza and is now convalescing. Her doctor has done well to advise her to use Fernet-Branca. This bitter is a good tonic during convalescence.

Every family should have a supply of Fernet-Branca and this stomach-digestive should be on the table during every meal so that every member of the family can take it according to how he feels.

An important aid in promoting and maintaining good health.

If your health is poor—take Fernet-Branca.

Fernet-Branca * * * Avoid all common ailments by taking regularly.

PAR. 5. Through the use of the statements and representations hereinabove set forth, and others of similar import not set forth herein, all of which purport to be descriptive of the therapeutic properties

of respondent's preparation, respondent represents, directly and by implication, that the use of its preparation "Fernet-Branca" is a cure and remedy for and constitutes a competent and effective treatment of stomach disorders, indigestion, headaches, insomnia, liver ailments, and constipation; that it regulates the stomach, bowels, and intestines and relieves overfulness of the stomach; that it gives the body resistance to the inclemency of the weather; that it acts as a digester, regulates the bodily functions and aids in digestion; that it is a bile stimulant; that it is of value in the treatment of menstrual disturbances; that it is an effective tonic for convalescents and its use will promote, maintain, and improve health generally and by taking said preparation regularly all common ailments may be avoided.

PAR. 6. The aforesaid statements and representations are grossly exaggerated, false, and misleading. In truth and in fact respondent's medicinal preparation is not a cure or remedy for and does not constitute a competent and effective treatment of stomach disorders, indigestion, headaches, insomnia, liver ailments, and constipation. It will not regulate the stomach, bowels, and intestines, nor will it relieve overfulness of the stomach. It will not give the body resistance to the inclemency of the weather. It will not act as a digester, regulate the bodily functions, nor will it aid in digestion. It will not act as a bile stimulant. It has no value in the treatment of menstrual disturbances. Its use will not promote, maintain, and improve health generally and none of the common ailments may be avoided by the regular use of said preparation. It has no therapeutic value as a tonic for convalescents in excess of that afforded by a bitter appetizer. Said preparation is essentially a laxative and has no therapeutic value in the treatment of stomach disorders, indigestion, headache, insomnia, liver ailments, and menstrual disturbances and has no therapeutic value in the treatment of constipation in excess of affording temporary relief.

PAR. 7. Respondent's advertisements, disseminated as aforesaid, constitute false advertisements for the further reason that they fail to reveal facts material in the light of such representations or material with respect to the consequences which may result from the use of the preparation to which the advertisements relate under the conditions prescribed in said advertisements or under such conditions as are customary and usual. In truth and in fact, respondent's said preparation is an irritant laxative and is potentially dangerous when taken by one suffering from abdominal pains, stomach ache, cramps, nausea, vomiting, or other symptoms of appendicitis. Its frequent or continued use may result in dependence on laxatives.

PAR. 8. The use by the respondent of the foregoing false, deceptive, and misleading statements, representations, and advertisements, dis-

seminated as aforesaid, with respect to its 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 into the purchase of substantial quantities of respondent's preparation, with the result that trade has been diverted unfairly to the respondent from its competitors and as a result 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. 9. Among the competitors of respondent as referred to in paragraph 3 herein are many who do not falsely represent the therapeutic value and efficacy of their various medicinal preparations.

PAR. 10. The aforesaid acts and practices of 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 the 31st day of August 1942, issued and served its complaint in this proceeding upon said respondent, Fratelli Branca & Co., Inc., a corporation, charging it with the use of unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, in violation of the provisions of said act. On November 3, 1942, the respondent filed its answer in this proceeding. Thereafter, a stipulation was entered into whereby it was stipulated and agreed that a statement of facts executed by the respondent and its counsel, Frank, Weil and Strouse, and Richard P. Whiteley, Assistant Chief Counsel for the Federal Trade Commission, subject to approval of the Commission, may be taken as the facts in this proceeding and in lieu of testimony in support of the charges stated in the complaint, or in opposition thereto, and that the said Commission may proceed upon said statement of facts to make its report, stating its findings as to the facts and its conclusion based thereon and enter its order disposing of the proceeding without the presentation of argument or the filing of briefs. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, answer and stipulation, said stipulation having been approved, accepted and filed, and the Commission having duly considered the same and being now fully advised in the premises,

finds that this proceeding is in the interest of the public and makes its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Fratelli Branca & Co., Inc., is a corporation, organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business located at 12-14 Desbrosses Street in the city of New York, State of New York and has for some time past been engaged in the sale and distribution of a medicinal preparation designated as Fernet-Branca; respondent causes its said preparation, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in the various other States of the United States and in the District of Columbia and maintains, and at all times mentioned herein has maintained, a course of trade in said preparation in commerce between and among the various States of the United States and the District of Columbia. In the course and conduct of its business respondent is now, and has been for more than 5 years last past, engaged in substantial competition with other corporations and with firms, partnerships and individuals likewise engaged in the business of advertising and selling in commerce, among and between the various States of the United States and in the District of Columbia, various medicinal products and preparations recommended for the treatment of the same diseases and conditions as respondent. Among such competitors are many who do not falsely represent the therapeutic value and efficacy of their various medicinal preparations and products.

PAR. 2. In the course and conduct of its aforesaid business, respondent has disseminated and has caused the dissemination of false advertisements concerning its said preparation by United States mails, and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act; and respondent has also disseminated, and has caused the dissemination of false advertisements concerning its said preparation by various means for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of its said preparation in commerce, as commerce is defined in the Federal Trade Commission Act. Among and typical of the false, misleading and deceptive statements and representations contained in said false advertisements, disseminated and caused to be disseminated, as hereinabove set forth, by the United States mails, by advertisements in newspapers and periodicals, by radio continuities and other advertising means, are the following, which are translations of advertising in the Italian language, as well as advertising in the English language:

When you have disorder in the stomach a small amount of Fernet-Branca in a cup of hot coffee will relieve you.

Fernet-Branca is the best remedy for overfulness of the stomach and indigestion.

Stimulates the appetite, aids digestion, regulates the bowels.

Has the properties of giving to the organism the resistance necessary to combat the winter snares.

Constant use of F-B helps the digestion and regulates the intestines.

Only Fernet-Branca guarantees its unsurpassed qualities as a digester; its incomparable qualities as a regulator.

Drink it regularly, your health will gain by it.

When you are tormented by poor digestion, headache or insomnia, drink Fernet-Branca - your headache will leave, your insomnia disappear.

R. C. of New York must have a liver complaint since the ordinary medicines to correct gas and acidity don't seem to help. I think he should have his gall-bladder X-rayed. He can take Fernet-Branca with orange juice or salt water.

Fernet-Branca contains some substances which stimulate somewhat the function of the bile.

Mrs. J. P. writes: "I am writing you two lines." And she does write just two lines. She suffers from periodical disturbances. In these cases, it is necessary to know certain things. Has she any children? Has she any pains? Are her menses late or scarce? She should have written me another line and given me a clear picture of her conditions. At any rate, in these cases, gland extracts and hot baths are useful. Also, if she cares, some small glass of Fernet-Branca each morning, taken with orange juice, is useful.

B. V. of Brooklyn has a boy suffering from chronic constipation. He moves his bowels every 8 days. The father who writes to me says that he uses Fernet-Branca for his digestion, to his advantage. Yet it is strange that he has never thought of using it for the boy to correct the constipation.

Mrs. L. E. has had influenza and is now convalescing. Her doctor has done well to advise her to use Fernet-Branca. This bitter is a good tonic during convalescence.

Every family should have a supply of Fernet-Branca and this stomachic-digestive should be on the table during every meal so that every member of the family can take it according to how he feels.

An important aid in promoting and maintaining good health.

If your health is poor - take Fernet-Branca.

Fernet-Branca * * * Avoid all common ailments by taking regularly.

PAR. 3. By the use of the statements and representations herein-above set forth, and others of similar import not set forth herein, all of which purport to be descriptive of the therapeutic properties of respondent's preparation, respondent represented, directly and by implication, that the use of its preparation "Fernet-Branca" is a cure and remedy for and constitutes a competent and effective treatment of stomach disorders, indigestion, headaches, insomnia, liver ailments and constipation; that it regulates the stomach, bowels and intestines and relieves overfulness of the stomach; that it gives the body resistance to the inclemency of the weather; that it acts as a digester; regulates the bodily functions and aids in digestion; that it is a bile

Findings

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stimulant; that it is of value in the treatment of menstrual disturbances; that it is an effective tonic for convalescents and its use will promote, maintain and improve health generally and by taking said preparation regularly all common ailments may be avoided.

The aforesaid statements and representations are grossly exaggerated, false and misleading; in truth and in fact said medicinal preparation is not a cure or remedy for and does not constitute a competent and effective treatment of stomach disorders; indigestion, headaches, insomnia, liver ailments, and constipation; it will not regulate the stomach, bowels, and intestines, nor will it relieve overfulness of the stomach; it will not give the body resistance to the inclemency of the weather; it will not act as a digester, regulate the bodily functions, nor will it aid in digestion; it will not act as a bile stimulant; it has no value in the treatment of menstrual disturbances; its use will not promote, maintain, and improve health generally and none of the common ailments may be avoided by the regular use of said preparation; and it has no therapeutic value as a tonic for convalescents in excess of that afforded by a bitter appetizer.

Said preparation is essentially an appetizer, an alcoholic stimulant and a laxative when taken as directed, in the dosage of one to two tablespoonfuls three times a day, and has no therapeutic value in the treatment of stomach disorders, indigestion, headache, insomnia, liver ailments, and menstrual disturbances and has no therapeutic value in the treatment of constipation in excess of affording temporary relief.

PAR. 4. The advertisements set forth herein, disseminated as aforesaid, constitute false and misleading advertisements for the further reason that they fail to reveal facts material in the light of such representations or material with respect to the consequences which may result from the use of the preparation to which the advertisements relate under the conditions prescribed in said advertisements or under such conditions as are customary and usual. In truth and in fact, the use of said preparation in the dosage above indicated, is potentially dangerous when taken by one suffering from abdominal pains, stomach ache, cramps, nausea, vomiting, or other symptoms of appendicitis; and its frequent or continued use may result in dependence on laxatives.

PAR. 5. The use by the respondent of the foregoing false, deceptive, and misleading statements, representations, and advertisements, disseminated as aforesaid, with respect to its said preparation, has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such false statements, representations, and advertisements were true and into the purchase of substantial quantities of respondent's prepara-

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Order

tion, with the result that trade has been diverted unfairly to the respondent from its competitors and as a result injury has been done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia; that among the competitors of respondent as referred to in paragraph 1 herein are many who do not falsely represent the therapeutic value and efficacy of their various medicinal preparations.

CONCLUSION

The aforesaid acts and practices of 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 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 on the complaint of the Commission, the answer of respondent, and a stipulation as to the facts entered into between the respondent herein and Richard P. Whiteley, assistant chief counsel for the Commission, which provides among other things, that without further evidence or other intervening procedure, the Commission may issue and serve upon the respondent herein findings as to the facts and conclusion based thereon and an order disposing of the proceeding; and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Fratelli Branca & Co., Inc., a corporation, its officers, directors, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of its preparation designated "Fernet-Branca," or any other preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails, or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents directly or through inference:

- a. That respondent's preparation is a cure or remedy for stomach disorders, indigestion, headaches, insomnia, or liver ailments or that it constitutes a competent or effective treatment for any of such diseases or conditions.

b. That respondent's preparation will regulate the stomach, bowels, and intestines or relieve overfulness of the stomach.

c. That respondent's preparation will give the body resistance to the inclemency of the weather or promote, maintain, or improve health generally.

d. That respondent's preparation will aid digestion, act as a digester, regulate the body functions, or act as a bile stimulant.

e. That respondent's preparation has any therapeutic value in the treatment of menstrual disturbances.

f. That respondent's preparation has any therapeutic value as a tonic for convalescents in excess of that afforded by a bitter appetizer.

g. That respondent's preparation has any therapeutic value in the treatment of constipation in excess of providing an evacuation of the lower intestinal tract when taken in the dosage of one to two table-spoonfuls three times a day.

h. That by the regular use of respondent's preparation all common ailments may be avoided.

2. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act, which advertisement fails to reveal that respondent's preparation should not be used in cases of nausea, vomiting, abdominal pains, or other symptoms of appendicitis; *provided, however*, That if the directions for use wherever they appear, on the label, in the labeling, or both on the label and in the labeling, contain a warning of the potential dangers in the use of said preparation as hereinabove set forth, such advertisement need contain only the cautionary statement, "CAUTION: Use only as directed."

3. 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 respondent's preparation, which advertisement contains any of the representations prohibited in paragraph 1 hereof and the respective subdivisions thereof or which fails to comply with the requirements set forth in paragraph 2 hereof.

It is further ordered, That the respondent shall, within 60 days after 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.

Complaint

IN THE MATTER OF

MRS. ALMA LOUGHRAN AND LEE R. LOUGHRAN, TRADING AS ALMA'S HOME MADE CANDIES

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

Docket 4409. Complaint, Dec. 9, 1940—Decision, June 16, 1943

Where two individuals engaged in the manufacture and competitive interstate sale and distribution, to wholesalers and jobbers, of candy—

Sold a 2-pound box of chocolates packed in a miniature cedar chest along with push cards, which they supplied therewith in some instances and in others forwarded separately to wholesalers and jobbers, for use under a plan by which the customer selecting by chance from the 50 feminine names displayed on the card the name corresponding to that concealed under the card's master seal, received the candy and chest, and paid for the chance the amount indicated by the number concealed by the disc below the names selected; and Thereby supplied to and placed in the hands of dealers means of conducting lotteries in the sale of their aforesaid products under said plan, involving a game of chance to obtain merchandise at much less than its normal retail price, contrary to an established policy of the United States Government, and in competition with those who do not use any such method;

With result that many persons were attracted by their said sales plan and the element of chance involved therein, and were thereby induced to buy and sell their products in preference to those of their aforesaid competitors, whereby substantial trade was diverted unfairly from them to individuals aforesaid:

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 in commerce and unfair acts and practices therein.

Before *Mr. W. W. Sheppard* and *Mr. John W. Addison*, trial examiners.

Mr. L. P. Allen, Jr., *Mr. J. V. Mishou*, and *Mr. J. W. Brookfield, Jr.*, for the Commission.

Mr. J. R. Mulliner, of Salt Lake City, Utah, for respondents.

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 Mrs. Alma Loughran and Lee R. Loughran, individually, and trading as Alma's Home Made Candies, hereinafter referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the interest of the public, hereby issues its complaint stating its charges in that respect as follows: