

Complaint

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IN THE MATTER OF
WILLIAM R. WARNER & 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 4770. Complaint, June 5, 1942—Decision, Aug. 25, 1948

Where a corporation engaged in the interstate sale and distribution of its laxative preparation "Agarol"; in various advertising statements—

Represented through use of said trade name "Agarol" and the word "agar agar" therein, that said preparation contained agar agar in sufficient quantities to produce an independent laxative effect;

The fact being that while said product was a laxative, it did not contain any agar agar, and no therapeutic effects, therefore, could be attributed thereto by reason of any agar agar content; and while it did contain agar gel, a derivative of agar agar, said ingredient likewise produced no independent laxative action;

With effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous belief that said preparation contained agar agar in quantities sufficient to produce independent laxative action, and thereby inducing purchases of substantial quantities thereof, and with capacity and tendency so to do:

Held, That such acts and practices, under the circumstances set forth, were to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

In said proceeding in which the complaint charged also that respondent's advertisements concerning said preparations, constituted false advertisements for the reason that they failed to reveal certain facts as to potential danger in the use thereof to individuals suffering from abdominal pains or other symptoms of appendicitis, and that continued use might result in dependence on laxatives, the Commission was unable to find that the potential danger in the use thereof was serious or that its frequent or continuous use might result in an impairment of the public health, and under the circumstances was of the opinion that no disclosures of such facts should be required in the advertising.

Before *Mr. John W. Norwood* and *Mr. Webster Ballinger*, trial examiners.

Mr. William L. Taggart for the Commission.

Breed, Abbott & Morgan, of New York City, for respondent.

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 the William R. Warner & 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 public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. William R. Warner & Co., Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 113 West Eighteenth Street, New York City.

PAR. 2. Respondent is now and for the year last past has been engaged in the sale and distribution of various medicinal preparations, among them a preparation advertised and sold under the brand name of "Agarol."

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 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 aforesaid business, respondent has disseminated and is now disseminating, and has caused and is now causing the dissemination of false advertisements concerning its said preparation by the 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 said preparation, by various means, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said preparation in commerce, as commerce is defined by the Federal Trade Commission Act. Among and typical of the false and misleading statements and representations contained in said false advertisements, disseminated and caused to be disseminated as hereinabove set forth, by United States mails, by advertisements inserted in newspapers, and by circulars and other advertising material are the following:

Many physicians have found the answer to their quest in Agarol. This good mineral oil and agar emulsion with phenolphthalein softens the intestinal contents, lubricates the channel of their passage and gently stimulates peristaltic activity. It combines effectiveness with exceptional palatability.

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Why should you try Agarol? Because it satisfies the demands of modern medicine for a bowel evacuant and a therapeutic measure for the treatment of habitual constipation. Send for a trial supply. See how Agarol compares.

AGAROL—Mineral oil agar emulsions may come and go, but this original preparation continues to be the physicians' favorite recommendation. They know its effectiveness; know too that old or young patients like to take Agarol.

AGAROL

A compound of modified MINERAL OIL with phenolphthalein and AGAR AGAR.

You will find, as many physicians have already found, that Agarol is the preparation well-suited to the treatment of the obstinate constipation of advanced years. The contents of the colon are softened by unabsorbable moisture, evacuation is made easy and painless and devoid of dangerous straining. Such action is of course, desirable not only in the aged, but in every age group.

PAR. 4. Through the use of the foregoing statements, representations and implications and others of similar import and meaning but not specifically set out herein, respondent, directly and by implication, represents that its product "Agarol" contains agar agar as one of its major ingredients and that said preparation contains agar agar in sufficient quantities to have beneficial therapeutic effects in conditions of constipation.

The brand or trade name "Agarol" used by the respondent to describe or designate such product, serves, in and of itself, as a representation that said preparation contains agar agar in sufficient quantities to provide beneficial therapeutic effect in cases of constipation.

Agar agar when taken in sufficient quantities has beneficial effects in cases of constipation, and the purchasing public is generally well informed of the therapeutic properties of agar agar as a bulk laxative.

PAR. 5. The foregoing statements, representations, and implications relative to said medicinal preparation are false, deceptive, and misleading, and constitute false advertising. Further, the use of the brand or trade name "Agarol" for said medicinal preparation is false, deceptive, and misleading and constitutes false advertising. In truth and in fact, the quantity of agar agar contained in respondent's preparation is insignificant from a therapeutic standpoint, and said preparation, so far as the agar agar content is concerned, has no therapeutic value in the treatment of constipation.

PAR. 6. The advertisement 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 prepa-

ration to which the advertisements relate under the conditions prescribed in said advertisements or under such conditions as are customary or usual. In truth and in fact, said preparation is a laxative containing phenolphthalein and is potentially dangerous when taken by one suffering from abdominal pains, stomach ache, cramps, colic, nausea, vomiting or other symptoms of appendicitis; and the frequent or continued use of said preparation may result in dependence on laxatives.

PAR. 7. The use by the respondent of the aforesaid false, misleading and deceptive statements, representations and implications 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 said preparation may be taken in all cases without danger to the health of the user and that said preparation contains agar agar in therapeutic quantities and to induce the purchase of substantial quantities of said preparation because of such erroneous and mistaken belief, so engendered.

PAR. 8. The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice and injury of the public and constitute 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 June 5, 1942, issued and subsequently served its complaint in this proceeding upon the respondent, William R. Warner & Co., Inc., charging said respondent with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. After the filing of the respondent's answer, a trial examiner of the Commission was designated by it to take testimony and receive evidence in support of and in opposition to the allegations of the complaint, and a number of hearings were held and a substantial amount of evidence was introduced and duly recorded and filed. Subsequently, a written stipulation was entered into by and between the respondent, by its counsel, and Daniel J. Murphy, assistant chief trial counsel of the Commission, and in this stipulation it was provided that, subject to the approval of the Commission, the statement of facts contained therein may be taken as the facts in this proceeding in lieu of all testimony, and that the Commission may proceed upon the complaint, the respondent's answer,

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and said statement of facts, to make its report, stating its findings as to the facts, including inferences which it may draw from the stipulated 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, the proceeding regularly came on for final hearing before the Commission upon the complaint, the answer thereto, and the stipulation, said stipulation having been approved, accepted, and filed; 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, William R. Warner & Co., Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 113 West Eighteenth Street, New York, N. Y.

PAR. 2. The respondent is now, and for several years last past has been, engaged in the sale and distribution of various medicinal preparations, one of which is advertised and sold under the trade mark "Agarol." Said respondent causes this preparation, when sold, to be transported from its 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. The 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 its business, since March 21, 1938, the respondent has disseminated and has caused the dissemination of advertisements concerning its preparation "Agarol" by the United States mails, and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act; and the respondent has disseminated and has caused the dissemination of advertisements concerning said preparation by various means for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. Among and typical of said advertisements are the following:

Many physicians have found the answer to their quest in Agarol. This good mineral oil and agar emulsion with phenolphthalein softens the intestinal contents, lubricates the channel of their passage and gently stimulates peristaltic activity. It combines effectiveness with exceptional palatability.

Why should you try Agarol? Because it satisfies the demands of modern medicine for a bowel evacuant and therapeutic measure for the treatment of habitual constipation. Send for a trial supply. See how Agarol compares.

AGAROL—Mineral oil agar emulsions may come and go, but this original preparation continues to be the physicians' favorite recommendation. They know its effectiveness; know too that old or young patients like to take Agarol.

AGAROL

A compound of modified MINERAL OIL with phenolphthalein and AGAR AGAR.

You will find, as many physicians have already found, that Agarol is the preparation well-suited to the treatment of obstinate constipation of advanced years. The contents of the colon are softened by unabsorbable moisture, evacuation is made easy and painless and devoid of dangerous straining. Such action is of course desirable not only in the aged, but in every age group.

PAR. 4. By means of the advertisements aforesaid, the respondent has represented that its said preparation is a laxative. Further, the use of the trade-mark "Agarol" and the word "agar agar" in said advertisements have had the capacity to lead the public to believe that the preparation contains agar-agar in sufficient quantities to produce an independent laxative effect.

PAR. 5. The respondent's preparation "Agarol" is composed of the following ingredients per 100 cc.:

Mineral oil.....	31.80 cc.
Phenolphthalein.....	1.32 grams.
Agar gel made from 0.2 grams of marine agar to which is added—	
Tragacanth.....	.68 grams.
Acacia.....	.68 grams.
Egg albumen fresh.....	.59 grams.
Benzoic acid.....	.1.
Glycerin.....	13.6 cc.
Water q. s.....	

Thus, while the product is a laxative, it does not contain agar-agar. Consequently no beneficial therapeutic effects can be attributed to Agarol by reason of any agar-agar content. The preparation does contain agar gel, which is derived from agar-agar, but this ingredient does not produce an independent laxative action. The Commission is of the opinion, therefore, and finds that the implications in the respondent's advertisements were misleading and deceptive.

PAR. 6. The use by the respondent of the misleading and deceptive statements and representations above referred to, with respect to its said preparation, has had the tendency and capacity to and has misled and deceived a substantial portion of the purchasing public into the

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erroneous and mistaken belief that said preparation contains agar-agar in quantities sufficient to produce independent laxative action and has induced the purchase of substantial quantities of said preparation because of such erroneous and mistaken belief.

PAR. 7. The complaint charged also that the respondent's advertisements concerning Agarol constituted false advertisements for the further reason that they failed to reveal certain facts as to potential danger in the use of the preparation by individuals suffering from abdominal pains, stomach ache, cramps, colic, nausea, vomiting, or other symptoms of appendicitis, and failed to reveal that the continued use of said preparation may result in dependence on laxatives. The Commission is unable to find, however, that the potential danger in the use of the preparation is serious or that its frequent or continued use may result in an impairment of the public health, and in the circumstances is of the opinion that no disclosure of such facts should be required in the advertising.

CONCLUSION

The acts and practices of the respondent as herein found are all to the prejudice and injury of the public and constitute 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 respondent's answer thereto, and a stipulation as to the facts entered into by and between Daniel J. Murphy, assistant chief trial counsel for the Commission, and the respondent, by William L. Hanaway, its counsel, which stipulation provides, among other things, that subject to the approval of the Commission the statement of facts contained therein may be taken as the facts in this proceeding in lieu of testimony in support of the complaint or in opposition thereto, and that the Commission may proceed upon said complaint, respondent's answer, and said statement of facts to make its report, stating its findings as to the facts, including inferences which it may draw from the stipulated facts, and its conclusion based thereon, and enter its order disposing of the proceeding, without the presentation of argument or the filing of briefs; 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, William R. Warner & Co., Inc., a corporation, and its officers, agents, representatives, and employees, in connection with the offering for sale, sale, or distribution of its medicinal preparation designated "Agarol," or any other 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:

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

(a) That said preparation contains agar-agar.

(b) That said preparation contains any derivative of agar-agar in sufficient quantity to produce an independent laxative action.

2. Disseminating or causing to be disseminated, by any means, any advertisement 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 the respondent's preparation, which advertisement contains any representation prohibited in paragraph 1 hereof.

3. Using the term "Agarol" as a brand or trade name for said preparation.

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.

IN THE MATTER OF
BRODIE'S, INC. ET AL.

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

Docket 5564. Complaint, June 7, 1948—Decision, Aug. 25, 1948

Where a corporation and two individuals who controlled the same, engaged in the interstate sale and distribution of push cards and punchboards, including (1) many designed for the sale or distribution of various specified articles, as explained by legends or instructions set forth thereon, under plans whereby there was determined by lot or chance the amount paid by a customer for a punch or push, and whether or not the customer received, without further charge, one of the articles being thus disposed of at much less than the normal retail price thereof, or nothing further; and (2) other devices upon which the purchasers placed, in the blank spaces provided therefor, instructions or legends of similar import, and which were made use of by ultimate purchasers only in combination with other merchandise so as to enable them to sell or distribute the same by lot or chance—

Sold and distributed such devices to dealers in candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in commerce and to retailers thereof by whom, whether as direct or indirect purchasers, the assortments of such articles, as packed and assembled, together with said push cards and punchboard devices, by the purchasers thereof, were exposed to the purchasing public and sold and distributed by means of said cards and boards in accordance with the sales plan above described, involving a game of chance or sale of a chance to procure articles at much less than the normal retail price thereof; contrary to an established public policy of the United States Government; and thereby—

Supplied to and placed in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the sale or distribution of their merchandise; and means of or instrumentalities for engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act;

Whereby many members of the purchasing public were induced to trade or deal with retailers who sold or distributed such merchandise by means of said cards and boards, and the element of chance involved therein; and many retailers, as a result thereof, were induced to deal with or trade with manufacturers, wholesalers, and jobbers who sold and distributed such merchandise together with aforesaid devices:

Held, That such acts and practices, under the circumstances set forth were all to the prejudice and injury of the public, and constituted unfair acts and practices in commerce.

Mr. J. W. Brookfield, Jr. for the Commission.