

IN THE MATTER OF
MARION BUTLER KIRTLAND AND ROY M. KIRTLAND
TRADING UNDER THE NAME AND STYLE OF RAY
LABORATORIES

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

Docket 1513. Complaint, May 10, 1928—Decision, June 29, 1929

Where a firm engaged in the sale and distribution of a so-called hair-color restorer, which (1) was and acted only as a dye, (2) was apt to be harmful to the body, (3) produced a color which was impaired by shampooing or bathing in salt or fresh water and wore off, and (4) was not a stimulant to hair growth nor effective in any degree as a remedy or cure for dandruff; in its advertisements of its said so-called "Youthray",

- (a) Falsely represented that the same neither was nor acted as a dye, but permanently restored gray hair to its original and natural color through its action through the hair channels in supplying natural-color pigment to the inside of the hair through the roots thereof, and thus caused nature to assimilate such coloring matter and to replenish the color glands with the original coloring;
- (b) Falsely represented that the color thus produced, since within the hair itself, neither came off, nor was impaired in any way by shampooing or bathing in salt or fresh water; and
- (c) Falsely represented that said preparation should be frequently applied, and that so applied, it was not only harmless, but a distinct benefit, aside from its restoration of the natural color, and constituted a stimulant to hair growth and an effective remedy and cure for dandruff;

With the effect of misleading and deceiving large and substantial numbers of the consuming public into purchasing said lead-and-sulphur dye in reliance on the truth of the aforesaid statements and representations, and with the capacity and tendency so to do, all to the prejudice and injury of the public and of its competitors from whom trade was thereby unfairly diverted:

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition.

Mr. Henry Miller for the Commission.

Nugent & O'Hara, of Washington, D. C., and *Church, Traxler & Kennedy*, of Chicago, Ill., for respondents.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondents, Marion Butler Kirtland and Roy M. Kirtland, engaged as partners in the sale of a hair color restorer under the name of

"Youthray", by mail order throughout the various States, and doing business under the firm name of Ray Laboratories, with principal offices and main place of business in Chicago, with advertising falsely or misleadingly, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondents, as charged, engaged as above set forth, and doing a large amount of advertising of their said product in magazines, periodicals, booklets, circulars, and other printed matter, in their said advertising falsely and misleadingly represent that their said "Youthray" is a natural color restorer and not a dye, but a result of a new discovery, supplying the hair roots or glands with the proper substance to provide the channels inside the hair with their proper coloring, that is to say, the process used by nature herself, consequently is permanent and will not wash off or come off like the theretofore unsatisfactory dyes which are purely external, that it is safe, and, in addition to its qualities above referred to, stimulates growth and contains an effective remedy for dandruff, a menace which has taken on new proportions for women with their adoption of the practice of bobbing hair, and "is a thousand times more to be desired than merely dying the hair"; the facts being that the preparation in question is nothing more nor less than a lead and sulphur dye, which will not restore gray hair to its natural color except by its dying process, and is a poison apt to be harmful if frequently rubbed into the scalp, and that the color gland in the hair root can not be replenished, by said hair color restorer.¹

¹ Excerpts from the substance of respondents' advertising, as more fully alleged and set out in the complaint, follow:

No one wants gray hair. Most people do something to overcome the condition. Dyes are not satisfactory. Nor are the many so-called colorless liquids that cause the hair to turn dark. For these liquids are nothing more than dyes. They contain chemicals which darken when exposed to light, air and heat. And with all dyes and stains, the hair again becomes gray as it grows out.

Now science has found the way to actually restore gray hair to its original color. You will realize the importance of this discovery when you know that for years chemists and hair specialists all over the world have worked continuously to find the secret.

Youthray is the answer science has found to the problem of gray hair. So remarkable is Youthray that women (also men) are acclaiming it the greatest beauty discovery of all time. And well they may; for nothing ages one's appearance as much as gray hair. The first gray hair—as women well know—strikes terror to the heart; for it seems to say "Youth is fleeting."

Then they resort to dyes. But not any more—for those who learn of Youthray. One fact is convincing proof that Youthray is different, that it cannot be a dye, or stain. For Youthray is not applied to the hair itself, but is rubbed into the scalp, acting thru the hair canal.

Study of the hair reveals that it depends for color upon the activity of a tiny bulb at the hair root. Nature takes certain chemicals and transforms them into color. Then, since the hair is hollow in the center, the natural color is present along the hair shaft, clear to the tip. Also it is known that the hair is formed of tiny scales and cells. These

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The said statements and representations so made by respondents, as charged, have the tendency and capacity to mislead and deceive the public into the erroneous belief that said product is a natural color restorer, and not a dye, which will restore the original color by replenishing the color gland, will not harm the scalp in any way, and is effective in curing dandruff, and into believing such statements and representations to be true; all to the prejudice of the public and of respondents' competitors.

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provision of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondents, Marion Butler Kirtland and Roy M. Kirtland, trading under the name and style of Ray Laboratories, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act.

Respondents having entered their appearance herein and filed answer to said complaint, a stipulation as to the facts was agreed upon by and between respondents and the chief counsel of the Federal Trade Commission wherein it was stipulated and agreed that the facts therein stated may be taken as the facts in the proceeding before the Federal Trade Commission and in lieu of testimony before the Commission in support of the charges stated in said complaint or in opposition thereto, and that the Commission may proceed further upon said stipulation to make and enter its report in said proceeding, stating its findings as to the facts and conclusion and entering its order disposing of the proceeding.

can be plainly seen under a powerful microscope. The coloring matter supplied by nature fills the minute cells and is deposited in the spaces between the scales.

It is then found that when hair grays, nature has ceased producing color at the hair root. This deprives the hair of color throughout its length. The actual appearance of gray is caused by air which gets into the hair in place of color.

In working to perfect Youthray, the coloring matter nature uses was analyzed to discover its exact chemicals. The next step was to duplicate these natural chemicals for Youthray. As you will observe when you use Youthray, the necessary natural chemicals do not form a dye, or stain. The actual color is produced within the hair itself. And that is the natural way. That is why Youthray is applied, not to the length of the hair, but to the scalp, to the hair roots themselves.

You quickly have proof that nature utilizes Youthray; for you apply a non-coloring liquid with the result that color creeps up the hairs from root to tip, restoring the gray hair to its original color.

This process, you now understand, is directly the opposite to the action of dyes. For with dyes, or colorless liquids that change when exposed, you are always told to comb them through the hair. Great stress is laid upon this combing.

Dyes and stains may work a little more rapidly than Youthray. But a few days more are of no consequence to anyone when it is remembered that Youthray restores gray hair in a natural way, that there is no gray left at the hair root, that there is no streaking or uneven application of color, no hint of artificiality.

And of course Youthray does not come off; for it is actually within the hair itself.

Thereupon this proceeding came on for decision, and the Commission having duly considered the record, and now being fully advised in the premises, makes this its report, stating its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PAR. 1. Respondents Marion Butler Kirtland and Roy M. Kirtland are copartners doing business under the firm name and style of Ray Laboratories with their office and place of business in the city of Chicago, State of Illinois; and as such copartners and under said firm name they are and for more than one year last past have been engaged in the business of selling and distributing to the consuming public a so-called hair color restorer named, designated and denominated by them as "Youthray", being a liquid preparation for the care and treatment of the human hair and scalp.

PAR. 2. In the sale and distribution of said so-called hair color restorer, "Youthray", respondents carry on and conduct, and for more than one year last past have carried on and conducted said business as in this paragraph set forth. Respondents offer for sale, solicit orders therefor, sell and advertise said so-called "Youthray" to the consuming public through and by means of numerous advertisements published by them from time to time in magazines, newspapers, and other periodicals circulating among the consuming public throughout the various States of the United States; and also through and by means of advertising booklets, circulars, and other printed matter, which respondents cause to be sent by mail and otherwise from their place of business in Chicago, Ill., through and into many other States of the United States to consumers and prospective consumers of said so-called "Youthray". As a result of such advertising, solicitation and offering for sale of said so-called "Youthray", respondents receive from time to time from consumers and other members of the public, numerous purchase orders for said so-called "Youthray", which purchase orders, together with remittances of the purchase price of said product, are sent by mail and otherwise, pursuant to instructions in said advertising matter, from the respective purchasers in the several States of the United States to respondents at their place of business in Chicago, Ill. Upon receipt of said purchase orders, respondents, pursuant thereto, fill said orders and cause said product "Youthray" to be shipped and delivered by them from their place of business in Chicago, Ill., through and into other States of the United States to the respective purchasers thereof, thus accomplishing and conducting the inter-

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state sale and distribution of said product to the consuming public. In so carrying on their business respondents are and throughout the course and conduct thereof have been engaged in interstate commerce and in direct, active competition with many other individuals, partnerships, and corporations similarly engaged in the sale and distribution, in commerce between and among the various States of the United States, of competing products and of products used for similar purposes.

PAR. 3. In said advertising matter, published and circulated by respondents throughout the space of about one year immediately prior to August, 1928, and through and by means of which respondents offered for sale, solicited purchase orders therefor, advertised and sold said so-called "Youthray", respondents caused to be set forth and printed, as inducements to the purchasing and consuming public to purchase said product, numerous statements and representations of and concerning said so-called "Youthray" so advertised, which statements and representations were to the following effect:

(1) That said so-called "Youthray" was not a dye and did not when used act as, but directly opposite to, a dye.

(2) That said so-called "Youthray" would permanently restore gray hair to its original and natural color.

(3) That said so-called "Youthray", when applied, acted through the hair channel and restored the original and natural color to gray hair by supplying natural color pigment to the inside of the hair through its roots, and thus caused nature to assimilate such coloring matter and to replenish the color glands of the hair with the original coloring matter.

(4) That the color produced by said so-called "Youthray" would not come off, because it is within the hair itself, and that shampooing or bathing in salt or fresh water would in no way impair said color.

(5) That said so-called "Youthray" should be applied to the scalp of consumers by frequently rubbing it into the scalp, and that when so used said product was harmless and would not cause any harmful results to the consumer.

(6) That said so-called "Youthray" when applied was a distinct benefit to the scalp, aside from its purpose of restoring the original and natural color to the hair.

(7) That said so-called "Youthray" was a stimulant to hair growth and was an effective remedy for and would cure dandruff.

PAR. 4. Because of said advertising matter and throughout the period same was published and circulated by respondents as set forth in paragraph 3 hereof, respondents sold and distributed large and substantial quantities of said so-called "Youthray" from their

place of business in Chicago, Ill., to the purchasing and consuming public in the several States of the United States, which so-called "Youthray" so advertised, represented, described, sold, and distributed was in truth and in fact a lead and sulphur dye and when applied as directed by respondents acted only as a dye. It could not and did not, when applied, act through the hair channels nor restore the original and natural color to gray hair by supplying the natural color pigment to the inside of the hair through its roots; nor could or did said product, when applied as directed by respondents, cause nature to assimilate such coloring matter or to replenish the color glands of the hair with the natural coloring matter. Said so-called "Youthray", when applied to the scalp as directed by respondents, was apt to be harmful to the human body and to cause disease of the skin. The color produced on the hair by said so-called "Youthray" would and did become impaired by shampooing or bathing in salt or fresh water and would and did wear off. Said so-called "Youthray" was not a stimulant to hair growth, nor was it effective in any degree as a remedy or cure for dandruff.

PAR. 5. The aforesaid statements and representations set out in subparagraphs (1), (2), (3), (4), (5), (6), and (7) of paragraph 3 hereof, and published and circulated by respondents as hereinbefore set forth, were false, had the capacity and tendency to and did mislead and deceive large and substantial numbers of the consuming public into purchasing said so-called "Youthray" in and because of the erroneous belief that said statements and representations were true in fact, all to the prejudice and injury of the public and of respondents' competitors.

CONCLUSION

The aforesaid false, misleading or deceptive statements, representations or assertions made by respondents, under the conditions and circumstances described in the foregoing findings, tended to and had the effect of unfairly diverting trade from respondent competitors, were to the prejudice and injury of the public, and constitute unfair methods of competition in interstate commerce in violation of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes".

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of re-

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spondents thereto, and the stipulation as to the facts in lieu of testimony executed and filed by the respondents and the chief counsel of the Commission, and the Commission having made its findings as to the facts with its conclusion that the respondents have violated the provisions of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

It is now ordered, That respondents, Marion Butler Kirtland and Roy M. Kirtland, and each of them, their agents, representatives, servants, and employees, cease and desist, in connection with the sale and distribution in interstate commerce of any preparation or product for the care, treatment or dressing of the human hair or skin—

(1) From making or causing to be made in any manner whatsoever any representations, statements, or assertions to the effect that such preparation or product (a) is not a dye, (b) or that it does not act as a dye, (c) or that it will restore gray hair to its original or natural color, (d) or that it acts through the hair channel or that it supplies color pigment to the inside of the hair through the roots or otherwise, (e) or that it causes nature to assimilate such coloring matter, (f) or that it replenishes the color glands of the hair, (g) or that the color produced thereby will not come off or can not be impaired by shampooing or bathing, (h) or that it is harmless or will not produce harmful or deleterious effect upon the user, (i) or that it is beneficial to the scalp, (j) or that it is a stimulant to hair growth, (k) or that it is a remedy or cure for dandruff; when any such statements, representations, or assertions are not respectively true in fact.

(2) From making or causing to be made in any manner whatsoever any other false, misleading, or deceptive representation, statement, or assertion of or concerning the ingredients, uses, effects, action, origin, manufacture, sale, or distribution of any such preparation or product.

It is further ordered, That respondents, Marion Butler Kirtland and Roy M. Kirtland, shall, within 30 days after the service upon them of copies of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist hereinabove set forth.

Syllabus

IN THE MATTER OF
BOWEY'S, INCORPORATEDCOMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 1533. Complaint, July 21, 1928—Decision, June 29, 1929*

Where a corporation engaged in the manufacture and/or sale of true fruits, true fruit flavors, and imitation fruit flavors made from aldehydes and esters, with acids and aniline colors, for compounding drinks simulating the color and taste of those made with the juices of the grape, cherry, and raspberry, respectively, sold under the names "Cherry Flip", "Raspberry Flip", and "Grape Flip", along with its true fruit "Lemon Flip" and "Orange Flip", to jobbers and operators of pool rooms and soda fountains,

(a) Conspicuously labeled the containers of its said imitation fruit flavors, "Grape Flip", "Cherry Flip", or "Raspberry Flip", as the case might be, together with the word "imitation" in relatively inconspicuous letters, and supplied and sold to customers coolers containing the words "Bowey's Fruity Flips, Chicago, U. S. A.", together with labels to be pasted upon the bottom thereof, exposed to view upon the inverting of the cooler or bottle, containing the words "Grape Flip", "Cherry Flip", or "Raspberry Flip", and with the word "imitation" in much smaller letters; and

(b) Advertised its said "Grape Flip" in a trade periodical of nation-wide circulation among dealers and dispensers of soft drinks, under the afore-said name, and characterized the same, along with two other true fruit flips, as "dripping with the full, ripe, luscious flavor of the ripe fresh fruit", without indicating the imitation character of said first named product, and in its "Wholesale Price List of Crushed Fruit, Concentrated Fruit Stocks, Fudges, Hot Chocolate Powder, For the Soda Fountain", sent to customers, represented that its "Fruit Stocks and Concentrated Fruit Syrups are of Highest Quality and our Low Temperature Method of Packing Preserves in Full, Rich Flavor of Fresh Fruit", and described its fruitless imitation flavors as "Grape Flip, Cherry Flip, and Raspberry Flip", without disclosing that said flips were not made from true fruits;

With the capacity and tendency to mislead immediate buyers of its said imitation grape, cherry, and raspberry flavors into the belief that the same were made in whole or in part of the juice or fruit so designated, and to mislead and deceive ultimate purchasers of beverages made therefrom into believing the same to be composed in whole or in part of the fruit or juice designated:

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

Mr. E. J. Hornibrook for the Commission.

Lannen & Hickey, of Chicago, Ill., for respondent.