

Syllabus

IN THE MATTER OF
UNITED REMEDIES, INC.

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

Docket 1593. Complaint, Apr. 12, 1929—Decision, Apr. 7, 1930

Where a corporation engaged in the sale of a hair preparation named "Kolor-Bak", which (1) neither restored nor promoted recovery of the original color except possibly, in some instances, accidentally through action as a dye, to be then preserved, if at all, only by repeated applications, (2) possessed no value as a general hair tonic or as a cleanser or remover of dandruff, (3) ordinarily stained the hands and scalp, and (4) contained acetate of lead, an unsafe ingredient for the scalp and an injurious one, in some cases,

(a) Falsely represented through labels, cartons, containers, wrappers, advertising and printed matter that said preparation restored and brought back the original color of gray hair, always got the same perfect result, was neither a dye nor harmful, was valuable as a remedy for dandruff, falling hair, etc., and as general hair tonic, stained neither scalp nor hands, and was free from nitrate of silver, para and mercury and composed of beneficial ingredients;

With capacity and tendency to mislead the purchasing public or a substantial portion thereof into believing that use of said preparation caused gray hair through normal processes to recover its former natural color and to induce its purchase in reliance on such belief and also on the erroneous belief that said preparation had the merits and qualities otherwise attributed to it as above set forth; and, following discontinuance of said false representations, theretofore made by itself, and its predecessors in the sale of said preparation.

(b) Described and designated its said dye as "Kolor-Bak", without qualification, and represented that the same imparted color to gray hair, and that through use thereof such hair might be colored its original shade;

With capacity and tendency to mislead and deceive the public or a substantial portion thereof, by reason of the phonetic significance, meaning, and effect of the name, into purchasing the preparation in reliance on the erroneous belief that it restored the original natural color of gray hair instead of imparting an artificial color or shade thereto, and with the material and probable effect of so misleading and deceiving:

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

Mr. James M. Brinson for the Commission.

Mr. Stephen A. Day, of Chicago, Ill., and *Mr. Eugene L. Culver*, of Washington, D. C., for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, an Illinois corporation engaged in the sale of a certain preparation or compound for the hair, to purchasers in various States, and with principal office and place of business at Chicago, with naming product misleadingly, and misrepresenting and advertising falsely or misleadingly in regard thereto, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, names its aforesaid product Kolor-Bak and represents that the same will restore the original color of gray hair, that it "always gets the same perfect result", is neither a hair dye nor harmful, but is valuable as a general hair tonic and as a remedy for dandruff, falling hair and itching scalp, and that it will neither stain the scalp or hands and is free from nitrate of silver, "para" or mercury, and that its ingredients are beneficial to hair and scalp, the facts being that the product in question contains acetate of lead which is injurious in some cases and is not a safe or legitimate ingredient, that the product in question is a hair dye and does not have the results claimed, nor any uniform or other result, except such as is ordinarily produced by hair dye and is not of value as a dandruff remedy or hair tonic nor for falling hair or itching scalp and does not clean the hair of dandruff and does stain hands and scalp.

According to the complaint "the designation and description by respondent of its said product as Kolor-Bak, a word which has the same phonetic significance, meaning, and effect as the words "color back", has had and has the capacity and tendency to mislead and deceive the public into the belief that such product will restore or bring back the original color to hair, and the false representations used by respondent * * * and each and all of them has and have had, and has and have the capacity and tendency to mislead and deceive the public into the purchase of said product in the erroneous belief that said representations or one or more of them is or are true"; all to the prejudice of the public and respondent's competitors.

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an 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", the Federal

Trade Commission issued and served a complaint upon respondent, United Remedies Inc., charging it with unfair methods of competition in commerce, in violation of the provisions of said act.

The respondent having entered appearance and filed its answer, and having entered into a stipulation as to the facts in lieu of testimony and evidence in course of hearing before an examiner theretofore duly appointed for such purpose, thereupon this proceeding came on regularly for decision before the Federal Trade Commission and upon such complaint, answer, stipulation as to the facts, briefs and arguments of counsel for the Commission and respondent, and the Commission having duly considered the record and being now fully advised in the premises makes this its report in writing, stating its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent United Remedies, Inc., is now, and for more than a year prior to the issuance of complaint has been, a corporation organized and existing under and by virtue of the laws of the State of Illinois with its principal office and place of business at Chicago in said State. It has been and is offering for sale and selling, and when sold, causing to be transported, from its said place of business, to purchasers in the various other States of the United States, a preparation or compound, described and designated as Kolor-Bak, in competition with individuals, partnerships and corporations engaged in selling hair dyes in interstate commerce.

The name Kolor-Bak was first adopted by the Kolor-Bak Products Co., also a corporation organized and existing under and by virtue of the laws of the State of Illinois, and on August 1, 1916, it was duly registered in the United States Patent Office as a trademark, to distinguish certain products manufactured and sold by it, namely, amongst other certain products, hair dyes and hair tonics, from similar products offered for sale or sold by its competitors. The Kolor-Bak Products Co. later changed its corporate name to Hygienic Laboratories, and continued the sale of its said preparation for the hair until on or about February 28, 1927, when the business together with the trade name, and the formulae used by it for, and in the manufacture of, hair dyes under said trade name, was sold to certain individuals acting as trustees for respondent United Remedies, Inc. These individuals transferred said business, formulae, and trade name to respondent on or about May 1, 1927, together with the good will of said Hygienic Laboratories, particularly with respect to its hair dye Kolor-Bak, and containers, cartons,

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wrappers, advertising and printed matter, which Hygienic Laboratories and Kolor-Bak Products Co. had theretofore used in connection with the advertisement and sale of said hair dye. The good will so acquired by respondent United Remedies, Inc., represented or reflected the attitude of the purchasing public toward Kolor-Bak based on or due to statements on labels on bottles or containers in which Kolor-Bak had been marketed, or on cartons or wrappers enclosing the bottles or containers of Kolor-Bak sold in the course of commerce among the various States of the United States, or in printed directions for the use of Kolor-Bak, or in advertisements or other printed matter theretofore utilized by Hygienic Laboratories and Kolor-Bak Products Co. to present the merits of Kolor-Bak to the purchasing public.

Respondent United Remedies, Inc., thereupon adopted the representations and statements which its said predecessors had used as inducements to the purchase of Kolor-Bak, and began to use and did use said cartons, containers, wrappers, and other advertising and printed matter containing such representations and statements in offering for sale and selling Kolor-Bak in commerce among and between various States of the United States until October 25, 1928. Respondent was notified during the month of March, 1928, that its methods and practices including use of said cartons, containers, wrappers, and advertising matter were under investigation by the Federal Trade Commission.

PAR. 2. Respondent United Remedies, Inc., has falsely represented to the public by means of and through such labels, cartons, containers, wrappers, advertising and printed matter, just as had been done by its predecessors in establishing its reputation for Kolor-Bak, that such preparation can restore and bring back the original color of gray hair, that it always gets the same perfect results, that it is neither a hair dye nor harmful, that it is valuable for use as a general hair tonic, as a remedy for dandruff, falling hair and itching scalp, that it neither stains the scalp nor the hands, that it is free from nitrate of silver, para and mercury, and that its ingredients are beneficial to the hair and scalp.

In truth and in fact the product Kolor-Bak neither restores nor brings back the original or former color of gray hair, nor directly or indirectly promotes recovery or restoration of the original color. It may, in some instances, so color the hair that it has the general appearance of such original color, but if the hair does acquire from the use of Kolor-Bak its natural shade it is accidental, and it can be preserved, if at all, only by repeated application of the product. Such color or shade disappears whenever use of Kolor-Bak is discontin-

ued. It is a hair dye and neither always gets the same perfect result nor any uniform result except as ordinarily accomplished by dyeing the hair and repeatedly and continuously dyeing it from time to time. It is neither valuable nor effective as a remedy for dandruff, falling hair, or itching scalp, or as a general hair tonic. It neither cleans nor frees the hair from dandruff and ordinarily will stain the hands and scalp. It contains, among other ingredients, a substance known as acetate of lead, which may be, and in some instances is, injurious, depending on individual susceptibility or the extent of its use. This substance is neither a safe nor legitimate ingredient of a product to be rubbed into the scalp indiscriminately or without consideration of the state of health or condition of the scalp of the user.

On or about October 25, 1928, respondent United Remedies, Inc., discontinued representations in labels, containers, wrappers, cartons, or in advertisements to the effect that Kolor-Bak would restore the original color of gray hair, or that it was or is not a hair dye. It has continued, however, to describe and designate its hair dye as Kolor-Bak without any qualification whatever, and has represented and now represents that such preparation imparts color to gray hair accompanied by the statement that through use of Kolor-Bak gray hair may be colored to its original shade.

PAR. 3. The representation by respondent that use of Kolor-Bak can or will restore or bring back the original color of gray hair, together with the representation that it is not a hair dye, has had the capacity and tendency to mislead and deceive, and the representation that it imparts color to gray hair, accompanied by the statement that by its use such gray hair may be colored to its original shade, has had and now has the capacity and tendency to mislead and deceive the purchasing public or a substantial portion of it into the belief that use of Kolor-Bak would cause gray hair, through normal processes, to recover the natural color it had before turning gray, and to induce its purchase in reliance on such erroneous belief.

The representations by respondent that Kolor-Bak always gets the same perfect results, that it is neither a hair dye nor harmful, that it is valuable for use as a hair tonic, or as a remedy for dandruff, falling hair, and itching scalp, that it will neither stain the scalp nor the hands, and that its ingredients are beneficial to the hair and scalp, have had the capacity and tendency to mislead and deceive the purchasing public or substantial portion of it into the purchase of Kolor-Bak in reliance on the erroneous belief that such preparation has the merits or qualities so attributed to it.

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The description or designation by respondent of its preparation for dyeing or changing the color of gray hair by the trade name Kolor-Bak, which has the same phonetic significance, meaning and effect as the words "color back", and which has been used by respondent and its predecessors since 1916 for a hair dye represented to the public by advertisements and otherwise as an effective means for restoring, without dyeing, the original color of gray hair, has had and has the capacity and tendency to mislead and deceive, and the natural and probable effect thereof will be to mislead and deceive the public or a substantial portion of it into the purchase of Kolor-Bak in reliance on the erroneous belief that its use instead of imparting an artificial color or shade, will restore the original, natural color of gray hair.

CONCLUSION

The practices of said respondent United Remedies, Inc., under the conditions and circumstances described in the foregoing findings as to the facts are all to the injury and prejudice of the public and respondent's competitors, and are unfair methods of competition in commerce and constitute a 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 respondent and a stipulation as to the facts in lieu of testimony and evidence, and the Commission having filed its report stating its findings as to the facts and its conclusion that the respondent United Remedies, Inc., has violated the provisions of an 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 the respondent, United Remedies, Inc., its officers, agents, and employees, do cease and desist directly or indirectly:

(1) From representing, in connection with offering for sale or selling in interstate commerce, by advertisements, or on labels, cartons, containers, wrappers, directions for use, or in any other written or printed matter, that use of its preparation designated Kolor-Bak, offered for sale or sold in interstate commerce, for dyeing, or changing the color of gray hair, can or will restore, bring back, impart,

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produce, or cause to have, the original, natural or former color or shade; or that Kolor-Bak is neither a hair dye nor harmful, or that it is valuable for use as a hair tonic, or as a remedy for dandruff, falling hair, or itching scalp, or that it will neither stain the scalp nor the hands, or that its ingredients are beneficial to hair and scalp, or that it may safely be rubbed into the scalp indiscriminately without consideration of the state of health, or condition of the scalp of the user.

(2) From advertising, describing or designating its preparation offered for sale or sold in interstate commerce for dyeing or changing the color of gray hair, as Kolor-Bak, unless accompanied by apt and adequate words equally conspicuous and in immediate conjunction therewith clearly indicating that it is a hair dye, or imparts an artificial color or shade.

It is further ordered, That respondent shall within 60 days after the service upon it of this order file a report in writing with the Commission setting forth in detail the manner and form of its compliance therewith.

IN THE MATTER OF
JAMES KELLEY

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

Docket 1610. Complaint, Apr. 24, 1929—Decision, Apr. 7, 1930

Where an individual conducting a mail-order jobbing business in fountain pens, pencils, and specialties, purchased from manufacturers and resold to street fakers and peddlers, doing no manufacturing, though assembling certain of the pens dealt in, and with only a few employees, and a trade of about \$50,000 a year,

- (a) Falsely represented himself as a manufacturer and a large mail-order concern, with factory in Providence, and that persons should patronize him because of the saving of the middleman's profit thereby secured;
- (b) Sold pens with clip and lever branded "Iridium," with intent and effect of causing prospective purchasers and ultimate consumers to infer falsely that the points were tipped with said substance;
- (c) Supplied customers with fictitious price ring tags for said pens, bearing such figures as \$2.50, \$7, \$8, \$10, and others, and furnished customers with coupons advertising pens at a large reduction, for a short time only, from a so-called much larger "regular price," in supposed partial consideration of surrender of the coupons, with intent and effect of causing prospective customers or customers of his vendees to believe they were buying a high-grade pen at a greatly reduced price, the facts being that the pens were of poor quality and low cost, sold by him at \$60, \$72, and \$78 per gross, and that the implied price reductions were fictitious;
- (d) Represented his pen points as "Warranted 14K" and as "Warranted," and sold the higher priced pens with the mountings stamped "14K Waterson," the facts being that said points were not gold, but brass, thinly gold plated, and mountings were of "goldline," or brass, thinly coated with gold wash; and
- (e) Simulated barrel levers and cap clips of the L. E. Waterman Co., and stamped levers and cap clips of his pens and/or pen points "Waterson," with intent and effect of misleading the buyer and ultimate consumer into believing said inferior articles to be the "Waterman pens" made and sold by the L. E. Waterman Co., New York City;

With intent, capacity, and direct tendency to mislead customers and/or the buying public and with the effect in many instances of so misleading and deceiving such customers and public:

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

Mr. Edward L. Smith for the Commission.

Koenig, Bachner & Koenig, of New York City, for respondent.