

IN THE MATTER OF
BIRCONJEL CORPORATION, INC.

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

Docket 2998. Complaint, Nov. 27, 1936—Decision, Aug. 20, 1937

Where a corporation engaged in the manufacture of certain so-called hygienic and other products for use by women, including its so-called "Birconjel" and a patented applicator for use in connection therewith, and in the sale of said "Birconjel" and applicator, through radio and other advertising, to wholesale druggists and others, and, on order, to any individual unit of the purchasing or consuming public, in substantial competition with others similarly engaged in the offer and sale, in commerce among the various States, of hygienic and other products intended and designed for use exclusively by women, and including among its competitors those offering medicines or preparations of various kinds for use in connection with feminine hygiene and for aforesaid preventive effects, without stating expressly, or implying or importing, in their representations that their products or any of them are invariably or uniformly effective and safe and harmless, and those offering and selling, as aforesaid, medicines, with or without applicators, and other preparations, truthfully represented as for use in feminine hygiene and to prevent diseases arising from lack thereof, and as preventing contraction of diseases by women when used in accordance with directions—

- (a) Represented, through advertising literature enclosed in the carton or container of said product and distributed also among purchasers and prospective purchasers, and through window display advertising and other advertising matter distributed by its agents in introducing and promoting sale of said product, and also through booklets and other advertising, that said "Birconjel" and appliance constituted a competent and effective contraceptive and could be relied upon absolutely for such preventive purpose, and that its said preparation constituted a reliable remedy, treatment and cure for ills and diseases peculiar to women, facts being preparation in question could not be relied upon as such a preventive and had no beneficial therapeutic value in the treatment of any ailments, ills, or diseases peculiar to the feminine anatomy; and
- (b) Represented that said preparation constituted a protection against diseases and acted both mechanically and as a germicide in the prevention of trouble, and that it was prescribed by thousands of physicians and had the approval of the American Medical Association, American Birth Control League, and physicians generally, and that it was not a patent or proprietary medicine, but an open formula which might be used with safety and without deleterious effects by all women, facts being it was not a scientific prophylactic for feminine hygiene or otherwise, had not been used or approved as above claimed, formula thereof was not open, but secret, and use thereof, either with or without said applicator, was not absolutely harmless, but in many cases was capable of causing injuries and had deleterious effect upon the user thereof;

With effect of confusing, misleading, and deceiving members of the public as to the properties and efficacy of said preparation and appliance in the particulars above set forth, and of causing them, because of erroneous beliefs engendered by its representations and implication, to buy and use the same, and thereby unfairly divert trade in commerce to it from its aforesaid competitors who truthfully represent their products; to their substantial injury:

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Robert S. Hall*, trial examiner.

Mr. William L. Taggart for the Commission.

Mr. Nathaniel K. Altman, of Brooklyn, N. Y., for respondent.

COMPLAINT

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, having reason to believe that Birconjel Corporation, Inc., hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said 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. Respondent, Birconjel Corporation, Inc., is now, and has been for several years last past, a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 420 Lexington Avenue, city of New York, State of New York, and 37 East 28th Street said city and State.

Respondent has been and is engaged in the manufacture of certain so-called hygienic and other products for use by women, and in their sale and distribution in commerce between the State of New York and the various other States of the United States and in the District of Columbia. It causes these products, when sold, to be transported from its aforesaid place of business to purchasers thereof in the various States of the United States other than the State of New York and in the District of Columbia.

In the course and conduct of said business, respondent has been and is in substantial competition with other corporations, and with individuals and partnerships similarly engaged in offering for sale and selling, in commerce among and between the various States of the United States, hygienic and other products intended and designed for use by women exclusively.

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PAR. 2. In the course and conduct of its business, it has been and is the practice of respondent to offer for sale and sell a product known and described as Birconjel. In connection with the sale of its product "Birconjel" respondent also sells a patented applicator intended and designed for use in applying said "Birconjel" said applicator supposedly measuring and applying the correct amount of Birconjel to satisfactorily accomplish the results claimed by respondent. Sales are made through radio and other advertising to wholesale druggists and others, although when an order is received by respondent from any individual unit of the purchasing or consuming public, it is filled by respondent.

In the carton or container in which the said product is marketed, there is enclosed certain advertising literature in which the product is represented and described. Such advertising matter is also distributed by respondent among purchasers and prospective purchasers who inquire about the said product. It also employs and uses agents for the introduction of said product and promotion of its sale. They call upon druggists and install advertising window display and distribute other advertising matter, including circulars, a booklet called "A Straightforward Talk About Feminine Hygiene Sometimes Called Marriage Hygiene," and covered matches, the latter of which contain on their cover certain legends. Such legends as "Why Do Modern Women Practice Feminine Hygiene?," "The Birconjel Patented Applicator," "Some Scientific and Legal Aspects of Birconjel," "Measured Never Too Little and Never Too Much," "Approved Birconjel in Measured Applications Never Too Little, Never Too Much, Gloriously Simple, Feminine Hygiene, Truly Positive," appear on matches, blotters, and other advertising which is distributed in interstate commerce and otherwise. In its newspaper advertising it represents that "Birconjel enjoys medical and clinical approval"; that "Most chemicals powerful enough in solution to kill germs can be dangerous to delicate membranes (burns)"; that "The practice of feminine hygiene can have an aesthetic as well as practical side," and makes other similar representations through similar statements.

As inducements to the purchase of Birconjel and its applicator contrivance, respondent represents and infers that the use of such product will prevent conception; and that it is a protection against diseases; through such statements as "Keeps feminine secrets, complete safety and peace of mind is yours when you use Birconjel"; "Acts two ways in preventing trouble mechanically and is a germicide," and through other similar fraudulent statements. As a further inducement for the purchase of its product, Birconjel, and its appli-

cator contrivance, respondent has represented its cooperation with the American Birth Control League, using such language as signifies and implies a close connection between respondent and such league. It also represents that it has received approval of said product by physicians generally and that it is generally likewise dispensed and prescribed by thousands of such physicians. It further represents that it is well known to the medical profession for its high class pharmaceutical product. Respondent further represents that the product, Birconjel, is not a patent or proprietary medicine, but, rather an open formula which is given to physicians whenever they request it.

In truth and in fact, the use of respondent's said product will not accomplish such benefits as are claimed for said product in its advertising as set forth above, and it is not a scientific prophylactic for feminine hygiene, or otherwise. Its use is not absolutely harmless and its use with its patented applicator is not absolutely harmless, as is claimed in said representations made through its advertising. The product, Birconjel, has not received the approval of the American medical profession, nor physicians generally. It has not been dispensed and prescribed by thousands of physicians, and it is not recommended by the American Birth Control League. The product of respondent is a patented or proprietary medicine. Its formula is not open, as the word is understood, since the ingredients of the product are not declared or disclosed but held in secret by its manufacturers.

PAR. 3. There are now, and for several years last past have been, individuals, partnerships, and corporations who have been offering for sale and selling, in commerce among and between the various States of the United States, medicines or preparations of various kinds for use by women in feminine hygiene and for the prevention of conception, without stating expressly or implying or importing in their representations that their products or any of them are invariably or uniformly effectual and safe and harmless. They are now, and for several years last past have been, individuals, partnerships, and corporations offering for sale and selling, in commerce as herein set out, medicines with and without applicators and other preparations which they truthfully represent are for use in feminine hygiene and likely to prevent diseases arising from lack of feminine hygiene and will prevent the contraction of diseases by women when used in accordance with directions.

PAR. 4. The aforesaid practices of respondent have had and have the capacity and tendency to mislead and deceive wholesale dealers, retail dealers and their customers, the consuming or purchasing public, into the erroneous and mistaken beliefs that Birconjel is in-

variably and uniformly effective in preventing conception and is likewise a preventive of diseases caused by lack of feminine hygiene, and that all other representations of the respondent hereinbefore stated in paragraph 2 are true, and into the purchase of such product in reliance upon such erroneous beliefs or one or more of them.

The aforesaid practices have also had and have the capacity and tendency to unfairly divert trade to respondent from the competitors mentioned in paragraph 3 hereof. As a result thereof substantial injury has been, and is now being, done to such competitors by respondent in the course of such competition.

PAR. 5. The aforementioned methods, acts, and practices of respondent are all to the prejudice of the public and respondent's competitors as hereinabove alleged. Said methods, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

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 on November 27, 1936, issued, and on December 30, 1936, served its complaint in this proceeding upon the respondent, Birconjel Corporation, Inc., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of the complaint to be true, and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the substitute answer, no briefs having been filed or oral argument made, 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 this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Birconjel Corporation, Inc., is now, and has been for several years last past, a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 420 Lexington Avenue, city of New York, State of New York, and 37 East 28th Street said city and State.

Respondent has been and is engaged in the manufacture of certain so-called hygienic and other products for use by women, and in their sale and distribution in commerce between the State of New York and the various other States of the United States and in the District of Columbia. It causes these products, when sold, to be transported from its aforesaid place of business to purchasers thereof in the various States of the United States other than the State of New York and in the District of Columbia.

PAR. 2 In the course and conduct of said business, respondent has been and is in substantial competition with other corporations, and with individuals and partnerships similarly engaged in offering for sale and selling, in commerce among and between the various States of the United States, hygienic and other products intended and designed for use by women exclusively.

PAR. 3. In the course and conduct of its business, it has been and is the practice of respondent to offer for sale and sell a product known and described as Birconjel. In connection with the sale of its product "Birconjel" respondent also sells a patented applicator intended and designed for use in applying said "Birconjel," said applicator supposedly measuring and applying the correct amount of Birconjel to satisfactorily accomplish the results claimed by respondent. Sales are made through radio and other advertising to wholesale druggists and others, although when an order is received by respondent from any individual unit of the purchasing or consuming public, it is filled by respondent. By means and in the manner set out in paragraphs 4 and 5, the respondent represents and implies that the preparation Birconjel and its applicator appliance is a competent and effective preventive of conception, and that it is an absolute protection against pregnancy and can be depended upon for such purpose without limitation; and that the preparation is a reliable remedy, treatment, and cure for ills and diseases peculiar to women.

PAR. 4. In the carton or container in which the said product is marketed, there is enclosed certain advertising literature in which the product is represented and described. Such advertising matter

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is also distributed by respondent among purchasers and prospective purchasers who inquire about the said product. It also employs and uses agents for the introduction of said product and promotion of its sale. They call upon druggists and install advertising window display and distribute other advertising matter, including circulars, a booklet called "A Straightforward Talk About Feminine Hygiene Sometimes Called Marriage Hygiene," and covered matches, the latter of which contain on their cover certain legends. Such legends as "Why Do Modern Women Practice Feminine Hygiene?" "The Birconjel Patented Applicator," "Some Scientific and Legal Aspects of Birconjel," "Measured Never Too Little and Never Too Much," "Approved Birconjel in Measured Applications Never Too Little, Never Too Much, Gloriously Simple, Feminine Hygiene, Truly Positive," appear on matches, blotters, and other advertising which is distributed in interstate commerce and otherwise. In its newspaper advertising it represents that "Birconjel enjoys medical and clinical approval"; that "Most chemicals powerful enough in solution to kill germs can be dangerous to delicate membranes (burns)"; that "The practice of feminine hygiene can have an aesthetic as well as practical side," and makes other similar representations through similar statements.

PAR. 5. As inducements to the purchase of Birconjel and its applicator contrivance, respondent represents and implies that the use of such product will prevent conception; and that it is a protection against diseases; through such statements as "Keeps feminine secrets, complete safety and peace of mind is yours when you use Birconjel"; "Acts two ways in preventing trouble mechanically and is a germicide," and through other similar statements. As a further inducement for the purchase of its product, Birconjel, and its applicator contrivance, respondent has represented its cooperation with the American Birth Control League, using such language as signifies and implies a close connection between respondent and such league. It also represents that it has received approval of said product by physicians generally and that it is generally likewise dispensed and prescribed by thousands of such physicians. It further represents that it is well known to the medical profession for its high class pharmaceutical product. Respondent further represents that the product, Birconjel, is not a patent or proprietary medicine, but rather an open formula which is given to physicians whenever they request it.

PAR. 6. In truth and in fact, the use of respondent's said product will not accomplish such benefits as are claimed for said product in its advertising as set forth above, and it is not a scientific pro-

phylactic for feminine hygiene, or otherwise. Its use is not absolutely harmless and its use with its patented applicator is not absolutely harmless, as is claimed in said representations made through its advertising. The product, Birconjel, has not received the approval of the American medical profession, nor physicians generally. In many cases the use of the said preparation and appliance is capable of causing injuries and has a deleterious effect upon those using them. Said preparation has no beneficial therapeutic value in the treatment of any ailments, ills, and diseases peculiar to the female anatomy, and its use cannot be relied upon to prevent conception. It has not been dispensed and prescribed by thousands of physicians, and it is not recommended by the American Birth Control League. The product of respondent is a patented or proprietary medicine. Its formula is not open, as the word is understood, since the ingredients of the product are not declared or disclosed, but held in secret by its manufacturers.

PAR. 7. There are now, and for several years last past have been, individuals, partnerships, and corporations who have been offering for sale and selling, in commerce among and between the various States of the United States, medicines or preparations of various kinds for use by women in connection with feminine hygiene and for the prevention of conception, without stating expressly or implying or importing in their representations that their products or any of them are invariably or uniformly effectual and safe and harmless. There are now, and for several years last past have been, individuals, partnerships, and corporations offering for sale and selling, in commerce as herein set out, medicines with and without applicators and other preparations which they truthfully represent are for use in feminine hygiene and are designed to prevent diseases arising from lack of feminine hygiene and will prevent the contraction of diseases by women when used in accordance with directions.

PAR. 8. The representations and implications of the respondent in connection with the sale and distribution of said preparation and appliance, in said commerce, as stated, have the tendency and capacity to, and do, confuse, mislead, and deceive members of the public as to the properties and efficacy of said preparation and appliance in the particulars herein set forth, and cause them, because of the erroneous beliefs engendered by said representations and implications, to buy and use said preparation and appliance, thereby unfairly diverting trade in said commerce to the respondent from its aforesaid competitors who truthfully represent their products. As a result thereof substantial injury has been done, and is now

being done, by respondent to such competitors in commerce between and among the various States of the United States.

CONCLUSION

The aforesaid acts and practices of the respondent, Birconjel Corporation, Inc., are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, within the intent and meaning of Section 5 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer filed herein on July 9, 1937, by respondent, admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, and the Commission having made its findings as to the facts and its conclusion that said respondent 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 ordered, That the respondent, Birconjel Corporation, Inc., its officers, representatives, agents and employees in connection with the offering for sale, sale and distribution of its medicinal or pharmaceutical preparation and appliance which are designed, intended and used in the treatment of various female ailments and conditions, and for female hygiene purposes, now designated as Birconjel and patented applicator, or any other preparations of substantially the same ingredients and therapeutic effect, or appliances of substantially the same design, whether designated by the aforementioned names or by any other names, in interstate commerce or in the District of Columbia, do forthwith cease and desist from representing:

1. That the use of said preparation alone or in conjunction with the aforesaid appliance will prevent conception.

1. That the use of said preparation alone or in conjunction with hygiene or otherwise, and is a protection against disease.

3. That said preparation acts two ways in preventing trouble, mechanically and as a germicide.

4. That the preparation is prescribed by thousands of physicians and that it has the approval of the American Medical Association, American Birth Control League, and physicians generally.

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5. That the preparation is not a patent or proprietary medicine, but an open formula.

6. That the said preparation and appliance may be used with safety and without deleterious effects by all women, and

7. From making other representations of similar import and of like character to those made as above set forth.

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
CLEMENT A. DeGRACE, TRADING AS SOCIAL SECURITY
COUNSELORS

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

Docket 3168. Complaint, July 3, 1937—Decision, Aug. 20, 1937

Where an individual engaged in sale and distribution of a correspondence course of study and instruction designed and intended for the education of students for positions in the United States Government, in competition with those engaged in sale and distribution of courses of study and instruction designed and intended to prepare students for examinations for various Government positions—

- (a) Made use of trade name "Social Security Counselors," and represented, implied, and created belief, through newspaper advertisements in classified section and usually in "Help Wanted" section, that such advertisements were those of Government agencies or representative thereof, and that three thousand Government positions were open and available, with men and women wanted to fill same, and with examinations being held therefor, and that he could and would obtain such positions for those who completed his said courses of study and instruction, facts being he had had no connection whatever with the Social Security Board or with the United States Government, and representations aforesaid were false and misleading;
- (b) Falsely and misleadingly represented, through salesmen whom he had appointed and designated, and who traveled throughout the United States soliciting students for said courses, and through other means, to prospective purchasers and students, that he and said salesmen were connected with or otherwise represented the Government, and that there were thousands of positions available in the newly formed Social Security Board, and that examinations would be held therefor in the near future, or at different times stated, and that prospective students could and would be placed in Government positions if they pursued said courses of study; and
- (c) Represented, as aforesaid, that a Government position was guaranteed or assured, and that money paid for said courses would be refunded if no position was obtained by student solicited, and that only a limited number would be selected for training in a particular locality, facts being said representations were false and misleading, and money-back agreement made use of by said individual was conditioned, among other things, upon written application within thirty days after completing the regular work and studies, and the taking of two Government examinations, and, due to holding of few, if any, examinations and fact that few, if any, students had or would have opportunity to take two such examinations so as to determine whether or not student would or could be placed upon eligible list, and, in event of failure, become entitled to refunds under such agreement, was inoperative and misleading;