

IN THE MATTER OF
KENDALL COMPANY, TRADING AS BAUER & BLACK

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

Docket 3320. Complaint, Feb. 1, 1938—Decision, Nov. 29, 1940

Where a corporation engaged, among other things, in the manufacture, sale, and distribution of its "Blue Jay" corn plasters, bunion and callus plasters, and liquid corn remover, which, when used in accordance with its directions, embodied substantially same form of treatment and consisted, in case of said plasters, of felt rings attached to adhesive strips and containing disc of medicament with from 41 to 43 percent of salicylic acid in rubber base, and, in case of said liquid, of 13.4 percent solution of said acid, and which were designed, through use of said rings, to surround and protect the growth from outside pressure, with said acid acting upon the cornified tissue and softening same and facilitating eventual removal, and, as thus engaged, in substantial competition with others also engaged in sale and distribution of like and similar products in commerce among the various States and in the District of Columbia; in advertising, at a cost in excess of \$100,000 annually, its said "Blue Jay" line of preparations, in which its business ranked with that of the country's largest, in price lists, advertising circulars, and in newspapers and periodicals of general circulation, and through use of the radio, billboards, window displays, and inside-the-store displays—

- (a) Represented, directly and by inference, that its said plasters would remove corns completely without danger of infection, and scientifically and easily, in 3 days, and would stop pain immediately, and would cure corn cripples within 3 days, enabling such a person to walk within said period; and constituted new treatment;
- (b) Represented that its said liquid would rid the feet of corns and was a safe, scientific treatment therefor, and would permit user, after a period of time, to lift corns out, and would relieve pain immediately, and that corns had roots and its said remedies enabled user to remove them forever, roots and all, and that corn would not grow back; and
- (c) Represented that its said bunion and callus plasters would remove calluses without danger of infection, and that its remedies in question were safe and painless and eliminated aforesaid danger;

Facts being its said products do not constitute a cure for growths in question, since such growths will return after temporary removal unless pressure and irritation which caused them in the first instance is eliminated, and corns of long standing will return after temporary removal without further irritation and pressure, growths referred to do not have a root in the ordinary sense of the term, but cone-like apex thereof, thus referred to by it, is actually part of corn formed last, treatment with its said products cannot always be relied upon to remove entirely such cone-like portions projected into the dermis, nor can use of such products be relied upon to stop instantly pain of corns or calluses, since some time is required for pain caused by pressure of growth on sensory nerves of the skin to subside, following application of shield to relieve outside pressure thereon, preparations containing salicylic acid for treating corns have been in use for about 100 years and are recog-

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nized as standard method of destroying tissue, and its said products do not constitute new treatment for such growths;

With effect of misleading and deceiving members of purchasing public into erroneous and mistaken belief that aforesaid statements and representations were true, and of inducing, on account of such mistaken and erroneous beliefs, substantial portion of such public to purchase its said "Blue Jay" products, and with effect of diverting trade unfairly to it from competitors who truthfully represent the quality and character of their products; to the injury of competition in commerce:

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

Before *Mr. Arthur F. Thomas*, trial examiner.

Mr. George Foulkes and *Mr. S. Brogdyne Teu, II*, for the Commission.

Rogers, Woodson & Rogers, of Chicago, Ill., 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 The Kendall Co., a corporation, trading as Bauer & Black, 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, The Kendall Co., trading as Bauer & Black, is a corporation organized, existing, and doing business under the laws of the State of Massachusetts with its principal office and place of business located at 80 Federal Street, Boston, Mass. Respondent is now, and has been for some time, engaged in the business of manufacturing, distributing, and selling in commerce, as herein set out, a line of products designated "Blue-Jay Bunion and Callus Plasters," "Blue-Jay Corn Plasters," and "Blue-Jay Liquid Corn Removers."

PAR. 2. Said respondent, being engaged in business as aforesaid, causes said products, when sold, to be transported from its plant, which is located at 2500 South Dearborn Street, Chicago, Ill., to purchasers thereof located at various points in States of the United States other than the State from which said shipments were made. Respondent now maintains a course of trade and commerce in said

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products distributed and sold by it, 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 business, respondent is now, and has been, in substantial competition with other corporations and with individuals, and firms likewise engaged in the business of distributing and selling similar preparations, or other preparations or products designed and intended for similar usage, in commerce among and between the various States of the United States and in the District of Columbia.

In the course and operation of its business and for the purpose of inducing individuals to purchase its line of products, respondent has caused advertisements to be inserted in newspapers and magazines of general circulation throughout the United States, and has printed and circulated throughout the various States to customers and prospective customers advertising folders and other literature. Respondent also advertises its products by means of radio broadcasts. Examples of its aforesaid advertising with respect to its products are herein set out as illustrative of said representations but are not all inclusive.

BLUE-JAY STOPS PAIN INSTANTLY—REMOVES CORN COMPLETELY IN 3 DAYS WITHOUT DANGER OF INFECTION.

To 30,000,000 former corn sufferers the name "Blue-Jay" means foot comfort. It brought them a blessed new sense of relief—added zest for work and play—because it removed their corns safely and scientifically.

Here's how it works: The safe Blue-Jay medication gently undermines the corn. In 3 days the corn lifts out easily—completely. Soft felt pad lifts shoe pressure, stops pain instantly. Pad is held firmly by exclusive Wet-Pruf adhesive tape (waterproof) won't cling to stocking.

A CORN CRIPPLE FOR MONTHS WALKS IN 3 DAYS.

* * * * *

(Visitor): "An operation for a corn? Why, Mrs. Buckley—certainly you've heard of Blue-Jay. It's not an ordinary corn cure—but a scientific remedy that's quick, safe and works wonders."

* * * * *

Three days later:

(Mother): "Now Billy, all we do is take the pad off, soak your foot and out comes Mister Corn, simple as that".

(Billy): "Boy, oh Boy, that was easy. Blue-Jay certainly is my best friend."

"We tried just about every kind of a corn cure, but it took Blue-Jay to do the work. Now I can run and play all I want to".

Of course this is a unique case.

* * * * *

A CORN MUST COME OUT—ROOT AND ALL.

* * * * *

Your corn is like a tack in your toe! If you just pare the head off, you leave the rest of the corn to grow again—larger, uglier, more painful. Draw it out—swiftly, safely, gently,—with Blue-Jay! For Blue-Jay removes ROOT AND ALL.

There is no danger of infection.

Blue-Jay gently loosens the entire corn—draws it all out.

Get rid of it for good.

No growing back of the same corn over and over again.

Corns keep coming back bigger, uglier unless removed root and all. Wonderful new ROOT-AND-ALL METHOD ENDS CORN FOREVER.

Soak foot ten minutes in hot water. Then the dead callus layer may be lifted off. * * * Very obstinate bunions sometimes require several plasters for complete removal of the callus.

Blue-Jay Plasters offer safe and effective treatment for bunions and Calluses.

35 years ago a famous chemist perfected the formula which makes Blue-Jay Corn Remover safe and scientific.

In all of its advertising literature, radio broadcasts, and testimonials, respondent represents through statements and representations herein set out and through statements of similar import and effect, that:

1. Blue-Jay Corn Plasters:

- (a) Remove corns completely without danger of infection.
- (b) Stop pain immediately.
- (c) Remove corns safely and scientifically and easily in 3 days.
- (d) Cure corns forever and remove completely the roots of corns.
- (e) Are a new way to remove corns.
- (f) Are safe and painless.
- (g) Are effective as a remedy or cure for corns.
- (h) Will cure corn cripples within three days thus enabling one crippled by severe corns to walk within 3 days.

2. Blue-Jay Liquid Corn Remover:

- (a) "Rids" feet of corns.
- (b) Eliminates pain. Is a new and improved liquid treatment for removing corns.
- (c) Is a safe scientific treatment.
- (d) Permits the user, after a period of time, to lift out corns.

3. Blue-Jay Bunion and Callus Pads:

- (a) Relieve pain and remove calluses.
- (b) Are a safe and effective treatment for bunions and calluses.

PAR. 4. The aforesaid representations by respondent with respect to the therapeutic properties of its products, and the results obtained by the use thereof, are grossly exaggerated, false, misleading, and untrue. In truth and in fact, Blue-Jay Corn Plasters will not, in all cases, remove corns completely without danger of infection. Said plasters will not stop pain immediately and will not cause the easy removal of all corns within 3 days' time. Blue-Jay Corn Plasters will not cure corns forever. Corns do not have roots, consequently

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plasters cannot remove completely the roots of corns. The Blue-Jay Corn Plaster method of removing corns is not a new or recent method. The use of Blue-Jay Corn Plasters is not, in all cases, safe and painless, and is not effective as a cure or remedy for the removal of corns. The use of Blue-Jay plasters will not cure corn cripples within 3 days and will not enable one crippled by severe corns to walk within 3 days.

Blue-Jay Liquid Corn Remover will not "rid" feet of corns and will not in all cases eliminate the pain incident to corns. Blue-Jay Liquid Corn Remover is not a new and improved liquid treatment for removing corns, the same having been in use for a great number of years. It is not always a safe treatment to use. The user of said preparation cannot, after the expiration of a short period of time, lift out corns on which said preparation has been used. Blue-Jay Bunion and Callus Pads will not relieve pain in all cases. Blue-Jay Bunion and Callus Pads are not in all cases a safe and effective treatment for bunions and calluses.

PAR. 5. Each and all of the false and misleading statements and representations made by respondent as hereinabove set forth in its advertising in newspapers, magazines, pamphlets, testimonials, and over radio broadcasts in offering for sale and selling its products had, and now has, a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that all of said representations are true, and into the purchase of a substantial volume of respondent's products on account of such beliefs. As a result, trade is unfairly diverted to respondent from corporations, firms, and individuals likewise engaged in the business of selling similar preparations, or other preparations or products designed or intended for similar usage, and who truthfully advertise their products. As a consequence thereof substantial injury has been done, and is now being done, by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 6. The above and foregoing acts, practices, and representations of respondent have been, and are, all to the prejudice of the public and respondent's competitors, as aforesaid, and have been, and are, unfair methods of competition within the meaning and the intent 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."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 1, 1938, issued and on February 2, 1938, served its complaint in this proceeding upon the respondent Kendall Co., a corporation trading as Bauer & Black, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. On February 17, 1938, the respondent filed its answer in this proceeding. After the issuance of said complaint and filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by George F. Foulkes, attorney for the Commission, and in opposition to the allegations of the complaint by James H. Rogers of Rogers, Woodson and Rogers, attorneys for respondent, before A. F. Thomas, an examiner of the Commission theretofore duly designated by it, and the said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto and the oral argument of counsel for the Commission and counsel for the respondent; 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, Kendall Co., is a corporation organized and existing under and by virtue of the laws of the State of Massachusetts. Its principal office and place of business is located in Boston, Mass., at which point respondent is engaged in the manufacture of surgical dressings, textiles, and allied products. Respondent Kendall Co. operates a manufacturing division located in Chicago, Ill., under the trade name Bauer & Black, where it is engaged in the manufacture, sale, and distribution of a number of products for use in the treatment of corns, bunions, and calluses. These products are sold generally under the brand name "Blue Jay" and consist of: (1) Blue Jay Corn Plaster; (2) Blue Jay Bunion and Callus Plasters; and (3) Blue Jay Liquid Corn Remover.

In the conduct of its business, the respondent offers for sale and sells its Blue Jay line of products under the trade name of Bauer

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& Black in commerce between and among the several States of the United States and in the District of Columbia to retail dealers located at various points throughout the United States, who purchase said products for resale. When said products are sold, respondent causes them to be transported from its place of business in the State of Illinois to the purchasers thereof located at various points in the several States of the United States and in the District of Columbia. There has been for some time past and there still is a course of trade in respondent's products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the conduct of its business, respondent is and has been for some time engaged in substantial competition with other corporations, and with partnerships, firms, and individuals, engaged in the sale and distribution of like and similar products 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 business and for the purpose of inducing the purchase of its said Blue Jay line of preparations, respondent has caused various false and misleading statements and representations relative to the character thereof, their therapeutic value, and as to their effectiveness in use, to be made in price lists, advertising circulars, and in advertisements in newspapers and magazines having general circulation in the United States. Respondent also advertises its said products by the use of radio, billboards, window displays, and inside-the-store displays. Respondent spends in excess of \$100,000 annually in advertising its Blue Jay products and its business in this line of products ranks with that of the country's largest.

All of said statements, appearing in respondent's advertising material and literature, purport to be descriptive of respondent's preparations for use in the treatment of corns, bunions, and calluses and of the effectiveness of such preparations when so used. Through such false and misleading statements and representations, respondent has represented directly and by inference that its Blue Jay Corn Plasters will remove corns completely without danger of infection; will stop pain immediately; will remove corns scientifically and easily in three days; that said plasters comprise a new way to remove corns, and will cure corn cripples within three days, enabling one crippled with corns to walk within three days; that its Blue Jay Liquid Corn Remover will rid the feet of corns; is a safe scientific treatment for corns; and will permit the user after a period of time to lift corns out; and relieves pain immediately; that corns have roots and that respondent's aforementioned Blue Jay corn remedies enable the

user thereof to remove corns forever, to remove the corn completely, roots and all; that the same corn will not grow back; that respondent's "Root-out-All" method ends corns forever; that its Blue Jay Bunion and Callus Plasters will remove calluses without danger of infection; and that respondent's said remedies are safe, painless, and eliminate the danger of infection.

PAR. 4. The skin is composed of several layers. The outer layer or epidermis is composed of a substance called keratin. The keratinized layer is made up of dead cells which the body, in the course of its normal function, casts off daily. The next is known as the inner or transitional layer of the skin. The third and deepest layer of the skin is the dermis, in which are embodied the nerves, blood vessels, and glands of the skin.

The primary cause of corns, bunions, and calluses is irritation from either pressure or friction on the germinating layer of the skin. This irritation causes an enlargement of the blood vessels and an increased supply of blood. This causes, in turn, a proliferation or multiplication of skin cells. Keratin is thus formed in the epidermis faster than it can be sloughed off, resulting in an unusual mass at the point of irritation. When such masses build up on the toes in cone-like forms they are known as corns. Similar masses, flat in shape and occurring principally on the soles of the feet, are known as calluses. Bunions are larger masses of keratin formed usually over the joints of the feet.

PAR. 5. The respondent's three products, when used in accordance with directions, embody substantially the same form of treatment. The corn and the bunion and callus plasters consist of felt rings attached to adhesive strips. In the center of the ring is a disc of medicament, containing from 41 to 43 percent of salicylic acid in a rubber base. The user is advised to attach the plasters by means of the adhesive strips so that the corn, callus, or bunion is within the ring.

Respondent's Blue Jay Liquid Corn Remover is a solution containing 13.4 percent of salicylic acid, and with it are supplied felt rings attached to adhesive strips. The user is advised to apply the solution directly to the corn, and to cover the area with the felt ring.

The felt rings are designed to surround the growth and protect it from outside pressure. The salicylic acid is designed to act upon the cornified tissue, softening it and facilitating eventual removal.

PAR. 6. Respondent's products do not constitute a cure for corns, calluses, and bunions, since such growths will return again after temporary removal unless the pressure and irritation which caused

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them in the first instance is eliminated. Corns of long standing usually result in a chronic enlargement of the underlying blood vessels of the skin, and will return again after temporary removal without further irritation and pressure.

Respondent refers to the cone-like apex of corns as a "root," and represents that its products will remove corns, "roots and all." In fact this part of the corn is not a "root" in the ordinary meaning of that term, and is actually the part of the corn which is formed last. Furthermore, treatment with respondent's products cannot always be relied upon to remove entirely the cone-like portions of corns which project into the dermis.

Use of respondent's products cannot be relied upon to stop instantly the pain of corns or calluses. Such pain is caused by the pressure of the growth on the sensory nerves of the skin, and some time is required for pain to subside following application of a shield to relieve outside pressure on the corn.

PAR. 7. The respondent has further falsely and misleadingly represented that its products which contain salicylic acid constitute a new way to treat corns, calluses, and bunions. In truth and in fact, the respondent's products do not constitute a new treatment for corns, calluses, and bunions. Preparations containing salicylic acid for treating corns have been in use since as early as 1840, and are recognized as a standard method of destroying or macerating tissue.

PAR. 8. The use by the respondent of the above false, misleading, and deceptive statements and representations has the capacity and tendency to, and does, mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements and representations are true. On account of such mistaken and erroneous beliefs, a substantial portion of the purchasing public has been induced to purchase said "Blue Jay" products from respondent, and thereby trade has been unfairly diverted to respondent from competitors who truthfully represent the quality and character of their products. In consequence thereof, injury has been done, and is being done, by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of respondent as herein found are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition 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 answer of respondent, testimony and other evidence taken before Arthur F. Thomas, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral arguments by S. Brogdyne Teu II, counsel for the Commission, and by James H. Rogers, counsel for the respondent, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Kendall Co., a corporation, trading as Bauer & Black or trading under any other name, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of its products designated as Blue Jay Corn Plasters, Blue Jay Bunion and Callus Plasters, and Blue Jay Liquid Corn Remover, or any other products of substantially the same composition and intended for the same use and purposes, sold under any other name or designation, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that corns have a root or roots.
2. Representing that respondent's products will prevent the formation or recurrence of corns or calluses.
3. Representing that any of respondent's products constitute a new treatment for corns, calluses or bunions.
4. Representing that respondent's products will instantly stop the pain caused by corns or calluses.

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
PENICK & FORD, LTD., INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SUBSEC. (a) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914,
AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 3802. Complaint, June 1, 1939—Decision, Nov. 29, 1940

Where a corporation engaged in manufacture of glucose or corn syrup unmixed, and in distribution and sale thereof to, mostly, candy manufacturer purchasers in other States, competitively engaged in sale to various customers, including chain stores, wholesalers, and retailers in various States and in the District of Columbia, of said product, in many kinds of which, made by each of such manufacturers, said syrup is one of major raw materials used in production thereof, and in which such syrup accounted for as much as 90 percent, or most of the weight, of some varieties, and for a substantial part of the total cost of manufacturing such candies—

Sold its said syrup at higher delivered prices per hundred pounds to purchasers located in cities other than Chicago than those at which it concurrently sold such product of like grade and quality to purchasers located therein, and at prices which were not uniformly higher than those at which product was being concurrently sold to Chicago purchasers, but which varied with geographical location of other cities in which such purchasers were located;

With result that through said varying prices, differences between which, not justified by it, made more than due allowance for differences in cost of delivery, it discriminated in price between such purchasers who paid such higher and varying prices for said product, and costs of which unfavored purchasers were increased over those of favored purchasers directly as the amount of the discrimination between them and as the syrup content of the candy increased, necessitating substantially lower profits to such purchasers and reduction in margin of profit, and of total profit in event of continued sale by them of their product at prices competitive with those of favored purchasers, and absorption, in such event, of higher syrup costs, and in reduction in total profit at least, through lost profit on diminished sales, in event of increase in price to cover higher syrup cost, with increased overhead from unused plant capacity following higher price and decreased sales volume; and

With result that, by reason of diminished ability of unfavored candy manufacturers paying such higher prices for syrup to compete in any event in sale of their candy with those paying lower prices for their said syrup, effect of such discrimination might be substantially to lessen competition between the favored and unfavored purchasers, to tend to create a monopoly in such favored purchasers, and to injure, destroy, and prevent competition with them:

Held, that in discriminating in price between different purchasers of glucose, under the circumstances set forth, said corporation violated provisions of section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Frank Hier and Mr. Philip R. Layton, for the Commission.
Breed, Abbott & Morgan, of New York City, for respondent.