

IN THE MATTER OF
WARREN W. BURGESS ET AL. DOING BUSINESS AS
THE KNOX COMPANY

Docket 5509. Complaint, Aug. 19, 1947—Decision, Sept. 15, 1954

Dismissal, for variance between the allegations and the proof, of complaint charging false advertising as to the therapeutic properties of a drug product "Cystex" recommended for kidney and bladder troubles.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. R. P. Bellinger for the Commission.

Davies, Richberg, Tydings, Beebe & Landa, of Washington, D. C., and *Sampson & Dryden*, of Los Angeles, Calif., for respondents.

DECISION OF THE COMMISSION RULING ON APPEALS AND DISMISSING
COMPLAINT WITHOUT PREJUDICE

This matter came before the Commission upon the appeals separately filed by counsel supporting the complaint and counsel for respondents from the initial decision of the hearing examiner dismissing the complaint without prejudice.

For the reasons stated in its accompanying opinion, the Commission is of the view that the exceptions urged in support of the appeals filed by counsel for the respondents and by counsel supporting the complaint should be sustained to the extent there noted but in all other respects denied, and that the provision for dismissal of the complaint without prejudice as contained in the initial decision is appropriate.

It is ordered therefore that the respective appeals of counsel supporting the complaint and counsel for the respondents be granted in part and denied in part as noted in the accompanying opinion.

It is further ordered that the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to reopen this proceeding or to take such further or other action in the future as may be warranted by the then existing circumstances.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

Initial decision by *Everett F. Haycraft*, Hearing Examiner.

This proceeding came on to be considered by the above-named Hearing Examiner, theretofore duly designated by the Commission, upon the complaint of the Commission, the answer of the respondents, testimony and other evidence introduced in support of and in oppo-

sition to the allegations of the complaint, proposed findings and conclusions presented by counsel, oral argument by counsel.

The complaint in the present proceeding was issued in August 1947 against the individuals named in the caption hereof as co-partners doing business as The Knox Company. It was alleged in the complaint that the respondents manufactured and sold in interstate commerce a drug preparation known as "Cystex" which they advertised in newspapers and over the radio as a cure or remedy or a competent or effective treatment for certain symptoms or conditions such as "'getting up nights,' backache, nervousness, leg pains, dizziness, swollen ankles, rheumatic pains, bladder weakness, painful passages, 'feeling old and rundown', 'feel below par', 'circles under your eyes,' and muscular pains due to non-organic and non-systemic kidney and bladder troubles", and also that the taking of Cystex as directed will remove or eliminate excess acids or poisons from the blood stream, and that the taking of Cystex will cause the one taking it to have new energy, increased vitality and better sleep.

It was further alleged that said advertisements were misleading in material respects and were "false advertisements" as that term is defined in the Federal Trade Commission Act; and that the taking of Cystex as set forth in the formula in the complaint, as directed or otherwise, will not constitute a remedy or cure or a competent or effective treatment for the conditions or symptoms set forth in the complaint which are symptoms caused by diseases or disorders of the bladder or kidneys, organic and systemic in nature; nor will it remove acids or poisons from the blood stream, nor will it constitute a cure, remedy or competent or effective treatment for any diseases or disorders of the bladder or kidneys or any symptoms or conditions that may result therefrom, nor will it improve the functioning of the bladder or kidneys.

The answer of the respondents admitted some of the allegations, including the formula of "Cystex" and the nature and contents of the advertisements, but denied that they had represented that the symptoms or conditions listed in the complaint are caused by non-organic or non-systemic disease of the bladder or kidneys. It was admitted however, that they had represented that such symptoms *may be* caused by non-organic or non-systemic disorders or troubles of the bladder or kidneys. The answer further denied that respondents had represented that Cystex is a cure or remedy for the symptoms set forth in the complaint, or that Cystex constituted a competent or effective treatment therefore in excess of generally furnishing palliative relief from the pain and distress caused by such symptoms and con-

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ditions, by stimulating kidney action and thereby helping the kidney dispose of excess acid and waste materials which may have caused the onset or prolongation of such symptoms or conditions. Respondents denied that Cystex did not constitute a remedy or cure or a competent or effective treatment for any disorder of the bladder or kidneys, whether organic or non-organic, whether systemic or non-systemic, in origin. Respondents specifically denied the allegation that the taking of "Cystex" will not cause the one taking it to have new energy, increased vitality and better sleep. They further denied the allegation that "Cystex" would not constitute a remedy or cure or a competent or effective treatment for any disorder of the bladder or kidneys or any condition or symptom which may result therefrom, and that "Cystex" will not improve the functioning of the bladder or kidneys when functioning improperly, and averred to the contrary that "Cystex" is an urinary antiseptic and a diuretic which possesses value in the treatment of the symptoms and conditions, specifically named in the complaint, as well as other symptoms or conditions, which such symptoms are due to disorders of the bladder or kidneys, and also averred that "Cystex," because of its antiseptic and diuretic properties, will improve the functioning of the bladder or kidneys when those organs are functioning improperly and that the improvement of such function, in turn, enables those organs to dispose of excess acids, waste materials and poisons which often are the cause of such symptoms and conditions.

By way of special defense respondents alleged that the Federal Trade Commission issued a complaint against The Knox Company, a corporation, in September 1938, Docket No. 3597; that said complaint alleged misrepresentations as to the therapeutic value of the same product "Cystex" in the treatment of various ailments, disorders, and diseased conditions of the human kidneys and bladder; that the findings as to the facts and an order to cease and desist were issued by the Federal Trade Commission in such case on August 1, 1939, which recognized that "Cystex" possessed certain therapeutic values in the treatment of ailments, disorders, and diseased conditions of the human kidneys and bladder, and that thereafter The Knox Company filed its report of compliance therewith which was received and filed by the Commission on November 2, 1939.

It was further alleged affirmatively, by way of special defense, that on or about February 1, 1945, The Knox Company, a corporation, was dissolved and the business theretofore conducted by it has since been carried on by the respondents herein who were the sole stockholders in said corporation and its only successors in interest and that at all

times subsequent to the issuance of the said order to cease and desist, both the corporation and its successor partnership composed of the individual respondents herein, believing that said order was binding upon them have faithfully complied with the terms and requirements of said order and such compliance had not been questioned by the Federal Trade Commission; that the formula for the tablets now known and sold under the name "Cystex" is substantially the same as the formula used in 1938 and 1939; that the issues of fact and law in the former proceeding and in the instant proceeding are identical, and that the previous proceeding resulting in the outstanding order is a complete bar to the trial of the present case.

No action was taken by the Commission as to the special defense and the case was assigned to the undersigned Hearing Examiner to take testimony and receive evidence which was begun by him in July 1949 in Los Angeles, California, and continued from time to time until June 1952.

At the first hearing in this matter testimony was received indicating that the dosage set forth in the complaint, two tablets *three* times a day with a full glass of water, had been changed to two tables *four* times a day. However, the testimony received in support of the allegations of the complaint with respect to the therapeutic value of respondents' product "Cystex" in the Commission's case in chief related exclusively to said formula when taken by the patient according to the directions set forth in the allegations of the complaint, namely, two tablets *three* times a day. When counsel for the respondents presented testimony in opposition to the allegations of the complaint this testimony related to the therapeutic effect of respondents' product "Cystex" when taken in accordance with the new dosage, namely, two tablets *four* times a day. At the conclusion of the receiving of testimony in opposition to the allegations of the complaint, the attorney in support of the complaint was given an opportunity to rebut the testimony thus presented by testimony of other experts which testimony related to the therapeutic effect of respondents' product "Cystex" when taken according to the new dosage.

Reference to the Commission's complaint against The Knox Company in September 1938, Docket No. 3597, discloses that the allegations of that complaint are substantially the same as those of the present complaint, and challenged the therapeutic efficacy of respondents' product Cystex. For instance, it is alleged in the former complaint:

If functional disorders of the kidneys or bladder make you suffer from getting up nights, nervousness, leg pains, circles under eyes, dizziness, backache, swollen

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joints, excess acidity or burning passages, don't rely on ordinary medicines, fight trouble with the doctors prescription Cystex.

It further appears that in the former case a stipulation of facts was entered into which served as a basis for the findings as to the facts in that proceeding. In the findings in that case the Commission found *inter alia* that—

Ailments, disorders and diseased conditions of the human kidneys or bladder often arise from, or are due to, or persist because of a systemic or organic derangement of some character. In such cases, while urinary anti-septic and diuretics frequently are used for temporary relief, "Cystex" does not constitute a cure or remedy for such ailments and disorders nor is it an adequate or competent treatment therefor. Such ailments, disorders and diseased conditions may also arise from other causes requiring various types of treatment, depending upon the particular cause of the condition in such case. "Cystex" does not constitute a cure or remedy for, or an adequate or competent treatment for, all non-organic or non-systemic cases due to such conditions, irrespective of the cause.

The various symptoms mentioned in respondents' advertising matter as being indicative of kidney or bladder derangement also may be symptoms of conditions dissociated from the kidney and bladder, and the presence of such symptoms does not positively indicate kidney or bladder derangement. Swollen joints, leg pains and so-called rheumatic pains may be and sometimes are symptoms of organic kidney and bladder disturbances. These symptoms, when present in cases of kidney or bladder troubles, may be and generally are of a systemic or organic origin. Backache, nervousness, dizziness, burning of the urinary passage, and "getting up nights" may be and sometimes are symptoms of kidney or bladder ailments that are systemic or organic in character. Functional disorders of the kidneys and bladder may, and sometimes do, arise from organic disturbances. For such functional disorders, while urinary antiseptics and diuretics frequently are used for temporary relief, "Cystex" is not a cure or remedy, nor is it an adequate treatment therefor.

The Commission in the former case against The Knox Company, Docket No. 3597, entered an order to cease and desist against the respondent The Knox Company "*and its officers, representatives, agents and employees directly or through any corporate or other device*" prohibiting them from representing that Cystex—

is an adequate remedy or cure or competent treatment for ailments, disorders, diseased conditions of the human kidneys and bladder, unless such representations are restricted to those cases of such disorders as are non-organic and non-systemic in character; or that said preparation is a cure or remedy for, or an effective treatment for, all ailments and disorders of the human kidneys and bladder which are non-systemic and non-organic; or that the presence of any of the following symptoms—swollen joints, leg and rheumatic pains, backache, nervousness, dizziness, burning of the urinary passage, "getting up nights", circles under the eyes, excess acidity or loss of energy—is necessarily indicative of ailments or diseased conditions which can be successfully treated by use of said preparation.

The foregoing findings as to the facts and order to cease and desist issued by the Commission against The Knox Company, Docket No. 3597, were duly served upon the respondent corporation therein and on November 2, 1939, the Commission advised said corporation that their report of compliance with the order to cease and desist in such proceeding had been received and filed. No appeal was prosecuted to any U. S. Circuit Court of Appeals with respect to the findings as to the facts and order to cease and desist and they became final within the meaning of subsection (1) of subsection (g) of Section 5 of the Federal Trade Commission Act on October 15, 1939, by operation of law.

From September 1938 until September 1947, the formulae for the two tablets comprising the drug product known as "Cystex" and the directions for its use were identical except for one minor ingredient which was eliminated. As hereinbefore indicated the directions for use were changed on September 1, 1947, so as to provide for the administration of the same dosage of two tablets *four* times per day instead of *three* times per day.

At the time of dissolution of The Knox Company, respondent in Docket No. 3597, in February 1945, its principal stockholders were Warren W. Burgess, Linn D. Johnson, and Richard T. Aldworth, respondents herein. Respondents Burgess and Johnson each owned a 45 percent interest in the corporation and respondent Aldworth owned a 10 percent interest in the corporation. From September 1938 up to and including the dissolution of the corporation on February 1, 1945, respondents Warren W. Burgess, Linn D. Johnson, and Richard T. Aldworth, were the sole officers of said corporation, respondent Burgess being president, Johnson, vice-president and treasurer, and Aldworth, vice-president and secretary. When the corporation was dissolved the assets thereof were distributed in kind to a co-partnership composed of respondents Burgess, Johnson and Aldworth, with their respective interest in the co-partnership remaining the same from the date of the distribution to the present as their prior respective interests in the corporation.

The issues raised by the complaint against The Knox Company, a corporation, Docket No. 3597, and the issues raised by the complaint against the respondents Burgess, Johnson and Aldworth, co-partners doing business as The Knox Company, Docket No. 5509, the present proceeding, are substantially identical since both complaints attack the efficacy and therapeutic value of the same product in the treatment of identical symptoms which may be indicative of ailments, disorders and diseased conditions of human kidneys and bladder, since both

