

IN THE MATTER OF
AR-EX COSMETICS, INC. ET AL.

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

Docket 5411. Complaint, Dec. 27, 1945—Decision, Feb. 19, 1952

The symbol "RX" is, and for a long time has been, in practically universal use by physicians as a part of their directions to pharmacists for the filling of their prescriptions, and it is also used to an extent by pharmacists to indicate that their establishments compound physicians' prescriptions.

While the Commission was unable to find from the record in the instant matter that the use by respondents of said symbol in connection with the advertisement and sale of their cosmetics or soap had the capacity or tendency to induce the beliefs alleged in the complaint, namely, that "each parcel is individually compounded in accordance with a specific prescription therefor", it may well be that the use of said symbol has become so firmly associated in the minds of a substantial number of the public with physicians and their prescriptions that its use in connection with or reference to cosmetics and, perhaps, other products as well, may have the capacity and tendency to engender an erroneous belief of some sort concerning the relationship of a physician to the product.

Where a corporation and the individual who was its president and treasurer, engaged in the interstate sale and distribution of their "Ar-Ex" cosmetics and soap, including their "Cold Cream", "Dry Skin" preparation, "Chap Cream", "Deodorant Cream", "Face Powder", "Indelible Lipstick", "Special Formula (Non-Permanent) Lipstick", "Creme Rouge", "Compact Rouge", "Skin Lotion", "Cosmetic Hose", and "Soap for Dry Skin"; in advertising their said products—

- (a) Falsely represented that they were free from all allergens and irritants; when in fact they contained ingredients which were known to have caused allergic reactions, including skin irritations, in some people;
- (b) Falsely represented that their "Cosmetic Hose" was virtually spot-proof, splash-proof and water-proof; and
- (c) Falsely and misleadingly represented that their "Special Formula Lipstick" had been recommended by Consumers Research, on the basis of a statement in the December 1940 issue of its Bulletin that "lipsticks of the non-permanent variety guaranteed by the distributor to be free from bromo-fluorescein compounds, are available from Ar-Ex Cosmetics, Inc. * * *";

With tendency and capacity to mislead a substantial portion of the purchasing public into the mistaken belief that such representations were true, and into the purchase of substantial quantities of respondents' said products by reason thereof:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive practices in commerce.

As respects the charge in the complaint that respondents' use of the symbol "RX" had long been used on the heading on physicians' prescriptions, and had become firmly associated in the minds of many persons with physicians

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prescriptions and as referring to medical preparations: the complaint did not allege that the belief that respondents' products were of a "medicinal" nature was erroneous, nor did the answer aver that they were of such a nature, but merely denied that such a belief was engendered; and there was no issue of whether the products were within the somewhat indefinite category of products of a "medicinal" nature.

As respects the allegation of the complaint that the use by respondents of the symbol "RX" constituted a misleading representation that "each parcel is individually compounded in accordance with a specific prescription therefor", the Commission noted that cosmetics and soap are usual articles of merchandise, that respondents' products are displayed in store windows and in the cosmetic sections of drug and department stores, where they are sold over the counter to anyone who wishes to buy, in the dress provided by respondents; that the mechanics of their purchase and sale is vastly different from that involved in the purchase and sale of a product prescribed by a physician, and that the dress of the products in question is far removed from that of a pharmacist-filled prescription;

The Commission was unable to find from the record that the use by respondents of the symbol "RX" in connection with the advertisement and sale of their cosmetics and soap had the aforesaid capacity or tendency; and, upon consideration of the record, including the arguments of counsel before the hearing examiner, was of the opinion that the complaint, insofar as it related to the use of said symbol by respondents as above set out, should be dismissed without prejudice.

Before *Mr. W. W. Sheppard*, hearing examiner.

Mr. William L. Taggart for the Commission.

Mr. Theodore E. Rein and *Mr. Simon H. Alster*, of Chicago, Ill., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Ar-Ex Cosmetics, Inc., a corporation and Julius B. Kahn, individually, and as an officer of said corporation, have violated the provisions of said Act, and it appearing to the 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, Ar-Ex Cosmetics, Inc., is a corporation organized and existing under the laws of the State of Illinois with its offices and principal place of business located at 1036 West Van Buren Street, Chicago, Illinois. Respondent, Julius B. Kahn, is the President and Treasurer of the corporate respondent, Ar-Ex Cosmetics, Inc., and formulates and directs the policies and practices of said corporate respondent. His address is 1036 West Van Buren Street, Chicago, Illinois.

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PAR. 2. Said respondents are now, and have been for some time last past, engaged in the sale and distribution of cosmetics, under the brand and trade name of "Ar-Ex."

Said respondents cause their said products, when sold, to be transported from their place of business in the city of Chicago, State of Illinois to purchasers located in various States of the United States other than the State of Illinois and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in their said products, in commerce, among and between the various States of the United States, and in the District of Columbia.

PAR. 3. In the course of the conduct of their aforesaid business, respondents have disseminated, and are now disseminating and have caused and are now causing the dissemination of, false advertisements concerning their said products by the United States mails and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act; and respondents have also disseminated and are now disseminating, and have caused and are now causing the dissemination of, false advertisements concerning their said products by various means, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of their said products in commerce, as commerce is defined in the Federal Trade Commission Act. Among and typical of the false, misleading and deceptive statements and representations contained in said false advertisements, disseminated and caused to be disseminated as hereinabove set forth by the United States mails, by advertisements inserted in newspapers and periodicals, and by circular leaflets, pamphlets, and other advertising literature are the following:

Ar-Ex Cosmetics Are Free From All Known Irritants and Allergens.

AR-EX. A line of cosmetics that are really free from the known allergens and irritants.

You have the assurance that irritants and allergens which may interfere with the clinical picture are eliminated.

You will find this Formulary useful whenever you have occasion to prescribe allergen free cosmetics for patients who cannot use ordinary cosmetics.

AR-EX Cosmetics are prescribed and recommended by physicians because they are free from all known irritants and allergens.

The colors used in AR-EX . . . Lipstick are certified in accordance with the new Drug and Cosmetic Law. We have gone a step farther than the regulations demand by eliminating from our list of colors those certified colors which we have found to be allergens.

AR-EX SPECIAL FORMULA LIPSTICK is the only lipstick recommended by Consumers' Research for women who complain of these conditions (cracked, sore, dry, chapped lips) and who cannot use indelible lipsticks.

Ar-Ex Lipstick . . . The absence of any ingredient known to be harmful is assured by the Ar-Ex ideal of ethical cosmetic.

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AR-EX DEODORANT has been clinically tested and does not irritate the most tender skin or harm the most delicate fabric . . . It contains no Alum, Aluminum Chloride, or other irritants.

AR-EX DEODORANT CREAM is a safe, non-irritating cream . . . It contains no Alum, Aluminum Chloride, Aluminum Sulfate, Aluminum Acetate, Zinc Sulphate, Formaldehyde, or Salicylic Acid, all of which are known to be irritating. The active ingredient is Aluminum Sulfocarboalate in a neutral vanishing cream base, has been tested and found to be non-irritating.

We remind you again that AR-EX Deodorant is a greaseless cream containing 20 percent aluminum phenolsulfonate, and hence may be tried by many patients who are sensitive to the ordinary commercial products containing one of the inorganic aluminum salts.

As far as we know, there is no other deodorant on the market, except AR-EX Deodorant in which the active ingredient is only aluminum phenolsulfonate.

AR-EX COSMETIC HOSE . . . Is virtually water, spot and splash proof.

PAR. 4. Through the use of the aforesaid statements and representations and others of the same import but not specifically set out herein, respondents have represented and now represent that their cosmetic products are free from all known allergens and irritants; that all certified colors which have been found to be allergens have been eliminated from their lipsticks; that their Special Formula lipstick is the only lipstick recommended by Consumers' Research for women who suffer from cracked, sore, dry and chapped lips and who for this reason cannot use indelible lipstick; that their Ar-Ex Deodorant contains no irritants and that their Cosmetic Hose product is virtually spot proof, splash proof and water proof.

PAR. 5. The foregoing statements and representations are grossly exaggerated, false and misleading. In truth and in fact, respondents' cosmetic products are not free from all known allergens and are not non-allergic. No substance can be said to be non-allergic to all persons. Respondents' Indelible lipstick contains the certified color or dye known as tetrabromfluorescin which is known to produce lipstick dermatitis and other allergic manifestations. Consumers' Research has not recommended respondents' Special Formula in preference to all others for use by women who suffer from cracked, sore, dry or chapped lips but only suggested that this product was one which was suitable for use under such conditions. The principal active ingredient in Ar-Ex Deodorant is aluminum phenolsulfonate (sulfocarboalate) which is known to be irritating to some skins. Respondents Ar-Ex Cosmetic Hose is not splash proof, spot proof or water proof or even "virtually" so, as represented by respondents.

PAR. 6. In connection with the advertising and sale of its products and as a brand or trade name therefor, respondents make use of the symbol "RX" accompanied by the symbol "Ar-Ex." For many centuries the symbol "RX" has been used as the heading or superscription on physicians' prescriptions and such symbol has become firmly

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associated in the minds of many persons with physicians' prescriptions and as referring to medical preparations. The use by the respondents of such symbols has the tendency and capacity to cause such persons to understand and believe that respondents' products are in fact of a medicinal nature and that each parcel is individually compounded in accordance with a specific prescription therefor.

In truth and in fact, while some of said products may have been prescribed by doctors for individual persons, they are not individually compounded for any particular person or upon a doctor's particular prescription but are manufactured in bulk and packaged from such bulk material.

PAR. 7. The use by the respondents of the foregoing false, deceptive and misleading statements and representations has had and now has the tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous and the mistaken belief that such statements and representations are true, and as a result of such erroneous and mistaken belief, to induce a substantial portion of the purchasing public to purchase substantial quantities of respondents' products.

PAR. 8. The aforesaid acts and practices, as herein alleged, are all to the injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on December 27, 1945, issued and thereafter caused to be served upon the respondents named in the caption hereof its complaint, charging them with the use of unfair and deceptive acts and practices in commerce in violation of said Act. After the service of said complaint and the filing by respondents of their answer thereto, testimony and other evidence in support of and in opposition to the complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and said testimony and evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission upon said complaint, the respondents' answer thereto, the testimony and other evidence and a stipulation as to certain facts entered into by counsel and made a part of the record, the hearing examiner's recommended decision and the exceptions thereto, briefs of counsel in support of and in opposition to the complaint and oral arguments of counsel; and the Commission, having entered its order disposing of the exceptions to the recom-

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mended decision 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 Ar-Ex Cosmetics, Inc., is a corporation organized and existing under the laws of the State of Illinois, with its offices and principal place of business located at 1036 West Van Buren Street, Chicago, Illinois. It was incorporated on August 9, 1935.

Respondent Julius B. Kahn is the president and treasurer of the corporate respondent, Ar-Ex Cosmetics, Inc., and formulates and directs the policies and practices of said corporate respondent. His address is 1036 West Van Buren Street, Chicago, Illinois.

PAR. 2. Said respondents are now, and have been for some time last past, engaged in the sale and distribution of a line of cosmetics and a soap, under the brand and trade name of "Ar-Ex." Among said products are Ar-Ex Cold Cream, Ar-Ex For Dry Skin, Ar-Ex Chap Cream, Ar-Ex Deodorant Cream, Ar-Ex Face Powder, Ar-Ex Indelible Lipstick, Ar-Ex Special Formula (Non-Permanent) Lipstick, Ar-Ex Creme Rouge, Ar-Ex Compact Rouge, Ar-Ex Skin Lotion, Ar-Ex Talc, Ar-Ex Cosmetic Hose, all of which are cosmetics, and Ar-Ex Soap for Dry Skin. Many of the said cosmetics are made in two forms, one with perfume and one without.

Said respondents cause their products, when sold, to be transported from their place of business in the city of Chicago, State of Illinois, to purchasers thereof located in various States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in their said products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of their aforesaid business, respondents, subsequent to March 21, 1938, disseminated and caused the dissemination of advertisements concerning their said products by the United States mails, and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which were likely to induce, directly or indirectly, their purchase; and also disseminated and caused the dissemination of advertisements concerning their said products by various means for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Through the use of various statements contained in said

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advertisements, respondents represented that their cosmetic products and soap were free from all allergens and irritants; that their Cosmetic Hose product was virtually spot-proof, splash-proof and water-proof, and that their Special Formula Lipstick was the only lipstick recommended by Consumers' Research for women who suffer from cracked, sore, dry or chapped lips and who for this reason cannot use indelible lipstick.

PAR. 4. The foregoing representations were false and misleading in material respects. In truth and in fact respondents' cosmetics and soap contain both allergens and irritants. In compounding various of the products respondents use, among others, the following ingredients which are known to have caused allergic reactions, including skin irritations, in some people: perfume, zinc oxide, castor oil, cholesterol, aluminum sulphocarbolate, depollenized beeswax, beeswax, cocoa butter and zinc stearate. Respondents' "Cosmetic Hose" is not splash-proof, spot-proof, water-proof or virtually so.

Respondents' representation that their "Special Formula Lipstick" has been recommended by Consumers' Research was based upon a statement in the December 1940 issue of Consumers' Research Bulletin that "Lipsticks of the 'non-permanent' variety guaranteed by the distributor to be free from bromofluorescein compounds, are available from Ar-Ex Cosmetics, Inc., 6 N. Michigan Avenue, Chicago." It is obvious that this did not constitute a recommendation for respondents' lipstick, and that the respondents' representation to the contrary is false and misleading.

PAR. 5. The use by respondents of the foregoing statements and representations in the advertising of and in connection with the offering for sale, sale and distribution of their cosmetics and soap had the tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were true, and into the purchase of substantial quantities of respondents' said products by reason of such erroneous and mistaken belief.

CONCLUSION

The acts and practices of respondents as found hereinabove were all to the prejudice and injury of the public, and constituted unfair and deceptive practices in commerce within the intent and meaning of the Federal Trade Commission Act.

The complaint alleged that in connection with the advertising and sale of its products (which for the purpose of these findings is taken to include both cosmetics and soap) and as a brand therefor, respond-

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ents have used the symbol "RX"; that for many centuries this symbol has been used on the heading on physicians' prescriptions and has become firmly associated in the minds of many persons with physicians' prescriptions and as referring to medical preparations. It also alleged that the use of this symbol has the capacity and tendency to cause such persons to understand and believe that respondents' products are in fact of a medicinal nature and that each parcel is individually compounded in accordance with a specific prescription therefor.

The alleged belief that it was compounded in accordance with a "specific prescription" would of necessity involve a belief that the prescription was one written by a "specific" physician for a "specific" person.

The complaint did not allege that the belief that the products were of a "medicinal" nature was erroneous. The answer does not aver that they were of a "medicinal" nature but merely denies that the belief was engendered. There was no issue of whether the products were or were not within the somewhat indefinite category of products of a "medicinal" nature.

The complaint alleged that the use by the respondents of the symbol "RX" constituted a representation that "each parcel is individually compounded in accordance with a specific prescription therefor" and that such representation is misleading because in truth "they are not individually compounded from any particular prescription . . .".

Cosmetics and soap are usual articles of merchandise. Respondents' products are displayed in store windows and in the cosmetic sections of drug and department stores where they are sold over the counter to anyone who wishes to buy, in the dress provided by respondents. The mechanics of their purchase and sale is vastly different from that involved in the purchase and sale of a product prescribed by a physician. The dress of the products in question is far removed from that of a pharmacist-filled prescription.

The evidence indicates that the symbol "RX" is a very old one, being the equivalent of the Latin "Recipe" meaning "Take" in the imperative. It is and for a long time has been in practically universal use by physicians as a part of their directions to pharmacists for the filling of their prescriptions. It is also used to an extent by pharmacists to indicate that their establishments compound physicians' prescriptions. It may well be that the use of this symbol has become so firmly associated in the minds of a substantial number of the public with physicians and their prescriptions that its use in connection with or reference to cosmetics, and perhaps other products as well, may have the capacity and tendency to engender an erroneous

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belief of some sort concerning the relationship of a physician to the product.

The Commission is unable to find from this record, however, that the use by respondents of the symbol "RX" in connection with the advertising and sale of their cosmetics and soap had the capacity or tendency to induce the beliefs alleged in the complaint, i. e., that "each parcel is individually compounded in accordance with a specific prescription therefor."

The foregoing is not to be taken as an indication or holding by the Commission that the use of the symbol "RX" is not misleading or deceptive regardless of circumstances; it relates only to its lack of deceptiveness in the manner alleged in the complaint by which the Commission is bound.

Upon consideration of the record, including the arguments of counsel before the hearing examiner, the Commission is of the opinion that the complaint, in so far as it relates to the use of the symbol "RX" by respondents in connection with the advertising and sale of the cosmetics and soap should be dismissed without prejudice and the order to cease and desist this day issued accordingly thus provides.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the respondents' answer thereto, testimony and other evidence in support of and in opposition to the complaint introduced before a hearing examiner of the Commission heretofore duly designated by it, a stipulation as to certain facts entered into by counsel and made a part of the record, the hearing examiner's recommended decision and certain exceptions thereto, briefs in support of and in opposition to the complaint and oral argument of counsel, and the Commission having issued its order disposing of the exceptions to the recommended decision and having made its findings as to the facts and its conclusion that Ar-Ex Cosmetics, Inc., a corporation, and Julius B. Kahn, individually and as an officer of said corporation, have violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent Ar-Ex Cosmetics, Inc., a corporation, and its officers, and the respondent Julius B. Kahn, individually and as an officer of said corporation, and said respondents' agents, representative and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparations heretofore designated Ar-Ex Cold Cream, Ar-Ex For Dry Skin, Ar-Ex Chap Cream, Ar-Ex Deodorant Cream, Ar-Ex Face Powder, Ar-Ex Indelible Lipstick, Ar-Ex Special For-

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mula (Non-Permanent) Lipstick, Ar-Ex Creme Rouge, Ar-Ex Compact Rouge, Ar-Ex Skin Lotion, Ar-Ex Talc, or Ar-Ex Cosmetic Hose, or any other cosmetic product of composition substantially similar to any of the foregoing, or any cosmetic product which contains perfume, zinc oxide, castor oil, cholesterol, aluminum sulphocarbolate, depoltenized beeswax, beeswax, cocoa butter or zinc stearate, do forthwith cease and desist from :

(1) Disseminating or causing to be disseminated, by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:

(a) That any such product is free from or does not contain any allergen or any irritant;

(b) That the product heretofore designated "Ar-Ex Special Formula (Non-Permanent) Lipstick," or any other product of substantially similar composition produced by the respondents, has been recommended by Consumers' Research;

(c) That any such product has been recommended by any person or organization, unless and until such recommendation has been made;

(d) Using the word "proof," or any other word or words of like meaning, to describe the resistance of "Ar-Ex Cosmetic Hose," or any other cosmetic of substantially similar composition, to spots, water or splashes.

(2) Disseminating or causing to be disseminated any advertisement, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited under paragraph (1) above.

It is further ordered, That the respondent Ar-Ex Cosmetics, Inc., and its officers, and the respondent Julius B. Kahn, individually and as an officer of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the product heretofore designated "Ar-Ex Soap for Dry Skin," or any other soap of substantially similar composition, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from :

Representing directly or by implication that such soap is free from or does not contain any allergen or any irritant.

It is further ordered, That the complaint herein in so far as it relates to respondents' use of the symbol "RX" be, and the same hereby is, dismissed without prejudice to the right of the Commission to take

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such further or other action in the future with respect thereto as may be warranted by the then existing circumstances.

It is further ordered, That the respondents Ar-Ex Cosmetics, Inc., and Julius B. Kahn shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.