

Syllabus

IN THE MATTER OF

ARTRA COSMETICS, INC., AND OSCAR C. OLIN AND
EUGENE A. KOVENKO

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

Docket 4930. Complaint, Mar. 17, 1943—Decision, May 26, 1948

Where a corporation engaged in the interstate sale and distribution of certain cosmetic preparations, including its "Imra" depilatory; and its "Sutra" sunburn protector; through broadcasts, advertisements in newspapers and periodicals, and circulars, leaflets, pamphlets, and other advertising literature distributed through the mails and otherwise—

Erroneously, misleadingly, and falsely represented that said "Imra" was entirely safe for use and that it would not irritate a normal skin; the facts being that the product was only reasonably or comparatively safe, and then only if directions were followed; and there was evidence of a substantial number of instances involving a painful and rather serious injuries, some of which necessitated treatment by a physician, and in at least some of which the user's skin was normal and directions were followed;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public, and thereby cause it to purchase substantial quantities of aforesaid product:

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

In said proceeding in which it was alleged that respondent falsely and misleadingly advertised that its "Sutra" preparation, when applied to the skin, acted as a selective sun filter, effectively preventing sunburn while permitting tanning, but not interfering with the absorption by the skin of the beneficial vitamin D-producing rays, and in which proceeding it was undisputed that the product did effectively protect the skin while permitting contact by those rays which cause tanning, leaving, as the issue, the question as to whether the product, while shutting out the sunburn rays, permitted contact by the vitamin D-producing rays; i. e., whether the exclusion of the former simultaneously resulted in the exclusion of the other, with respect to which the testimony of two experts was sharply divergent:

The Commission found it unnecessary to decide said scientific controversy, since the record showed that all advertising of the type concerned; that is, all vitamin D advertising, was discontinued by respondent some 6 years ago, prior to the issuance of the complaint, and there was good reason to assume that it would not be resumed in the future; and was of the view under the circumstances that said portion of the case should be closed without prejudice to the right of the Commission to resume it in the future should circumstances so require.

In said proceeding in which the complaint also charged that respondent falsely and misleadingly represented that there was a significant difference in the

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length of the hair shaft after use of its depilatory "Imra" as compared to its length after shaving, and that use thereof retarded the growth of the hair, the Commission was of the opinion and found that such additional charges were not sustained by the record.

Before *Mr. John L. Hornor* and *Mr. Randolph Preston*, trial examiners.

Mr. Merle P. Lyon and *Mr. Clark Nichols* for the Commission.

Klein, Alexander & Cooper, of New York City, 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 Artra Cosmetics, Inc., a corporation, and Oscar C. Olin and Eugene A. Kovenko, individually and as officers of said corporation, hereinafter referred to as respondents, 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, Artra Cosmetics, Inc., is a corporation organized, existing, and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 12 Roosevelt Avenue, Bloomfield, N. J. Respondents, Oscar C. Olin and Eugene A. Kovenko, are individuals and are respectively president and secretary of the respondent corporation Artra Cosmetics, Inc., and also have their office and principal place of business at 12 Roosevelt Avenue, Bloomfield, N. J. These individuals dominate and control the acts and practices of respondent corporation.

PAR. 2. Said respondents are now, and for more than 2 years last past have been, engaged in the sale and distribution of certain cosmetic preparations, one designated as "Imra," recommended for use as a depilatory, and one designated as "Sutra," recommended for use as a protection against sunburn. In the course and conduct of their business, respondents cause said cosmetic preparations, when sold, to be transported from their place of business in the State of New Jersey to the purchasers thereof located in various other 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 said preparations 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, the respondents have disseminated, and are now disseminating, and

have caused, and are now causing the dissemination of, false advertisements concerning their said products "Imra" and "Sutra" 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 advertisements disseminated and caused to be disseminated as hereinabove set forth, by the United States mails, by advertisements inserted in newspapers and periodicals, by circulars, leaflets, pamphlets, and other advertising literature, and by radio continuities are the following:

Representations with respect to the preparation "Imra":

Imra is safe to use.

Imra does not irritate a normal skin.

It is logical to believe that Imra retards new growth, inasmuch as the hair shaft is "dissolved" further down in the follicle than can be achieved through shaving.

Representations with respect to the preparation "Sutra":

Sutra Employs Sun Screen Admitting Vitamin D-Producing Rays But Barring Nearly All Burning Rays.

Although it shields against destructive rays, Sutra permits passage of sufficient tanning and anti-rachitic (Vitamin D) rays to assure sun benefits.

Make sunshine safe with *Sutra*, scientific sunfilter cream. It contains an exclusive compound which, on the skin, forms an invisible shield against destructive burn rays. It prevents painful sunburn! But healthful Vitamin D-producing and tanning rays pass through freely. These you *want*, and need, for your child, for yourself. These you *get* with Sutra.

You'll be safe in the sun with Sutra. It prevents painful sunburn. But it permits skin absorption of Vitamin D-producing and tanning rays.

Enjoy yourself in the sun—and get sunshine's benefits, without burn, by using Sutra. Remember! When a doctor says, "Get into the sun!" it's Vitamin D he's thinking of—not that handsome tan. Sutra, new, scientific sunfilter cream, contains an exclusive compound which forms an invisible shield on your skin. This shield acts as a filter for burn rays, prevents sunburn. It does *not* interfere with skin absorption of Vitamin D-producing and tanning rays.

So Sutra prevents painful sunburn, ugly blistering. But—it permits skin absorption of healthful Vitamin D-producing and tanning rays. These—which should reach your skin—do! In other words, Sutra is Selective.

A shield against burn rays, it prevents the painful sunburn you don't want. But it does *not* interfere with skin absorption of the healthful Vitamin D-producing and tanning rays you do want!

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PAR. 4. Through the use of the aforesaid statements and representations with respect to the preparation "Imra," and others of similar import and nature not specifically set out herein, respondents represent that said preparation is entirely safe and harmless and may be used without ill effects; that the use of said preparation will not irritate a normal skin; that there is a significant difference in the length of the hair shaft after use of this preparation as compared to its length after shaving and that its use retards the growth of hair.

PAR. 5. The aforesaid statements and representations are false, misleading, and deceptive. In truth and in fact, said preparation is not safe and harmless for use under all conditions and in the case of all individuals. All skins are not equally susceptible to the effects of the organic sulfide which constitutes the active ingredient in this preparation and if the preparation is allowed to remain on any skin for a longer period of time than that predetermined by experience to be safe for that particular skin, local irritation will result. Many normal skins are sensitive and the use of said preparation on such skins for a period sufficient to remove hair, will result in local irritation. There is so little difference in the length of the hair shaft after the use of said preparation as compared to its length after close shaving as to be practically indistinguishable by the average individual. The use of this preparation will not retard or delay the growth of hair after removal of the protruding shaft.

PAR. 6. Through the use of the aforesaid statements and representations with respect to "Sutra," respondents represent that said preparation, when applied to the skin, acts as a selective sun filter, effectively preventing sunburn but not interfering with the skin absorption of beneficial vitamin D-producing rays and tanning rays.

PAR. 7. The aforesaid statements and representations are false, misleading, and deceptive. In truth and in fact, while said preparation, if properly applied to the skin, will be effective in preventing sunburn and permits tanning, it will simultaneously shut out the vitamin D-producing rays and no benefit will be derived therefrom.

PAR. 8. The use by the respondents of the foregoing false, deceptive, and misleading statements and representations disseminated as aforesaid with respect to their products "Imra" and "Sutra" has had, and now has, the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements, representations, and advertisements are true, and induces a portion of the purchasing public, because of such erroneous and mistaken belief, to purchase said products.

PAR. 9. The acts and practices of the respondents, as herein alleged, are all to the prejudice and 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 March 17, 1943, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. After the filing by the respondents of their answer to the complaint, testimony, and other evidence in support of and in opposition to the complaint were introduced before trial examiners of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by the Commission upon the complaint, answer, testimony, and other evidence, recommended decision of the trial examiners, and exceptions thereto, and briefs in support of and in opposition to the complaint (oral argument not having been requested); 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 finding as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Artra Cosmetics, Inc., is a corporation organized, existing, and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 2 Broad Street, Bloomfield, N. J. The corporation is engaged in the sale and distribution of certain cosmetic preparations, including a preparation designated "Imra," which is designed for use as a depilatory, and a preparation designated "Sutra," which is designed for use as a protection against sunburn.

PAR. 2. In the course and conduct of its business the respondent corporation causes these preparations, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various other States of the United States and in the District of Columbia. The corporation maintains and at all times mentioned

herein has maintained a course of trade in these preparations in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. Respondent, Oscar C. Olin, was president of the respondent corporation until August 12, 1943, when he severed his connection with the business. Respondent, Eugene A. Kovenko, is secretary of the corporation but has not taken any prominent part in the conduct of the business, his duties being largely of a clerical nature.

The Commission is of the opinion that in view of these circumstances the complaint should be dismissed as to these individuals, and the term respondent, as used hereinafter, will therefore relate only to the corporate respondent, Artra Cosmetics, Inc.

PAR. 4. In the course and conduct of its business and for the purpose of inducing the purchase of the preparations Imra and Sutra, respondent has advertised the products by various means, including radio broadcasts, advertisements inserted in newspapers and periodicals, and circulars, leaflets, pamphlets, and other advertising literature distributed by means of the United States mails and otherwise to prospective purchasers. Among and typical of the statements appearing in these advertisements were the following:

As to product Imra—

The entire procedure takes only six to fifteen short minutes. Little longer than the hazardous razor, yet so superior in every way! With the razor, which has to be used often, there is danger of cuts and nicks, or irritation from too frequent use, plus the ugly bristle inevitable with the razor method. Shaving cuts the hair off at an angle above the hair line. Hence, the stubble you hate so. IMRA is *safe* to use; is *pleasant* to use; does a flawless job. And with IMRA the hair stalk is disintegrated down into the pore below the skin "level" leaving a rounded end which feels and looks softer on reappearance.

IMRA does not irritate a normal skin.

As to the product Sutra—

Sutra Employs Sun Screen Admitting Vitamin D Producing Rays But Barring Nearly All Burning Rays.

Although it shields against destructive rays, Sutra permits passage of sufficient tanning and anti-rachitic (Vitamin D) rays to assure sun benefits.

Make sunshine safe with Sutra, scientific sunfilter cream. It contains an exclusive compound which, on the skin, forms an invisible shield against destructive burn rays. It prevents painful sunburn! But healthful Vitamin-D-producing and tanning rays pass through freely. These you *want*, and need, for your child, for yourself.

These you *get* with Sutra.

You'll be safe in the sun with Sutra. It prevents painful sunburn. But it permits skin absorption of Vitamin-D-producing and tanning rays.

Enjoy yourself in the sun—and get sunshine's benefits, without burn, by using Sutra. Remember! When a doctor says, "Get into the sun!" it's Vitamin D he's thinking of—not that handsome tan. Sutra, new, scientific sunfilter cream, contains an exclusive compound which forms an invisible shield on your skin. This shield acts as a filter for burn rays, prevents sunburn. It does *not* interfere with skin absorption of Vitamin-D-producing and tanning rays.

So Sutra prevents painful sunburn, ugly blistering. But—it permits skin absorption of healthful Vitamin-D-producing and tanning rays. These—which should reach your skin—do! In other words, Sutra is Selective.

A shield against burn rays, it prevents the painful sunburn you don't want. But it does *not* interfere with skin absorption of the healthful Vitamin D-producing and tanning rays you *do* want.

PAR. 5. Through the use of these statements and others of similar import respondent has represented that the product Imra is entirely safe for use and that the use of the product will not irritate a normal skin, and that the product Sutra, when applied to the skin, acts as a selective sun filter, effectively preventing sunburn while permitting tanning but not interfering with the absorption by the skin of beneficial vitamin D-producing rays.

PAR. 6. The depilatory product Imra is in the form of a paste or cream, its principal active ingredients being calcium thioglycolate, calcium hydroxide and calcium carbonate. The action of the product is keratolytic; that is, it tends to break down, soften, and dissolve the principal components of the hair, thus facilitating the removal of the hair. While there is some testimony by experts to the effect that the product is safe for use provided respondent's directions for its use are followed, the record contains evidence of a substantial number of specific instances in which the use of the product resulted in painful and rather serious injuries, necessitating in some cases treatment by a physician. The injuries included irritation of the skin, soreness, swelling, and the causing of lumps or cysts. It seems clear that in at least some of these cases the skin of the user was normal and the directions for use of the product were followed. Moreover, the experts testifying to the safety of the product recognized that it might produce injury in some cases, particularly where the skin is sensitive. In substance, the testimony of the experts is to the effect only that the product is reasonably or comparatively safe and then only if the directions for use are followed. Respondent's advertisements, on the other hand, were not so limited but in effect represented the product as entirely safe in all cases and as incapable of irritating a normal skin.

PAR. 7. The Commission therefore finds that the representations with respect to Imra, as set forth above, were erroneous and mis-

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leading and constituted false advertisements. While certain other charges with respect to this product were made in the complaint, the Commission is of the opinion and finds that such additional charges are not sustained by the record.

PAR. 8. With respect to the product Sutra it is undisputed that the product effectively protects the skin against those rays from the sun which cause sunburn, while at the same time permitting contact by those rays which cause tanning. The issue here presented is whether the product, while shutting out the sunburn rays, permits contact by the vitamin D-producing rays. In short, whether a user of the product can get the benefit of the vitamin D-producing rays without the sunburn or, stated differently, whether the exclusion of the sunburn rays simultaneously results in the exclusion of the vitamin D-producing rays.

On this issue two experts testified at length during the hearings, one testifying in support of the position taken by the complaint, the other contrary thereto, the views of the two being sharply divergent. The Commission finds it unnecessary to decide this scientific controversy, in view of the fact that the record shows that all advertising of the type here involved; that is, all vitamin D advertising, was discontinued by respondent some six years ago, prior to the issuance of the complaint, and there is good reason to assume that such advertising will not be resumed in the future. In the circumstances, the Commission is of the view that this portion of the case should be closed without prejudice to the right of the Commission to reopen it in the future should circumstances so require.

PAR. 9. The use by respondent of the advertisements with respect to its product Imra, as herein set forth, has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public, and the tendency and capacity to cause such portion of the public to purchase substantial quantities of the product as a result of the erroneous and mistaken belief so engendered.

CONCLUSION

The acts and practices of the respondent as herein found are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Order

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondents, testimony, and other evidence introduced before trial examiners of the Commission theretofore duly designated by it, recommended decision of the trial examiners and exceptions thereto, and briefs in support of and in opposition to the complaint (oral argument not having been requested); and the Commission having made its findings as to the facts and its conclusion that respondent Artra Cosmetics, Inc., has violated the provisions of the Federal Trade Commission Act:

It is ordered, That respondent, Artra Cosmetics, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of respondent's cosmetic product designated "Imra," or any product composed of substantially similar ingredients or possessing substantially similar properties, 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, that said product is safe for use or that the use of said product will not irritate a normal skin.

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 said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in paragraph 1 hereof.

It is further ordered, That said 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.

It is further ordered, That this proceeding, insofar as it relates to the product Sutra, be, and it hereby is, closed without prejudice to the right of the Commission to reopen the proceeding and take such further action therein in the future as may be warranted by the then existing circumstances.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to respondents Oscar C. Olin and Eugene A. Kovenko..

IN THE MATTER OF
STRUCTURAL CLAY PRODUCTS, INC. AND BRICK & TILE
SALES CORP. 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 5467. Complaint, Oct. 16, 1946—Decision, May 28, 1948

Where a trade association, a corporate selling agency, and certain manufacturers of glazed brick and tile, namely—

(1) Said corporate trade association, organized in 1934 by the clay products industry under the code authority provisions of the National Industrial Recovery Act, which embraced in its membership manufacturers of all types of structural clay products, including manufacturers of glazed facing tile, herein concerned, and, upon invalidation of said act, reached agreement with the former code authorities representing the clay industry (including those joined in the instant proceeding), whereby it was to continue on a voluntary basis the activities which had been carried on under the code, and pursuant to which it recommended to manufacturers herein concerned the adoption of a plan for the establishment of regional sales agencies by said industry;

(2) An exclusive corporate selling agency which was one of a number of regional agencies established as a result of the aforesaid recommendation, by member manufacturers who owned its stock and supplied its officers and directors, and through which said manufacturers cooperated to suppress competition and fix and maintain the price of said product; and

(3) Five manufacturers who sold annually, through their aforesaid selling agent and its subagents, over 60 percent of the glazed facing tile shipped from their producing area of Pennsylvania and Ohio to purchasers in various States—

(a) Cooperated between and among themselves in establishing, adopting and continuing a common course of action and agreement resulting in substantial frustration of competition in the sale and distribution of glazed facing tile; and

Where said corporate selling agency and manufacturers, in pursuance and in furtherance of the aforesaid common course of action, etc., and its objectives—

(1) Agreed that said selling agent should be the exclusive seller of the tile made by them, and through it agreed upon prices and pricing methods for their products under a plan dividing their trade area, which consisted of most of the United States east of the Rocky Mountains, by counties into about 40 zones; and maintained and published pricing schedules giving the delivered price, including terms and conditions, for all glazed facing tile sold therein;

Whereby the purchaser was quoted a delivered price consisting of a mill net price plus an arbitrary charge in lieu of the actual freight from the nearest manufacturing plant; and purchasers located in that section of any zone which had the lowest freight rate from the nearest plant were required to