

IN THE MATTER OF
THE FRANKLIN PAINT COMPANY

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

Docket 1567. Complaint, Feb. 20, 1929—Decision, June 28, 1932

Where a corporation engaged in sale to trade and consuming public throughout the United States, of roof coating, and paints consisting largely of outside house paint for use upon houses and other buildings and properties; in offering its product through catalogues, letters, and other trade literature,

- (a) Described its said outside house paint as composed wholly of the best grades of white lead, zinc oxide, and linseed oil, with necessary color pigments, and driers, and as prepared from the finest raw paint pigments and oils, together with the necessary driers and coloring tints, and as composed only of the best and finest paint ingredients obtainable, through such statements in catalogues, color cards, etc., as "We guarantee that every gallon * * * is * * * prepared from the highest grade white lead, zinc oxide, linseed oil, necessary coloring pigments and driers * * *" "Nothing but the purest white lead, zinc oxide, linseed oil, and best materials * * *", "Only those materials that are used by every master paint maker when he wants to produce the finest possible colors, i. e., white lead, zinc, linseed oil, color pigments and driers * * *", "We guarantee that every gallon * * * is * * * prepared from the finest raw paint pigments and oils combined with the necessary driers and coloring tints * * *", "* * * made from the finest materials money can buy * * *".

Facts being said paint contained white lead and zinc oxide only in minor proportions, and formula and composition required and disclosed approximate pigment and vehicle content of 58 per cent and 42 per cent, respectively, and (1) pigment or solid content of 36 per cent titanox, 4 per cent lead sulphate, 20 per cent zinc oxide, 16 per cent barium sulphate and 24 per cent asbestine (with subsequent substitution of 12 per cent white lead for 4 per cent lead sulphate, and 8 per cent barium sulphate for 16 per cent, and (2) vehicle or liquid content of 87 per cent linseed oil, in fact diluted by addition of substantial quantities of soya bean oil;

With capacity and tendency to mislead, deceive, and induce purchasing public to buy said paint as and for the preferred and demanded high-quality product composed of the generally esteemed white lead, zinc oxide, and pure linseed oil, with necessary color pigment and drier, and of the best and finest raw paint materials obtainable, and with no such cheap, inert pigments as barium sulphate and asbestine, or oil other than pure linseed oil;

- (b) Represented itself in its catalogues, etc., as the manufacturer of the aforesaid paint, selling direct from factory to customer under a plan "so heartily welcomed by thousands and thousands * * * that to-day it requires this big million-dollar factory shown below to take care of our customers", and referred to its expert employees, elaborate facilities, plants, warehouses, etc., through such statements as "Fresh from the factory direct to you", "We guarantee that every gallon * * * is made in our own modern factory", "Every gallon * * * made from start to finish in our own big paint factory", "* * * made in one of the

largest paint factories in the world", and " * * * most modern, up-to-date and best-equipped paint institution in this country", "Every gallon * * * made in our own factory by paint experts from reliable tested formulæ", "If you could visit our big factory and see the care and precision that is used * * * ", and "Our factory is equipped with the most modern paint making machinery", and set forth depiction of a large factory and warehouse buildings bearing signs with its corporate name thereon, of large factory storage tanks described as "Just one aisle of big tanks in our storage rooms", of factory scenes showing workmen and paint vats, etc.,

Facts being it did no manufacturing and owned no factories, warehouses, vats, etc., but along with some seven other similarly operated corporate selling organizations, procured and shipped all its paints from a separate corporate manufacturer, to which its interests were tied by the fact of common stock owners and general officers, upon a small part of the premises of which corporate manufacturer its own place of business was located, and which manufacturer was the real owner of buildings, etc., depicted as its own, as above set forth, and connection with which it carefully concealed and withheld;

With capacity and tendency to mislead and deceive purchasing and consuming public into buying its paint and paint products in the erroneous belief that it was the manufacturer thereof dealing directly with customers, that it directly owned, operated, and controlled a large factory making said paint, was the largest direct to user paint manufacturer in the world, with a million-dollar plant owning, operating, and controlling a large warehouse, modern paint mills, vats, etc., and that it purchased its raw materials in large quantities, stored, tested, and processed the same in connection with the manufacture thereof, employed a factory superintendent, staff of paint experts and paint makers, and that its factory, warehouse, etc., were as pictorially and otherwise represented, and were operated by it in manufacture of its products, and that entire output thereof was required and used to supply the demand of customers; and

- (c) Represented that it distributed its paint "Direct from factory to user", without intervention of middlemen or jobbers, wholesalers or retailers, and that its prices were manufacturers' prices without costs, profits or other charges of jobbers, etc., so that prices for its paint were lower than those for which paint of same quality could be purchased from competitors, and that purchasers thereby saved for themselves aforesaid costs, profits, and other charges of any and all middlemen, through such statements as "Paint fresh from the factory direct to you at money saving prices", "Why pay two or three useless profits on the paint you use when you get Franklin quality paints and varnishes direct from our big factory at prices just about 40 per cent cheaper than you pay for the same grade of goods at the retail stores", "Buy * * * direct from our factory, save \$1 per gallon", "When you buy paint direct from our factory you save every unnecessary cost, there is no jobber, wholesaler or retailer to add his profits to the price he paid, you get * * * the finest quality * * * at factory cost plus one small profit", "The direct from factory to user plan of selling which saves our customers at least 40 per cent on all paint prices has made our business grow by leaps and bounds", "Just think you can purchase superior quality house paint for as low as \$2.84

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- per gallon in barrel and half barrel lots * * * because the paint is made right here in our own large factory and is shipped to you direct completely cutting out all excessive profits of middlemen, jobbers, salesmen and representatives", " * * * keep in your own pocket the \$1 to \$2 on the gallon which ordinarily goes to pay the salaries of jobbers", etc.;
- Facts being that said manufacturer charged it for the paint in question a sum substantially in excess of said manufacturer's cost, its prices were not factory, or factory wholesale prices, but middlemen's prices, and figures at which it resold its said paint represented an increase of approximately 100 per cent over price to it and exceeded those charged purchasing public by retail stores for paint of comparable quality and did not represent the claimed savings to the purchasing public of 40 per cent or \$1 to \$1.50 per gallon over prices charged by competitors or retailers;
- With capacity and tendency to mislead and deceive consuming and purchasing public into buying its paint and paint products in the erroneous belief that as a large manufacturer distributing directly to purchasers without intervention of middlemen it was selling same at prices lower than those at which paint of equal quality could be or was sold by competitors or retail stores, or than those at which such paint could be purchased by the public through retailers, and that as a large manufacturer as aforesaid it gave its customers the benefit of the saving of the costs, profits or other charges of middlemen amounting to from \$1 to \$1.50 a gallon or about 40 per cent less than would otherwise have to be paid for paint of equal quality purchased from retail dealers or competitors; and
- With effect of injuring the public and unfairly diverting trade from and otherwise injuring and prejudicing competitors in their business, and of operating as an unfair competitive advantage to it and a detriment to and burden upon the legitimate paint manufacturing and marketing industry of the country, and with capacity and tendency so to do:
- Held*, That such practices, under the circumstances set forth, were to the injury and prejudice of the public, and constituted unfair methods of competition.

Mr. Henry Miller for the Commission.

Squire, Sanders & Dempsey and *Mr. Samuel Doerfler*, of Cleveland, Ohio, for respondent, and *Mr. Thomas J. McFadden*, of Washington, D. C., for Unfair Competition Bureau of the Paint & Varnish Industry (*Amicus Curiae*).

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, an Ohio corporation engaged in sale and distribution of paint and paint materials to the trade and consuming public, through advertisements, catalogues, etc., and through salesmen and agents, and with principal office and place of business in Cleveland, with misrepresenting business status or advantages, products and

prices, and advertising falsely or misleadingly in regard thereto, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, falsely represents itself as a manufacturer, with the largest "Direct-to-User" paint factory in the world, selling at prices which exclude middleman's profits and are lower than competitors, and, by reason of its being a manufacturer, as able to offer its customers paint of a better quality, at lower prices, saving costs and profits of all middlemen; falsely representing, in its sales literature, that its supposed factory and warehouse consist of large buildings bearing signs "The Franklin Paint Co.", and that pictorial representations of said buildings and of storage tanks, paint vats, machinery and office facilities, depicted by it, are true representations of the equipment, etc., owned and used by it in the manufacture and sale of its products, facts being it neither owns nor operates any paint factory, but operates as a middleman or dealer, selling at prices which include costs and profits of itself and others in addition to those of the manufacturer, and afford purchaser no such savings.

Respondent further, as charged, falsely represents its outside house paint as composed of the best grades of white lead, zinc oxide, and linseed oil, with only the necessary amount of color pigment and drier added, and with no barium sulphate, siliceous matter or other inert material, fact being product in question is inferior to that claimed in quality, containing, respectively, 40 per cent, and 10 per cent, of barium sulphate, and siliceous matter, and a substantial proportion of other inert matter, and high-grade ingredients represented only in minor proportions.

Aforesaid representations, statements, and assertions, as alleged, "have and had the capacity and tendency to, and did and do mislead and deceive large and substantial parts of the purchasing public into, and thereby cause them to purchase said paint in and because of, the erroneous beliefs that said false, misleading, and deceptive representations, statements, and assertions" are true, and said false, misleading, and deceptive acts and practices, as alleged, have the further capacity and tendency to and do unfairly divert trade from competitors, many of whom sell and distribute house paint without misrepresenting the same, "or the methods or terms under which it is marketed, or their business standing and facilities"; all to the prejudice and injury of the public and of respondent's competitors.

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission on February 20, 1929, issued and thereupon served its complaint in this proceeding upon the Franklin Paint Co., a corporation, respondent above named, charging it with the use of unfair methods of competition in commerce in violation of the provisions of section 5 of said act.

Respondent entered its appearance by counsel and on March 25, 1929, and February 12, 1931, respectively, filed answer and amended and supplemental answer to said complaint. By such answers respondent admitted certain allegations in said complaint, including all of paragraph 1 thereof, and denied others therein. Thereafter, the matter being ready for the taking of testimony and other evidence with respect to the charges in the complaint, hearings therefor were held before an examiner of the Commission thereunto duly appointed, at which hearings oral testimony, documentary evidence, and other exhibits were introduced in evidence by counsel for the Commission in support of said complaint and by counsel for the respondent in opposition thereto. By agreement the hearings were held and the evidence taken in a consolidated proceeding covering not only this case but also the proceedings before the Commission upon complaints issued against the Madison Paint Co., Docket No. 1573, and the Progress Paint Co., Docket No. 1575. Said evidence was duly recorded and filed of record in the office of the Commissioner, and thereafter a stipulation signed by respondent; dated November 6, 1931, and relating to certain matters of fact in issue, was submitted and filed by its counsel.

Thereupon, by agreement and with the opportunity for the filing of briefs by counsel, the proceeding was brought on for final hearing before the Federal Trade Commission, and was heard upon oral argument of counsel for the respondent and counsel for the Commission, the latter having filed brief, while counsel for the respondent elected to submit the case upon oral argument without brief. And the Commission having now duly considered the record, and being fully advised in the premises, makes this its report stating its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent the Franklin Paint Co. is a corporation organized under the laws of the State of Ohio in the year 1918, and, at all times since, doing business as such Ohio corporation with its office and place of business in the city of Cleveland in said State. The said business of respondent is the sale and distribution of paint and paint materials to the trade and consuming public throughout the United States. The said products are designated and sold by respondent as the Franklin line of paints and besides roof coating consists largely of outside house paint for use upon dwellings and other buildings and property. Respondent advertises, offers for sale, and sells its said merchandise (a) through and by means of advertisements published by it from time to time in newspapers, magazines, and similar periodicals of general circulation among the purchasing public throughout the United States and in various sections thereof; (b) also through and by means of catalogues, color cards, circulars, letters, pamphlets, price lists, and similar trade literature which, in the solicitation of trade for its paints, it causes to be sent from time to time by mail and otherwise from its place of business in Cleveland, Ohio, through and into other States of the United States to numerous customers and prospective customers in such other States; and (c) through and by means of its salesmen and agents who solicit purchase orders for said paint from customers and prospective customers throughout the various States of the United States.

As a result of such advertising, soliciting of trade and offering for sale of said paint, numerous purchasers throughout various States of the United States are thereby induced to purchase said paint and paint materials from respondent, and to transmit their purchase orders for said products and to make their remittances for the purchase price thereof from their respective points of location in the several States to, and which are received by, respondent at its place of business in Cleveland, Ohio. To complete the sale and in making distribution and delivery of its products, pursuant to said purchase orders, respondent causes its paint and paint materials so ordered and sold to be transported and delivered from its place of business in Cleveland, Ohio, through and into many other States of the United States to the respective purchasers thereof in such other States. In so conducting its business respondent has, in the course thereof, continuously maintained a current of commerce between the State of Ohio and other States of the United States,

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and is and has been engaged in interstate commerce in such sale and distribution of its paints and paint materials.

For the two annual periods immediately prior and subsequent to the date of the complaint, its total gross sales were substantially in excess of \$800,000 a year. The paint is distributed by respondent in the usual paint containers of 1-gallon cans, 5 and 10 gallon cans, kegs, half barrels and barrels. The shipments are made in small quantities of a few gallons up to comparatively large quantities depending upon the amount ordered by the customer, and are forwarded by parcel post, express, or freight, as desired. Throughout the territory covered by respondent in its sales there are many competing brands and makes of house paint and similar paint products offered for sale and sold to the purchasing and consuming public through the retail stores and by dealers, distributors, and manufacturers. At all times in the course and conduct of its business respondent has marketed its paint and paint materials and conducted its said business in direct, active competition with many individuals, partnerships, and other corporations similarly engaged in the sale and distribution of paint and paint materials in commerce in, between, and among the several States of the United States.

PAR. 2. Through the medium of said catalogues, circulars, letters, and other trade promotional literature or advertising matter used by respondent in promoting and effecting the sale of its paints and other products and in inducing the public to purchase the same, respondent advertised, offered for sale and sold its paints and other products upon various representations, statements, and assertions of the following-described character:

(1) Representations, statements and assertions to the effect that respondent's said outside house paint is composed wholly of the best grades of white lead, zinc oxide, and linseed oil with the necessary amount of color pigments and drier; and that all the ingredients therein are of the best and finest paint ingredients obtainable.

The following are among the specific representations set forth in this respect by respondent in its catalogues, color cards, and letters or trade promotional literature:

GUARANTY

1st. We guarantee that every gallon of Franklin paint is made in our own modern factory and prepared from the highest grade white lead, zinc oxide, linseed oil, necessary coloring pigments and driers. * * * (Com. Ex. 65.)¹

Nothing but the purest white lead, zinc oxide, linseed oil and best materials go into our paint, assuring you of the highest grade and quality. (Com. Ex. 65, p. 3.)

¹ Exhibits not published.

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That in its manufacture respondent uses "only the very best of ingredients". (Com. Ex. 65.) And that—

Only those materials that are used by every master paint maker when he wants to produce the finest possible colors, i. e., white lead, zinc, linseed oil, color pigments, and driers. These materials lend themselves to a greater variety of shades and tints, and produce the most satisfactory house paints both for outside and inside work. (Com. Ex. 67.)

That "it is made from pure raw materials—white lead, zinc oxide, and linseed oil * * * ." (Com. Ex. 70.)

That—

You take absolutely no risk for every gallon of Franklin House Paint is guaranteed to contain only the finest of white lead, zinc oxide and linseed oil obtainable and if you are not entirely satisfied in every way—your money will be cheerfully refunded. (Com. Ex. 74.)

That in the manufacture of the paint respondent uses "only the finest white lead, zinc oxide and linseed oil * * * ." (Com. Ex. 144-A, Oct. 18, 1923.)

That respondent's outside house paint "is made from the very best white lead, zinc oxide, linseed oil and driers and is guaranteed to render satisfactory service in every respect." (Com. Ex. 144-B, Dec. 8, 1923.)

That said paint is "prepared from the finest raw paint pigments and oils combined with the necessary driers and coloring tints". (Resp. Ex. 26.)

PAR. 3. Respondent's said representations in respect to its house paint being composed of white lead, zinc oxide, and linseed oil with necessary coloring pigments and drier were used continuously without change throughout a period of more than three years prior to the issuance of the complaint and for a period of approximately ten months thereafter. Thereupon and in its trade promotional literature used beginning with the season of 1930, there was incorporated by respondent a change in the text of such representations. Such change consisted in eliminating the specific mention of the terms "white lead", "zinc oxide", and "linseed oil" and substituting therefor expressions to the effect that the paint is composed of "the finest raw paint pigments and oils"; "nothing but the finest raw paint pigments"; "only the very best of ingredients"; "the finest raw paint pigments and oil combined with the necessary driers and coloring tints"; "the very finest raw materials that money can buy"; "only the best paint materials obtainable".

Pursuant to this change the said guaranty as now being used in its large catalogue reads, with respect to ingredients, as follows:

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1st. We guarantee that every gallon of Franklin paint is made in our own modern factory and prepared from the finest raw paint pigments and oils combined with the necessary driers and coloring tints.

As further example of such change this current large catalogue also contains the representation that—

Nothing but the finest raw paint pigments go into the make up of our paint, which assures you of a durable, lasting and satisfactory paint. (Resp. Ex. 26.)

In the current sales letters which respondent sends to its customers and prospective customers, the ingredients of the paint are described, for example, as follows:

Franklin paints are made from the very finest materials that money can buy. Every gallon is produced right here in our modern factory by experts who have spent their entire lives in the paint industry. We use only the best raw paint materials obtainable. (Resp. Ex. 29.)

While the above-described changes were made in the literature beginning with the season of 1930, the change in the so-called guaranty was not made in respondent's small catalogue, respondent's Exhibit 28, and the use of such catalogue has been continued after the above-mentioned changes and is currently used by respondent as such trade promotional literature and with such guaranty set forth as follows:

GUARANTY

1st. We guarantee that every gallon of Franklin paint is made in our own modern factory and prepared from the highest grade white lead, zinc oxide, linseed oil, necessary coloring pigments and driers. * * *

Respondent's sales manager testified that in their anxiety and carelessness they had overlooked said guaranty and had, therefore, failed to make the change at this point in said catalogue.

Subject to the foregoing changes, the representations, statements, and assertions set forth in paragraph 2 hereof are still being used by respondent in the marketing of its product as above described.

PAR. 4. In truth and in fact said house paint sold by respondent under the representations hereinabove described has not been and is not composed wholly or principally of white lead, zinc oxide, and linseed oil with the necessary color pigments and driers, but contains white lead and zinc oxide only in small or minor proportions, and as hereinafter stated, was made during a period of such representations with the oil ingredient composed of linseed oil to which was added soya bean oil.

(a) It is established by the evidence and by stipulation of respondent that the composition of said paint and the basic master

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formula under which the same has been manufactured, since about January 1, 1931, are as follows:

Master formula covering period since January 1, 1931

Pigment (i. e., the solids, comprising 57.77 per cent of the paint) :

	Per cent
Titanox.....	36
White lead.....	12
Zinc.....	20
Asbestine.....	24
Barium sulphate (also known as Barytes).....	8

Vehicle (i. e., the liquid portion, comprising 42.23 per cent of the paint) :

Linseed oil.....	87
Mineral spirits and driers (i. e., volatile liquid).....	13

(b) It is also established, by evidence adduced by respondent, that prior to the change to the above formula, and during the period from October 26, 1925, to December 31, 1930, more than three years immediately prior to the issuance of the complaint and for a considerable period of time thereafter, respondent's said paint was manufactured under the following master formula, subject, however, to the exception stated below with respect to the item of linseed oil:

Master formula covering period October 26, 1925, to December 31, 1930

Pigment (i. e., the solids in the paint consisting of 57.77 per cent of the paint) :

	Per cent
Titanox.....	36
Lead sulphate.....	4
Zinc oxide.....	20
Barium sulphate.....	16
Asbestine.....	24
Total.....	100

Vehicle (i. e., the liquid portion, consisting of 42.23 per cent of the paint) :

	Per cent
Refined linseed oil.....	87
Oil drier and thinner.....	13
Total.....	100

(c) In the manufacture the paint was processed through the grinders, mixers, and other manufacturing machinery in batches of 83 gallons each. It was the duty of the factory workmen engaged in producing the paint to introduce the ingredients in certain designated quantities which would be sufficient to produce 83-gallon batches and would correspond to the relative proportions named in the above formulæ. In the manufacture of the paint under said master formula covering the period October 26, 1925, to December

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31, 1930, it was not purely linseed oil which was in fact used for the ingredient listed as "refined linseed oil * * * 87 per cent", but besides linseed oil there was actually used soya bean oil in the proportion of 7 gallons to each batch of 83 gallons of paint. Such 7 gallon substitution of soya bean oil was made during the incumbency of a former factory superintendent of the Acorn Refining Co., Mr. Rumberg who served as such for several years and until July, 1929. Testimony of the succeeding factory superintendent of the Acorn Refining Co., H. L. Williams, was introduced by respondent to the effect that beginning in October, 1929, the amount of soya bean oil substituted for linseed oil was 6 gallons in every 83 gallons of the paint; that such substitution of soya bean oil for linseed oil was made because "in our estimation" such soya bean oil "is as good an oil in that quantity as linseed, and as we had an oversupply of soya bean oil at that time, we used it to cut down our inventory, and that only was done until the first of the year 1930"; also that the cost of soya bean oil was higher than the cost of linseed oil (Tr. p. 1171).

(d) In proof of the composition of said paint there is also evidence introduced by counsel for the Commission, as to the ingredients in seven different samples of the paint as determined by chemical analyses made by paint chemists of the United States Bureau of Standards. Five of such samples were 1-gallon cans of the paint procured prior to the issuance of the complaint from shipments to purchasers. The other two were 1-quart cans obtained directly from a distributor of paints in Cleveland, Ohio, after the date of the complaint. All samples were procured prior to said use of the changed formula adopted January 1, 1931, and during the period of the use of said master formula of the period of October 26, 1925, to December 31, 1930. In comparison with such last-named formula the results of said analyses as given in evidence showed some variations or differences in the relative proportions or percentages of the various ingredients in these particular samples or specimens, but were in substantial accord with the specifications in the master formula in the following important respects: Kind or name of ingredients used; the total amount of inert pigments in the paint; total amount of active pigments in the paint and the relative proportions of the pigment and the vehicle or liquid.

(e) Titanox is a paint pigment consisting of 75 per cent barium sulphate, also called barytes, and 25 per cent titanium dioxide. Thus, when expressed by its component parts, the item of 36 per cent titanox in the above-stated master formulæ may be rendered 9 per cent titanium dioxide and 27 per cent barium sulphate. The respective items of 8 per cent and 16 per cent barium sulphate in the above-

mentioned master formulæ used prior and subsequent to January 1, 1931, are barium sulphate ingredients which are in addition to the barium sulphate present in said titanox and is free barium sulphate. The said 8 per cent barium sulphate and 24 per cent asbestine in the currently used master formula above stated, and the 16 per cent barium sulphate and 24 per cent asbestine in said former master formula, are inert paint pigments, while the remaining pigments listed in said formulæ are known as active paint pigments.

(f) Barium sulphate is an inert pigment having little or no opacity, i. e., hiding power, and is a very cheap ingredient in comparison with lead, zinc, or titanox. From figures supplied by respondent covering the year 1927 and since, the cost of the barium sulphate in the paint was less than 1 cent per pound as compared to the average of $6\frac{1}{2}$ cents per pound for zinc oxide and from $6\frac{3}{4}$ cents to 9 cents per pound for lead. Through the same period the cost of titanox ranged from $6\frac{1}{2}$ cents per pound to $11\frac{1}{2}$ cents with an average for the period of a little less than 9 cents per pound. Barium sulphate is a relatively heavy material of approximately the same bulk as titanox, but of about 35 per cent and 60 per cent greater bulk than zinc and lead, respectively. Asbestine is a siliceous material which is likewise inert and has little or no opacity in comparison with lead, zinc, or titanox. It is also a comparatively cheap pigment with an average cost of less than 1 cent per pound for the above-mentioned period. Such asbestine is of much greater bulk than lead or zinc or the other pigments in the paint.

The comparative bulk of these materials may be expressed by the fact that it requires only 23.74 pounds of asbestine to make 1 gallon in volume, whereas it requires respectively 56.74 pounds of lead, 47.15 pounds of zinc, 35.82 pounds of titanox, and 35 pounds of barium sulphate to make 1 gallon in volume in each instance. Said inert pigments, such as barium sulphate and asbestine are paint ingredients of low quality or merit and they do not rank among the finest or best paint pigments which are on the market and in general use. Titanox is a comparatively newly discovered paint ingredient which is classed as an active pigment. As shown by the figures above stated it has about 60 per cent greater bulk than lead and 35 per cent greater than zinc. It is used by some manufactures as one of the pigments for first-quality paint but its properties or qualities as a paint pigment are not so generally or widely known among the purchasing public as are those of white lead and zinc oxide.

(g) White lead and zinc oxide are paint pigments of high quality and have long been known and recognized as such in the paint industry and trade, and by painters and the consuming public generally.

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They are generally considered in the industry as the standard of comparison among paint pigments and are extensively used by paint manufacturers as the principal pigment for paint of highest or best quality. Linseed oil is likewise recognized and considered as a product of highly desirable quality and merit for use as the oil ingredient of paint. Outside house paint consisting wholly or principally of white lead, zinc oxide, and linseed oil with necessary color pigments and drier is a paint which is among those of the highest grade or best quality and has been considered and generally recognized as such among paint manufacturers, dealers, users, and consumers. And paints composed wholly or principally of such ingredients are in demand by the purchasing and consuming public and the fact of such composition of white lead, zinc oxide, and linseed oil in a paint is a sales advantage and an important factor which is conducive to the sale of such paint.

(h) Much evidence was introduced with respect to the quality of respondent's paint and the effect of the ingredients therein as compared to high-quality paints and paints manufactured of white lead, zinc oxide, and linseed oil or paints containing only the best or finest paint ingredients. The witnesses called by counsel for the Commission on these points included paint chemists of the United States Bureau of Standards and a number of paint chemists and others having long experience in the manufacture, formulation, testing and sale of paints. The evidence adduced embraces testimony of such witnesses to the effect that respondent's said paint is inferior in quality to paint composed wholly or principally of white lead, zinc oxide, and linseed oil or paints composed of the best paint ingredients; that the said inert pigments in respondent's product, barium sulphate and asbestine, are in excessive proportion to the active pigments; that of the pigment of first or best quality paints a maximum of, or not more than, 15 per cent of inert materials can be used without reducing the quality of the paint below first class or best paints, and that in many of the best-quality paints on the market a much lesser proportion than 15 per cent of inerts is used; that the large proportion of inert materials in respondent's said paint are excessive and that by reason of the use thereof respondent's paint is not only cheapened as to cost of materials, but is also of an inferior or reduced quality; that such inert pigments are fillers and extenders and considered by some in the excessive proportion used in respondent's paint as adulterants.

Respondent's witnesses in this regard—comprising principally the factory superintendents where the paint is made, who formulated the product, and another paint expert of varied experience—testified

to the effect, among others, that respondent's paint is first quality and that said inert pigments therein have various necessary or desirable effects particularly because of the use in the paint of said titanox ingredient; and that said inert pigments notwithstanding their cheapness in price and lack of opacity are not excessive. The term reenforcing pigments is used in respondent's testimony to designate said inert ingredients. (All percentages or relative proportions of paint ingredients in these findings are given on the basis of weight of the product, unless otherwise stated.)

PAR. 5. Upon consideration of the record the Commission finds that some of the purchasing public do not believe paints composed as respondent's in fact is, and has been, are of as high quality as paints composed wholly or principally of white lead, zinc oxide, and linseed oil with necessary color pigment and drier or paints of equally high quality. And the Commission further finds that respondent's said representations to the effect that its paint is composed wholly or principally of white lead, zinc oxide, and linseed oil with necessary color pigments and driers and that all the ingredients thereof are of the best and finest raw paint materials obtainable, as more particularly set forth in paragraph 2 hereof, are and have been false, misleading, and deceptive, and have been calculated, and had the capacity and tendency, to mislead, deceive and induce the purchasing public to purchase said paint in the erroneous beliefs that said representations are and were true in fact and that the paint was in fact so composed; that said paint does not and has not contained other ingredients, nor said barium sulphate and asbestine as above-described or any inert paint pigment other than coloring pigment; that the oil in the paint was in fact purely linseed oil at all times throughout the use of such representations as to linseed oil, and that it did not contain any such soya bean oil as was in fact substituted for linseed oil, to the extent above stated, in the manufacture of the paint under said master formula used prior to January 1, 1931.

PAR. 6. The said false, misleading, and deceptive representations above set forth have been made by respondent with knowledge that the said paint was not in fact composed wholly or principally of lead, zinc, and linseed oil, as represented, but was in truth manufactured with the ingredients as described in paragraph 4 hereof. Respondent's said so-called guaranty and other representations to the effect that the paint is composed of white lead, zinc oxide, and linseed oil with necessary color pigments and driers were repeated throughout the long period above mentioned and perpetuated in revised editions of its catalogues and in letters sent out with said catalogues as well as other letters sent from time to time to customers and

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prospective customers. In no instance in the letters sent from time to time to purchasers and prospective customers, whether accompanying said catalogue or otherwise, has respondent, prior or subsequent to the issuance of the complaint, informed purchasers of the fact that said paint is not in truth composed as stated in its so-called guarantee under which it sold the paint and in said other representations, or that it contains inert materials or titanox, or soya bean oil, or that the white lead and zinc oxide therein constitutes only a small or minor part of the pigment. Respondent has not followed the practice used by some paint manufacturers of printing the formula upon the label on the commercial containers of the paint or otherwise disclosing the actual ingredients in the paint. Nor has respondent in any other manner advised or informed the purchasers of said paint of the actual composition thereof.

PAR. 7. In the course and conduct of its business of promoting and effecting the sale and distribution of said paint as hereinabove described, and through and by means of its said trade promotional literature, respondent also offers for sale and sells its said paint upon various representations, statements and assertions to the following effect:

(1) That respondent is the manufacturer of said paint and in its sale and distribution acts as a manufacturer and not as a middleman; that it manufactures said paint and that it directly owns, operates and controls a large, modern paint factory in which it manufactures said paint; that it owns, operates, and controls a large warehouse as part of its facilities used by it in the manufacture, sale, and distribution of its paint; that its paint factory is the largest "Direct-to-User" paint factory in the world; that said paint factory and warehouse consists of large spacious buildings bearing large and conspicuous signs reading "The Franklin Paint Co.", and that said factory and warehouse are as pictorially represented in its aforesaid sales literature, particularly in its business stationery and catalogues; that the pictorial representations in said sales literature of storage tanks, paint vats, paint manufacturing machinery, and office facilities are true representations of factory equipment and business facilities directly owned, operated, controlled, and used by respondent in the manufacture, sale, and distribution of its paint and paint materials.

(2) That because respondent is the manufacturer of said paint and owns, operates, and controls the above-mentioned factory and other business facilities, respondent is able to and does sell to its customers paint of a better quality and at less price than its competitors.

(3) That respondent sells and distributes its paint "Direct-from-factory-to-user", and that its sale and distribution thereof to its

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customers are without the intervention of middlemen or jobbers, wholesaler or retailer; and that purchasers in buying paint from respondent thereby purchase and receive such paint directly from the manufacturer thereof.

(4) That the prices at which respondent sells its paint are manufacturers' prices and do not include costs, profits, or other charges of jobber, wholesaler, retailer, or other middlemen; that because of such supposed fact, the prices at which respondent sells its paint are lower than the prices for which paint of the same quality can be purchased from competitors; and that in purchasing from respondent purchasers thereby save to themselves the costs, profits, and other charges of any and all middlemen.

The following-described specific instances of the foregoing representations, statements, and assertions are among those appearing in the catalogues, color cards, letters, or other trade-promotional literature used by respondent in the solicitation and promotion of trade:

(a) On the outside cover of its large catalogue (Com. Ex. 65; Resp. Ex. 26) respondent depicts factory buildings with the statement—

Paint fresh from the factory

Direct to you

At money-saving prices

The Franklin Paint Co., Cleveland, Ohio

In the catalogue are printed said so-called guaranty of the Franklin Paint Co. and other representations reading in part as follows:

1st. We guarantee that every gallon of Franklin paint is made in our own modern factory * * *

But why pay two or three useless profits on the paint you use when you get Franklin Quality Paints and Varnishes direct from our big factory at prices just about 40 per cent cheaper than you pay for the same grade of goods at the retail stores.

BUY FRANKLIN PAINT DIRECT FROM OUR FACTORY—SAVE \$1 PER GALLON

Every gallon of paint, varnish, or other products which you find listed in this catalogue is made from start to finish in our own big paint factory. When you buy paint direct from our factory you save every unnecessary cost. There is no jobber, wholesaler, or retailer to add his profits to the price you pay. You get Franklin Quality Paint—the finest quality that good materials, honest men and modern machinery can produce—at factory cost plus one small profit.

This Direct-from-factory-to-user plan of selling Franklin Quality Paints at wholesale prices has been so heartily welcomed by thousands and thousands of folks from Maine to Texas that to-day it requires this big million-dollar paint factory shown below to take care of our customers. We are saving

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hundreds of thousands of dollars every year for others—send us your order for paints, varnishes, or enamels and let us save money for you. (Beneath this statement appears a picture of a large factory bearing signs reading The Franklin Paint Co.)

When you buy Franklin Quality Paint, no matter whether it is a quart can or a 50-gallon barrel, you get it *fresh from the factory*—fresh from our grinding and mixing vats and every drop of it is uniform, smoothly ground and full bodied.

YOU CAN'T GET A THOROUGH MIXTURE BY HAND

If you were to sit down with a gallon of lead, zinc oxide, and oil and stir it with a paint paddle night and day without stopping for two full months you could not possibly mix that gallon of paint as thoroughly as our powerful grinding and mixing machinery does in an ordinary 8-hour day's time.

You know what heavy materials lead and zinc oxide are. You know how hard it is to get oil to mix thoroughly with anything. Then it stands to reason that you can not begin to get a thorough mixture of paint by hand when it takes hours of constant grinding, agitating, and revolving in our giant machine mixers to combine these materials into an evenly blended, smooth paint—ready to use.

THE LARGEST "DIRECT-TO-USER" PAINT FACTORY IN THE WORLD

The splendid reputation for saving and satisfaction which Franklin Quality Paints and Varnishes have acquired has become nation-wide. The Direct-from-factory-to-user plan of selling which saves our customers at least 40 per cent on all paint prices has made our business grow by leaps and bounds.

To-day, Franklin Quality Paints are made in one of the largest paint factories of its kind in the world, and we believe that this factory is the most modern, up-to-date and best equipped paint institution in this country.

To-day, this modern, million-dollar paint factory is saving money for hundreds of thousands of satisfied customers.

Every gallon of Franklin paints, varnishes, and paint products is made in our own factory by paint experts from reliable, tested formulas. Nothing but the purest white lead, zinc oxide, linseed oil, and best materials go into our paint, assuring you of the highest grade and quality.

FRANKLIN HOUSE PAINT

The highest grade house paint at wholesale factory prices.

If you could visit our big factory and see the care and precision that is used in the making of Franklin Quality House Paint you would be quick to appreciate just why it has acquired such a good reputation among our thousands of customers all over the country.

In the first place we use only the very best of ingredients in our Quality House Paint. This, though important is not the only sign of good paint. These ingredients must be correctly proportioned and thoroughly mixed by machinery so that the paint will spread well and wear well. Paint making is an art. It requires experts throughout the various stages of manufacture and that is one place where the Franklin Factory excels. Being the largest paint manufacturers in the world selling Direct-to-the-users and being located in Cleveland, the greatest paint-producing center of the universe, we are in a position to secure the most competent and best skilled paint experts to superintend the making of our Quality House Paint and all other paint products. And our

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factory is equipped with the most modern paint-making machinery. It is this unbeatable combination of—

Best Materials

Best Paint Experts

Best Manufacturing Equipment

that makes Franklin Quality House Paint superior in quality—superior in covering capacity—superior in wearing service—superior in appearance even though it is sold to you at Direct-from-factory wholesale prices which are about 40 per cent less than you usually pay.

(b) In connection with the above representations there are also set forth prominently in said catalogues the following, purporting to be pictures of manufacturing facilities of the Franklin Paint Co. (Com. Ex. 65):

(1) Depiction of large factory and warehouse buildings bearing signs reading The Franklin Paint Company, which purport to be permanently attached to and actually upon such buildings. The entire picture is entitled "A Panoramic View of Our Factory and Warehouse".

(2) Depiction of large factory storage tanks with the following description:

Just one aisle of big tanks in our storage rooms. Our factory has over a quarter of a million gallon storage capacity for linseed oil, turpentine, driers, and other raw materials from which we make our Quality Paints.

(3) Depiction of factory scene showing workmen and paint vats from which paint is filled into commercial containers, the depiction being described as follows:

Here's how you get fresh paint, direct from our giant paint vats to you.

(4) Depiction of factory scene of workmen and paint mills with the following description:

One battery of our grinding and mixing mills. There are three batteries of mills like this in our factory.

(c) On its color cards appear, among other things, the following:

FRANKLIN HOUSE PAINTS

Manufactured by

Franklin Paint Company

Cleveland, Ohio

Franklin paints are the right paints because they are made right. In the manufacture of our paint, we use only those materials that are used by every master paint maker when he wants to produce the finest possible colors, i. e., white lead, zinc, linseed oil, color pigments, and driers. These materials lend themselves to a greater variety of shades and tints, and produce the most satisfactory house paints both for outside and inside work. Years of experience in paint making have enabled us to establish formulas that are based on the exact proportions of each ingredient that produces the firmest body and most

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lasting colors. (Com. Ex. 67, Color Card; see also Resp. Ex. 27 for change of text.)

(d) On respondent's letterheads are depicted large factory buildings likewise bearing the sign The Franklin Paint Company and purporting to be the sign of real designation of said buildings. Printed immediately adjacent to said depiction are the words of the letterhead as follows:

THE FRANKLIN PAINT COMPANY

Manufacturers of

House and Barn Paints, Enamels and Varnishes

Saveall

Liquid Asbestos Roofing

Cleveland, Ohio

(e) Respondent's sales letters and other trade promotional letters are sent to customers and prospective customers on the above letterhead, and among the representations used in such letters by respondent are the following:

There is absolutely no middlemen, jobbers, salesmen, or representatives, profits for you to pay—you are dealing direct with the manufacturer when you purchase Franklin Paints. (Com. Ex. 68.)

If you don't happen to have the ready cash, it doesn't mean that you have to leave your buildings go shabby, gloomy, and unprotected. The Franklin Factory to you plan shows you how you can paint and brighten things up now and pay later. Through this plan you not only can get 60 days to pay for what you get but there is no freight to pay and you save at least 40 per cent because the jobber, retailer, and salesman's profits are cut out.

Franklin paints are made from the very finest materials that money can buy. Every gallon is produced right here in our own modern factory by experts who have spent their entire lives in the paint industry. We use only the purest and best white lead, zinc oxide, linseed oil, turpentine, etc., and are free to say that Franklin Paints are equal or better in every way to any other paint on the market regardless of price.

This is a real buy and if you want to save yourself at least 40 per cent on real first quality—Grade A house and barn paints—send your order in now. (Com. Ex. 73.)

Franklin rock bottom prices can't be beat, just think you can purchase Superior Quality House Paint for as low as \$2.84 per gallon in barrel and half-barrel lots.

The reason I am able to quote these low prices is because the paint is made right here in our own large modern factory and is shipped to you direct completely cutting out all excessive profits of middlemen, jobbers, salesmen, and representatives. (Com. Ex. 74.)

You will be well pleased with Franklin Paint, Mr. Moody, because this is pure, fresh paint, manufactured right here in our own factory from the very finest raw materials that money can buy. Our huge grinders assure you of a smooth, perfectly blended paint that will flow freely under your brush, go farther, have greater hiding power and give extraordinary long wear with 100 per cent protection.

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There is no middlemen's profit. You pay us only the cost of manufacturing plus one small profit and keep in your own pocket the \$1 to \$2 on the gallon which ordinarily goes to pay the salaries of jobbers, salesmen, representatives, and dealers. (Com. Ex. 75-A.)

I am writing this letter today because I want you to know that due to a steady advance in linseed oil and other raw materials during the past month paint prices are going up.

I am enclosing a copy of the Bulletin from our factory superintendent which reached my desk this morning. This Bulletin speaks for itself and shows very clearly that if you want to save money on your paint you should place your order at once.

Other large paint companies all over the country have already have advanced prices, but due to fortunate June contracts we will still be able to ship your order of Franklin Paints at present prices.

These prices can't last much longer, however, and I urge you as one of my personal friends to get your order in at once so that you can save this advance of 30 cents to 35 cents a gallon.

Remember Franklin Paints are offered you—wholesale—direct from our factory with all profits of jobber, retailer and salesman completely eliminated. (Com. Ex. 76-A.)

(Inclosure to above letter)

BULLETIN

To L. S. SANDERS, *Sales Mgr.*

As you know linseed oil and other raw materials during the past month have taken a sharp advance in price. This of course means increased production costs. Fortunately we have enough stock on hand purchased at June contract prices to run us for the next few weeks. Selling prices on practically our complete line of paints must necessarily advance as soon as our present supply of raw materials is exhausted.

Please advise all customers at once.

THE FRANKLIN PAINT COMPANY

(Signed)

H. L. WILLIAMS

Factory Superintendent.

(Com. Ex. 76-B.)

We acknowledge with thanks yours of recent date inclosing remittance and are pleased to advise that your account has been properly credited.

If at any time you are in need of additional products we hope you will write for our factory prices.

Remember we are manufacturers of high-grade house paints, barn paints, roof paints, varnishes, enamels, in fact, a paint for every conceivable purpose.

Respectfully yours,

THE FRANKLIN PAINT COMPANY.

(Com. Ex. 110.)

In considering your paint needs, remember that Franklin products are guaranteed quality A—shipped fresh from our factory and are not to be confused with the many cheap paints that are flooding the market today. Cheap paint always proves the most expensive in the long run—it has less covering capacity—poorer finish—lasts about half as long as good paint and yet costs you just as much to apply.

As paint manufacturers—dealing only direct with the consumer—completely cutting out all middlemen, salesmen and retailer's profits—doesn't it stand

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to reason that we are able to offer you higher grade products at lower prices than concerns jobbing paint and carrying them only as a side line.

No expense is spared in the manufacture of our paints. We use only the finest white lead, zinc oxide, and linseed oil and are always ready to return your money if you are not entirely satisfied in every way. (Com. Ex. 144-A, October 18, 1923.)

If you don't happen to have the ready cash, it doesn't mean that you have to leave your buildings go shabby, gloomy and unprotected. The Franklin factory to you plan shows you how much you can paint and brighten things up now and pay later. Through this plan you not only get 60 days to pay for what you get but there is no freight to pay and you save at least 40 per cent because the jobber, retailer, and salesman's profits are cut out.

(f) In its price lists which are sent to customers the following appears:

FRESH FROM OUR FACTORY DIRECT TO YOU

Buy Franklin paints direct from our mammoth factory and save \$1 to \$1.50 per gallon. You gain by saving the middlemen's profits.

The highest grade at wholesale factory prices. Best materials. Best paint experts. Best manufacturing equipment. (Com. Ex. 69.)

(g) In its small catalogue are the following representations among others:

FRANKLIN HOUSE PAINT

Sold direct from factory to you with 60 days to pay! Here is, without a doubt, the most liberal offer ever made on high quality house paint. Think of it! On this offer you not only get the finest quality of paint that the largest paint factory of its kind in the world can produce—you get the lowest factory prices cutting out all the middlemen's profits—but we also give 60 days to pay for the paint you order. You save the jobber's, retailer's, and salesman's profits. (Com. Ex. 70; Resp. Ex. 28.)

This catalogue also carries the guaranty as above quoted.

(h) In addition to the depiction of factory buildings upon its letter-heads and in its large catalogue as above described, respondent also carries such depiction of factory buildings upon order blanks of which it uses large numbers in sending copies to customers and prospective customers. This depiction of factory buildings likewise showed the sign on such buildings—The Franklin Paint Co.

PAR. 8. The true facts in regard to said representations are and have been as follows:

(a) Respondent corporation, The Franklin Paint Co., is not a manufacturer and does not manufacture any of the paint or other products which it markets, but procures its paint from the Acorn Refining Co. at certain prices charged therefor by such Acorn Co. The Franklin Paint Co., respondent corporation, does not own, control, or operate any such paint factory, factory warehouse, paint vats, grinding, mixing or other paint manufacturing equipment or

facilities as represented or depicted in its catalogues, letters, and other trade promotional literature, or any other paint manufacturing equipment or facilities. The authorized capital stock of such Franklin company is \$100,000, par value, and all its physical property consists of furniture and fixtures such as desks, chairs, adding machines, typewriters, and similar office equipment, which are used in the promotion, sale, and distribution of its products. Its other assets consist of cash and accounts receivable of over \$250,000, being sums due largely from paint customers. Said Franklin corporation has no factory superintendent, nor does it employ any paint manufacturing experts or any other employees engaged in manufacturing. The said H. L. Williams, represented above by respondent as factory superintendent of The Franklin Paint Co., is not so employed by such Franklin corporation, but is employed by and is the factory superintendent of the Acorn Refining Co. Respondent corporation's employees number about 50, besides temporary clerks and others added during busy seasons, and all are engaged under the supervision of a sales manager in the work of promoting and effecting the sale and distribution of its paint and paint products.

Respondent corporation does not purchase, store, test, or otherwise handle or use any raw materials for the manufacture of paint or paint products. Evidence was introduced that the depictions of factory buildings, warehouse, tanks, grinders, and other manufacturing machinery, or facilities, set forth in its catalogues and on its business stationary, are depictions of the factory, warehouse, manufacturing facilities, and equipment owned and operated by the Acorn Refining Co. They are, however, set forth and described in effect in respondent's catalogues, letters, and order blanks as being the Franklin paint factory and manufacturing facilities and owned and operated by it in manufacturing the paint which it sells. The said factory buildings of the Acorn Refining Co. bear the word "Acorn" as a large permanent sign forming an integral part of the front of the main building. Depictions used by respondent have been so altered as to eliminate such sign "Acorn" and in lieu thereof depict the words "The Franklin Paint Co." purporting to be a large permanent sign on the front of said factory building and another on the warehouse.

The depiction of such signs on the building is wholly fiction as in reality no such signs exist on any building in any way connected with The Franklin Paint Co. Respondent eliminated from such depictions the fictitious signs The Franklin Paint Co., but in all other respects it continues the use of such depictions of factory showing them in its catalogues, letters, and order blanks in such an altered

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form as to conceal the sign "Acorn," which in reality exists on the buildings themselves. Such altered depictions are likewise still described in effect as depictions of The Franklin Point Co.'s property and factory. Said change by which such fictitious sign The Franklin Paint Co. was removed from such depictions of factory buildings was made by respondent in its catalogues after the issuance of the complaint. The change in the depictions on letterheads and order blanks was made after the trial of the proceedings had been begun.

(b) Respondent has used the representations described in paragraph 7 above in promoting the sale of its products throughout the period of more than three years prior to the date of the complaint. Such representations have also been so used subsequent thereto, and respondent is continuing their use as heretofore subject, however, to the foregoing change with respect to the removal of said fictitious sign.

(c) The said Acorn Refining Co. is an Ohio corporation engaged since about the year 1914 in the manufacture of a complete line of paints and paint products, which in the course of its business it sells to the purchasing and consuming public including industrial plants and other users and consumers throughout the United States, as well as supplying said paint and paint products at prices hereinafter stated to the respondent and to seven other similarly situated corporations including the Madison Paint Co. and The Progress Paint Co., respondents in Dockets 1573 and 1575, respectively. Said Acorn Refining Co. has, and operates in its business, a paint factory or paint manufacturing plant at Cleveland, Ohio, which paint factory or paint manufacturing plant is of reputable appraisal value of substantially less than \$1,000,000. The average daily production of the plant is 4,000 to 5,000 gallons of paint and 5,000 to 6,000 gallons of roof coating. Such Acorn company has facilities for the purchase and storage of raw materials in carload quantities. It also has a paint laboratory with a staff of four men. The respondent corporation, The Franklin Paint Co., occupies as its place of business rented office space on the premises of the Acorn Refining Co. for which space it pays rent to such Acorn company. And it is from the Acorn Refining Co.'s factory premises that respondent corporation ships its paint to its customers. Besides paint and paint products, respondent also purchases various other supplies and services used in its business from said Acorn company.

(d) Prior to the issuance of the complaint and until about January, 1930, substantially all of the capital stock of the respondent corporation, The Franklin Paint Co., was owned in equal proportion by S. S. Sanders and E. M. Katz, president and secretary-treasurer, respec-

tively, of the respondent, who also own in equal proportion all of the capital stock of the Acorn Refining Co. and are officers of that company. After the issuance of the complaint the capital stock of respondent corporation, owned by said individuals Sanders and Katz, was acquired and is now owned by the Acorn Refining Co.

(e) The Franklin Paint Co., respondent, is one of eight corporations whose stock, ranging from \$10,000 to \$100,000 authorized par value, is similarly owned by the Acorn Refining Co. They are similarly engaged in procuring paint manufactured by the Acorn Refining Co. and selling the same to the public throughout the United States. It is marketed by said companies as paint of their own respective line and manufacture. For instance, it is sold by The Franklin Paint Co. as the Franklin line of paints; by the Progress Paint Co. as the Progress line of paints; by The Madison Paint Co. as the Madison line of paints. To other purchasers it is sold by the Acorn Refining Co. as the Acorn line of paints. The products sold by the respondent corporation comprise from about 20 per cent to 25 per cent of the output of the Acorn Refining Co.

(f) Evidence was introduced on behalf of respondent to the effect that the prices charged by the Acorn Refining Co., to the respondent, The Franklin Paint Co., for said paint are the Acorn Refining Co.'s so-called "blue-book" prices less 15 per cent; and that such prices represented only the Acorn Refining Co.'s cost; that all the profits in the distribution of the paint to the public are allowed to accumulate in the name of The Franklin Paint Co. and are taken out mainly, if not entirely, in the form of salaries to said Katz and Sanders instead of through the declaration of dividends.

(g) Evidence was also introduced through respondent's witnesses tending to show that the business of the Acorn Refining Co. and said other eight corporations, including respondent, which are engaged in selling and distributing paint manufactured by the Acorn company, is considered by the officers of the Acorn company and of respondent as one business. That any such relationship exists between said companies is not disclosed to the purchasing public. Testimony was also given, largely by said S. S. Sanders, president of respondent, substantially to the effect that care is also taken to avoid disclosing any such relationship to the salesmen who sell the paint to the public for the various companies referred to, and that such nondisclosure enables these companies to sell more paint, and makes possible the solicitation and sale of the paint by several of the respective companies in any given locality or community by reason of the nondisclosure in such communities of the existence of such relationship or that in reality it is all the same paint which

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is being sold under different company names and labels. As part of such nondisclosure each of said respective companies, although located on the same premises, represents itself as being located at a differently named street address. Testimony was also adduced by respondent to the effect that instead of continuing to conduct respondent's business under its name as an unincorporated trade name, it was incorporated so that, among other things, respondent could receive a listing and rating in the commercial rating publications of R. G. Dun & Co. and of Bradstreet's in such a way as not to disclose or reveal any relationship or connection with the Acorn Refining Co. or other company.

(h) In the sale and distribution of its paint and the conduct of its business, respondent corporation is a middleman instead of a manufacturer. The prices at which it sells its said paint to the public are middleman's prices and not factory prices or factory wholesale prices as represented. The profits which respondent makes in the sale of said paint and its costs therein, which profits and costs are included in its paint price and ultimately borne by the consumer, are in fact middlemen's costs and profits. The relative costs and prices covering the various colors, years and types of containers involved are illustrated by the following (using the color white, 1-gallon cans and the year 1930 as representative): The cost to Acorn Refining Co. of the paint material in 1 gallon of paint was \$1.16. The price which the Acorn Refining Co., the manufacturer, charged respondent for such gallon of paint was \$1.624 for the first four months of 1930 and \$1.573 for the remainder of the year. The Franklin Paint Co.'s price at which it sold such paint to the public was \$3.32 less 5 per cent discount for cash with order, or net within 60 days, and with freight paid on all orders shipped by freight and amounting to more than \$10. The prices per 1-gallon can of the same paint as sold throughout the same States and on similar terms by The Progress Paint Co. was \$3.75, and by the Madison Paint Co., \$3.85 with a 20-cent to 25-cent reduction during the latter part of the year.

(i) In the evidence adduced is testimony tending to show that outside house paint of quality comparable with that of respondent's paint is marketed and available to the purchasing public through retail stores at \$2.75 per 1-gallon can, as testified to by a paint manufacturer of Cincinnati marketing paints throughout various States which are also covered by respondent; that substantially comparable quality paint of the largest paint manufacturer in the industry is marketed through retail stores to users and consumers throughout the United States as retail prices from \$2.50 to \$2.75 per 1-gallon

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can, as testified to by an official of such manufacturer. Some of the other testimony on this point included that by a retail dealer who stated he sells house paint of the best or highest quality at a price of \$2.65 per gallon in 100-gallon lots; also testimony by a paint manufacturer, selling largely to industrial plants for maintenance purposes, that in his opinion paints of certain costs, delivered to the carrier, ranging from \$1.17 to \$2.09 per gallon would be sold through dealer channels in 1-gallon cans at certain retail prices to the consumer which ranged from \$2.80 to \$4.70 per gallon. Upon the whole record the Commission finds that the prices at which respondent sells its said paint to the public are not less to the extent of \$1 to \$1.50 per gallon, or by about 40 per cent, than prices at which paints of similar or comparable quality are available to the purchasing public or at which the purchasing public can buy the same from competitors or retail stores.

PAR. 9. The aforesaid representations, statements, and assertions of The Franklin Paint Co., respondent corporation, with respect to the manufacture of its paint and the facilities and organization therefor, its plan or method of distribution without the intervention of middlemen, and its prices and the savings afforded customers, all as more particularly set forth in paragraph 7 hereof, are and have been false, misleading and deceptive, and have and had the capacity and tendency to mislead and deceive the purchasing and consuming public into purchasing respondent's paint and paint products in the beliefs, which are erroneous, that said representations, statements, and assertions are true in fact, and that—

(1) Respondent corporation is the manufacturer of said paint and in its sale and distribution thereof acts as a manufacturer and not a middleman; that respondent's customers in purchasing from respondent thereby deal directly with the manufacturer of said paint; that respondent corporation directly owns, operates, and controls a large modern paint factory in which it manufactures said paint; that it is the largest direct-to-user paint manufacturer in the world and that its manufacturing plant is a million-dollar factory; that it owns, operates and controls a large warehouse, modern paint mills, vats, tanks, and other manufacturing equipment as part of its facilities used by it in the manufacture of its paint; that it purchases raw materials for its paint in large quantity, and stores, tests and processes the same in the manufacture of its paint; that it employs a factory superintendent and a staff of paint experts and paint makers; that its factory, warehouse, tanks, paint mills, vats, and other manufacturing facilities above mentioned are as pictorially and otherwise represented in its said sales literature and are operated by respondent

in the manufacture of its paint and paint materials, and that the entire output of its said factory is required and used to supply the demand of respondent corporation's customers.

(2) That because respondent is the manufacturer of said paint and owns, operates, and controls said large manufacturing facilities and distributes its paint from itself as manufacturer directly to purchaser without the intervention of middlemen, respondent is able to and does sell to its customers paint at lower prices than paint of equal quality can be or is sold by competitors or retail stores or can be purchased by the public through retailers; that its prices are manufacturer's prices or factory prices which by reason of its method of distribution do not include cost, profits, or other charges of any middleman; that by reason of its manufacturing facilities and operations and such method of distribution, respondent gives its customers the benefit of, and its prices afford to purchasers, the savings of all such costs, profits, or other charges of middlemen, and that the extent of such savings afforded by respondent to its customers are from \$1 to \$1.50 per gallon or about 40 per cent as compared to the prices which the purchasing public must otherwise pay in purchasing paint of equal quality from retail dealers or competitors.

PAR. 10. In the evidence respecting the effect upon competitors of the use by a paint distributor or by a paint seller of misrepresentations as to the ingredients and quality of its paint and as to being a manufacturer selling direct to purchasers without the intervention of middlemen, is testimony of four witnesses experienced as directors or managers of sales or otherwise in the promotion of the sale of house paint and paint products of manufacturers or distributors selling in competition throughout the several States in which respondent also sells its paint.

The testimony of these witnesses was given mainly as their views or respective opinions based upon or as a result of their experience in the business, and included testimony to the effect that the use on the part of any paint distributor of representations which are untrue is a detriment to competing concerns or others engaged in the same business; that it destroys confidence on the part of the consumer, the buyer, in his ability to know whether he is getting what he is paying for; that the misrepresentations by a distributor of paint of the quality or ingredients thereof is "extremely harmful to the business of competitors"; that the use of false or misleading representations has a tendency to divert trade from other competitors selling similar paints; that the misrepresentation as to the composition or quality of paint is "a general detriment to the whole trade"; that misleading representations by a paint distributor increases the burden

upon competitors to meet such competition; that representations of being a manufacturer selling direct to consumers to the exclusion of middlemen, whether true or false, would have an effect or tendency to substantially divert trade from competitors; that business has definitely been lost by one witness's company because of such representations by competing concerns not including the respondent; that a seller's misrepresentations of an inferior paint as first quality paint would divert business from competitors if the prices were less than the competitors' price for first quality paint, that such diversion would depend upon the price.

It was stipulated by respondent that certain Commission witnesses about to be sworn and consisting of five other members of paint manufacturing or distributing companies selling in general competition in the same territory in which respondents are selling, if called as witnesses, would testify that untruthful advertising is unethical and that it tends, in their opinion, to divert business or trade from those engaged legitimately in a similar business; and that such stipulation may be used with the same effect as though such witnesses were actually sworn and so testified. It was also conceded of record by respondent that "deliberately false advertising is unethical", and "contrary to good morals".

PAR. 11. Upon the record the Commission finds that the aforesaid false, misleading, and deceptive representations, statements, and assertions, as set forth in the foregoing findings and used by respondent in the course and conduct of its said business, are methods of competition in interstate commerce which (a) are unfair and are characterized by deception; (b) have been pursued by respondent against the interest of the public; (c) have the capacity, tendency and effect of injuring the public and unfairly diverting trade from respondent's competitors and otherwise injuring and prejudicing said competitors in their business; and (d) operate as an unfair competitive advantage to respondent and a detriment to and burden upon the legitimate paint manufacturing and marketing industry in this country.

CONCLUSION

Respondent's use in its said paint marketing and distributing business of the false, misleading, and deceptive acts and practices under the circumstances and conditions hereinabove set forth are unfair methods of competition contrary to the public interest, and are and have been injurious and prejudicial to the public and to the competitors of respondent and constitute a violation of the provisions of section 5 of the act of Congress approved September 26,

1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes".

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the record, including the pleadings, the evidence, stipulations, and upon argument of counsel, and the Commission having made its findings as to the facts with its conclusion that respondent has violated the provisions of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

It is now ordered, That, in the course of the sale or distribution in interstate commerce of paints or paint products, the respondent corporation, The Franklin Paint Co., its officers, directors, agents, representatives, servants, and employees, cease and desist:

(a) From directly or indirectly making or causing to be made any representation, statement or assertion, in advertisements, trade promotional literature or in any other manner, to the effect that any such paint or paint product is composed wholly or principally of white lead, zinc oxide and linseed oil with necessary color pigments and dryers; or that any such paint or paint product does not contain titanox, barium sulphate, asbestine, silicious material, or any inert material, if and when such representation, statement, or assertion is not true in fact.

(b) From directly or indirectly making or causing to be made any representation, statement, or assertion, in advertisements, trade promotional literature or in any other manner, to the effect that respondent corporation is the manufacturer of any of said paints or paint products; that it owns, operates, or controls a paint factory, or any other paint manufacturing equipment or facilities used in the manufacture of said paints or paint products; or that customers in purchasing from respondent are thereby dealing directly with the manufacturer of said products; or that in the sale and distribution of said products by respondent corporation to its customers the same are sold and distributed by and from the manufacturer directly to such customers to the exclusion and without the intervention of middlemen, unless and until respondent becomes the manufacturer and actually owns and operates, or directly and absolutely controls such paint factory and paint manufacturing equipment or facilities by which any and all such products so represented are manufactured; or unless and until, so long as said paint or paint

products are manufactured by the Acorn Refining Co. and the relationship subsists between that company and the respondent as set forth in the findings as to the facts, a full and true disclosure of the facts of such manufacture by, and relationship of respondent to, said Acorn Refining Co. be prominently made in conjunction with such representations.

(c) From directly or indirectly making or causing to be made any representation, statement or assertion, in advertisements, trade promotional literature or in any other manner, to the effect that the prices at which respondent sells its products are manufacturer's prices; or that by reason of respondent being such manufacturer and selling its products under a plan or method of distribution by which all costs, profits, or other charges of middlemen are eliminated, respondent's said prices are less than the prices at which paints of equal quality are available, or may be purchased from competitors and from retail stores or through other dealer channels; or that the benefit of such savings by reason of the elimination of such middlemen accrues to purchasers from respondent, or that such a saving is a certain definite amount, such as \$1 or \$1.50 per gallon, or 40 per cent, unless and until respondent owns and operates, or directly and absolutely controls a factory or manufacturing facilities in or by which said products are manufactured, and such representations are otherwise true in fact.

It is further ordered, That respondent corporation, The Franklin Paint Co., shall within 60 days after the service upon it of a copy 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 the order to cease and desist hereinabove set forth.

Commissioner Ferguson dissenting to issuance of order as to use of the word "manufacturer"; Commissioner Humphrey dissenting in memorandum attached.

Dissenting opinion by Chairman Humphrey

One who is not a manufacturer is guilty of an unfair practice in advertising that he is such, because the public believes that by buying from a manufacturer they save the middleman's profit.

There is no such element in this case. The respondent is in every particular regarding additional profits a manufacturer. He is in fact, while not a sole manufacturer, a part manufacturer. There may be a deception in the technical sense to the public, but there is no injury to the public.

Dissent

16 F. T. C.

This case involves a method of business conduct that it is admitted increases the sales of the products of the respondent. It therefore increases competition, and is to that extent in the interest of the public.

To cause the respondent to cease calling itself a manufacturer, would do him substantial injury in many ways. It would benefit no one. I believe that the Commission should issue no order that is not clearly in the interest of the public. This proposition is so plain that it calls for neither argument nor citation of authorities.

Syllabus

IN THE MATTER OF
THE MADISON PAINT COMPANY

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

Docket 1573. Complaint, Feb. 25, 1929—Decision, June 28, 1932

Where a corporation engaged in sale and distribution of paints and paint materials to purchasing and consuming public through large numbers of solicitors in their respective home or local communities, and through catalogues, circulars, newspaper and periodical advertisements and other trade literature,

- (a) Described said paints in its trade promotional literature as composed wholly or principally of the best grades of white lead, zinc oxide, and linseed oil, and its outside house paint as a white lead and linseed oil paint of the highest grade containing only the best and most costly ingredients, through such statements as "Only the finest raw materials that money can buy", "Only first quality white lead, zinc, and linseed oil and other materials", "The finest exterior house paint that money can buy. Made of the purest ingredients, the result of years of research and experience. Covers easiest, lasts longest", etc., "You can buy elsewhere roofing and paints as good * * * but you would have to pay about twice the * * * low direct factory price", and that "unscrupulous manufacturers often take advantage" of common erroneous belief that weight in paint means quality "by loading their paint with barytes or marble dust, which are both very heavy fillers but which do not wear or cover well", and that its house paint was "exactly the right weight because it contains the finest, purest, and the most durable of ingredients";

Facts being its own paint contained (1) such inert pigments as barium sulphate (barytes) and asbestine in proportions regarded by experts as excessive, and, by some, as amounting to adulterants in proportions used, and (2) white lead and zinc oxide only in minor proportions, and formula and composition required and disclosed approximate pigment and vehicle content of 58 per cent and 42 per cent, respectively, and (a) pigment or solid content of 36 per cent titanox, 4 per cent lead sulphate, 20 per cent zinc oxide, 16 per cent barium sulphate and 24 per cent asbestine (with subsequent substitution of 12 per cent white lead for 4 per cent lead sulphate, and 8 per cent barium sulphate, 20 per cent zinc oxide, 16 per cent barium sulphate, and 24 per cent asbestine (with subsequent substitution of 12 per cent white lead for 4 per cent lead sulphate, and 8 per cent barium sulphate for 16 per cent), and (b) vehicle or liquid content of 87 per cent linseed oil, in fact diluted by addition of substantial quantities of soya bean oil, and weight was less than that claimed;

With capacity and tendency to mislead, deceive, and induce purchasing public to buy said paint as and for the preferred and demanded high quality product composed of the generally esteemed white lead, zinc oxide, and pure linseed oil, with necessary color pigment and dryer, and of the best and finest raw paint materials obtainable, and with no such cheap, inert pigments as barium sulphate and asbestine, or any other inert pigment other than necessary coloring pigment, or oil other than pure linseed oil;