

IN THE MATTER OF
THE PROGRESS 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 1575. Complaint, Feb. 26, 1929—Decision, June 28, 1932

Where a corporation engaged in sale and distribution of outside house paint and roof coating 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 outside house paint as a lead and oil paint of highest grade, with pigment content composed wholly of white lead and zinc oxide and vehicle composed wholly of linseed oil and represented said paint as made of the finest raw materials obtainable and its roof coating as containing gilsonite in substantial proportions, through such statements in its trade promotional literature as "the acme of perfection in high grade lead and oil house paint", "Cheap paint is easily loaded with powdered rock or barytes (barium sulphate)", "the only genuine protection * * * Progress House Paint—good old lead, zinc, and oil", "the best paint money can buy * * * You can't afford to use cheap paint. Remember there is a 'joker' in the cheap paint can—it doesn't wear", "Why fool ourselves? We've found nothing yet that can replace the ingredients our forefathers used in making paint and that is lead, zinc, and linseed oil! You can't improve on these products * * *", "When you buy cheap paint something has been put into it that costs less than lead or zinc—some substitute has been added to the linseed oil to cheapen that. Consequently when you buy cheap paint you are getting just what you pay for. You suffer in the cost of application which is the big item and the lack of protection which good paint would give for just a few cents more per gallon. * * *", "We do not sell linseed oil or white lead separately, as we know that a customer cannot make as good a paint by hand as we can through our modern machinery nor as economical", and so worded its instructions to salesmen and trade literature as to directly feature and discuss the asserted and assumed gilsonite composition of its roofing;

Facts being said roof coating did not contain gilsonite in substantial proportions and aforesaid house 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 percent and 42 percent, respectively, and (1) pigment or solid content of 36 percent titanox, 4 percent lead sulphate, 20 percent zinc oxide, 16 percent barium sulphate, and 24 percent asbestine (with subsequent substitution of 12 percent white lead for 4 percent lead sulphate, and 8 percent barium sulphate for 16 percent), and vehicle or liquid content of 87 percent 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 roof coating as and for one containing gilsonite in substantial proportions, and said house paint as and for the preferred, demanded, and long used high quality product composed wholly or principally of the extensively used and 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;

- (b) Represented itself as the manufacturer of aforesaid products, directly owning, operating, or controlling a "million dollar" factory, and depicted factory buildings, machinery, equipment, etc., as true illustrations of the buildings, etc., owned, operated, and controlled by it and alleged that its gross annual sales exceeded several million dollars, it had a Bradstreet rating of GAa \$1,000,000, its factory was "the largest in the land selling direct to users" and engaged in manufacture for over 20 years, making such statements as "Roofing and paint from this million-dollar factory to you", "Twenty-five years in the harness, serving constantly increasing thousands of customers", etc., "Twenty-five years which have seen this company grow from a little obscure 2-story building, with a force you could count on your finger tips, to the present modern million-dollar paint plant, with its towering buildings, acres of floor space", etc., "The factory is the place to buy paint and roofing", "Everything * * * made in our modern fireproof factory. Everything * * * guaranteed fresh", "Rating in Dun's or Bradstreets * * * is GAa \$1,000,000 and over, which is the highest rating we could have", "An old established manufacturer. We manufacture every product you sell", "Sell paint direct from this million-dollar factory", etc.; and
- (c) Represented itself as selling and distributing its products directly from itself as the manufacturer to the consuming public without the intervention of the middleman, jobber, wholesaler, or retailer, selling products at prices lower than those at which products of like quality could be purchased from competitors or retailers and, as manufacturer's prices, containing no costs, profits, or other charges of middlemen or dealers, saving purchasers said costs, etc., at an advantage of from \$1 to \$1.50 a gallon, or 40 percent over prices charged by competitors or retailers for similar products, making such statements as "Twenty-five years devoted to exclusive selling direct from the factory to user at wholesale prices through thousands of specially trained neighborhood service men", "Lower prices because sold direct from the factory to user", "Eliminating the store with its expenses, rent, clerk hire, salesmen, etc., cutting out jobbers, warehouses, trucking charges, and all the other odds and ends that are also added to the price you pay, * * * you come into contact with lower prices that only such a plan worked out to such an extensive degree makes it possible for you to share in * * *", "When merchants and dealers say buy at home remember they are asking you to pay a price that will include their profit—their expense, rent * * * the profit of jobber who sold to them, the jobber's salesman", etc., that "to buy (comparable) products * * * under such a system" (you pay) "from \$4.50 to \$5 per gallon and take a chance as to whether the paint is fresh" instead of paying the "\$3.45 per gallon in barrels for (our) house paint", "Our direct from factory prices * * * will be found 30 percent to 40 percent less than the store cost for

equal quality", "A gallon of the best paint sells from \$5 to \$6 in a paint store. The factory price is \$3.15 a gallon. The difference goes to pay the travelling salesman's salary and expenses, the wholesaler's profit and expenses, the retailer's profit and expenses", "This million-dollar factory sells paints and roofing direct to the user at the factory price * * *";

Facts being it did no manufacturing and neither owned nor operated any factories, machinery, etc., but along with seven other similarly operated corporate selling organizations, secured all its paint from a separate corporate manufacturer (with a reputable appraisal value substantially less than \$1,000,000), 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 some of the buildings, etc., depicted as its own, as above set forth, and connection with which manufacturer was carefully concealed and withheld, with result of permitting sale of said manufacturer's paint in the same localities under the different company names and labels, depiction of factory buildings, etc., were either those of said manufacturers or fictitious, its gross sales averaged about \$1,000,000, and not \$3,000,000 annually, its 50 or 60 employees exclusive of aforesaid neighborhood solicitors were engaged in promoting and effecting sale and distribution of its merchandise, rating referred to was a collective figure applying to entire group under directors' resolution passed to secure such a rating, aforesaid corporate manufacturer charged it for paint in question a sum substantially in excess of said manufacturer's cost, its prices were not factory or factory-wholesale prices, but middleman's prices, and figures at which it resold its said paint represented an increase of 100 percent, or more over price to it and exceeded those charged purchasing public by retail stores for paint of comparable quality, and did not represent claimed savings to purchasing public of \$1 to \$1.50 per gallon or from 20 percent to 40 percent over prices for comparable paints purchased of competitors or retailers;

With capacity and tendency to mislead and deceive the purchasing and consuming public and induce purchase of its said paint and roof coating by such public in the erroneous belief that said false, misleading, and deceptive representations were true in fact, 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 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 competitors, and constituted unfair method 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 the sale and distribution of paints and roof coating to the purchasing and consuming public throughout the several States, through salesmen and agents, catalogues, circulars, letters, color cards, pamphlets and similar sales literature, and advertisements in newspapers, magazines and similar publications of general circulation, and with office and place of business in Cleveland, with misrepresenting business status, advantages and size and composition and quality of product, and advertising falsely or misleadingly in regard thereto, in violation of the provisions of such section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, represents itself as a manufacturer of the products dealt in by it, engaged in business for 22 years or more, operating a "million-dollar" factory and selling directly to manufacturer to consuming public without the intervention of middlemen, or costs, profits or charges thereof, and with the largest paint factory in the land selling direct to users, with gross annual sales exceeding several million dollars, and, by reason of its being the manufacturer of the products dealt in, selling, as above set forth, as able to offer products of better quality and at lower prices than competitors are able to do; respondent further displaying in its advertising and sales literature illustrations purporting to represent its factory buildings, machinery and equipment; the facts being that respondent has been engaged in business for about six years only, neither owns nor operates any factory manufacturing the products dealt in by it, does not market the same at manufacturers' prices, but at dealers' prices, including costs and profits of itself and other middlemen, does not save purchasers from such costs and profits, does not have any such investments as alleged of \$1,000,000, or to any substantial extent, in manufacturing or other facilities, or any such buildings etc., as purportedly shown in aforesaid illustrations, and does not have any such gross annual sales as above claimed, but sales substantially less than \$1,000,000.

Respondent further, as charged, represents its outside house paint coating (a) through and by means of salesmen and agents who, on zinc and linseed oil, and with a pigment composed wholly or principally of white lead and zinc oxide and a vehicle composed wholly of linseed oil, and containing neither barytes, barium sulphate, siliceous matter, calcium carbonate or any inert ingredients, and repre-

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sents a roof coating dealt in by it under the name "Asbesto-Ruf" as containing gilsonite in substantial proportions and as containing no coal tar or other tar, and as a product which, when applied to roofs, will endure and cause the same to become and remain waterproof for 10 years; facts being that aforesaid paint is not composed as represented, but contains large proportions of barium sulphate, or barytes, siliceous matter and calcium carbonate, to wit, approximately 22 percent, 17 percent, and 9 percent, respectively, consists principally of inert ingredients, and is inferior in quality to a paint composed wholly or principally of white lead, zinc, and linseed oil, and that aforesaid "Asbesto-Ruf" does not contain gilsonite in any substantial proportion, but does contain coal tar or other tar and will not cause roofs to which it is applied to remain waterproof for more than five years.

The use by respondent, as alleged, of the aforesaid representations, statements, and assertions "is calculated to mislead and deceive, and said representations, statements, and assertions 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 made by respondent" are true in fact, and respondent's "false, misleading, and deceptive acts and practices have the capacity and tendency to and do unfairly divert trade from competitors, many of whom deal in similar products, without misrepresenting the same or the character of their business and methods of marketing their products"; 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, 1924, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purpose", the Federal Trade Commission on February 26, 1929, issued and thereupon served its complaint in this proceeding upon The Progress 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 Franklin Paint Co., Docket No. 1567, and The Madison Paint Co., Docket No. 1573. Said evidence was duly recorded and filed of record in the office of the Commission, and thereafter a stipulation 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 of 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 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 Progress Paint Co. is a corporation organized under the laws of the State of Ohio in February, 1924, 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 paints and roof coating to the purchasing and consuming public throughout the several States of the United States. The said paints are designated and sold by respondent as the Progress line of paints and they consist largely of outside house paint for use upon dwellings and other buildings and property.

Respondent advertises, offers for sale and sells its paints and roof coating (a) through and by means of salesmen and agents who, on behalf of respondent, solicit purchase orders for said paints and roof

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coating from the purchasing and consuming public throughout the several States of the United States; (b) also through and by means of catalogues, circulars, letters, color cards, pamphlets, and similar sales or trade promotional literature in which it describes, represents, and offers for sale its paints and roof coating, and which it causes to be sent and delivered from time to time by mail and by said salesmen and agents, and otherwise, from its place of business in Cleveland, Ohio, through and into many other States of the United States to numerous customers and prospective customers in such other States; (c) and through and by means of advertisements published by it from time to time in newspapers, magazines, and similar publications of general circulation among the purchasing public throughout the United States and in various sections thereof. Respondent's said salesmen and agents who are active, number about 3,500. They are employed by respondent on a commission basis and solicit orders for and sell said products in their respective home or local communities throughout the United States. Respondent's means of contact with the great majority of such salesmen is entirely through correspondence and through said sales or trade promotional literature which is supplied to such salesmen and used by them in soliciting trade for respondent.

As a result and because of said advertising, soliciting and offering for sale, many members of the purchasing public throughout the United States are thereby induced from time to time to purchase said paints and roof coating from respondent, which purchase orders and such customer's remittances for the purchase price of the products ordered are transmitted from various States to respondent at its place of business in Cleveland, Ohio. To complete the sale in making distribution and delivery of its products, pursuant to said purchase orders, respondent causes its paints and roof coating so ordered and sold to be transported and delivered from its place of business in Cleveland, Ohio, through and into 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, and is and has been engaged in interstate commerce in such sale and distribution of its paints and roof coating. For the years 1928, 1929, and 1930, respondent's total gross sales averaged approximately \$900,000 per annum. Said products are distributed by respondent in the usual commercial containers, such as 1-gallon cans, 5 and 10 gallon cans, kegs, half barrels and barrels. Shipments are made in small quantities of a few gallons up to comparatively large quantities, depending

upon the amount ordered by the respective customer; and such shipments 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 roof coating, house paint, and similar paints 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 paints and roof coating and conducted its said business in direct, active competition with such competing products and with many individuals, partnerships, and other corporations engaged in the sale and distribution of paints and roof coating in commerce in, between, and among the several States of the United States.

PAR. 2. In and through the methods and means used by respondent in advertising, offering for sale and selling its paints and roof coating as hereinabove set forth, and for the purpose and with the effect of thereby inducing the purchasing public to purchase said paints and roof coating, respondent has made, and has caused its paint to be offered for sale, sold, and distributed to the purchasing and consuming public upon various statements, representations, and assertions to the following effect:

(1) That respondent's outside house paint is a lead and oil paint of highest grade; that said paint is composed wholly of lead, zinc, and linseed oil; that the pigment of said paint is composed wholly of white lead and zinc oxide and that the vehicle of said paint is composed wholly of linseed oil; that said paint is the highest grade lead and oil paint, but that cheap paint is easily loaded with powdered rock or barytes (i.e., barium sulphate), the presence of which in a paint can not be detected by the purchaser unless he be a chemist; that people have the misguided impression that because white lead is the principal ingredient of good house paint, that it should be heavy, but that they overlook the fact that there are other substitutes for lead which weigh more than lead but surely do not cover or wear; that such a product is said barytes or barium sulphate which requires a chemist to detect its presence in paint but which makes the paint feel heavy; that, however, respondent's said paint weighs from 15 to 16 pounds to the gallon and is a strictly lead, zinc, and raw linseed oil product.

PAR. 3. The following are among the specific representations of the above-mentioned type as they have been printed by respondent in its said sales or trade promotional literature:

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PROGRESS READY MIXED, HIGH-GRADE HOUSE PAINT

This paint represents the acme of perfection in high-grade lead and oil house paint. * * * (Com. Ex. 42, Color Card.)¹

How are you going to tell good paint from bad? Not by weight. Cheap paint is easily loaded with powdered rock or barytes. You can't analyze it. You can't weather test it. True, the cheap paint won't cover as much as Progress—but how can you determine how long paint or roofing will stand up? Read our answer to these important questions. (Com. Ex. 43-A, p. 6, Catalogue.)

The invisible fire. That is what we Paint Makers call deterioration. Because, whether the sun is shining or not—deterioration is at work—slowly, invisibly burning up your property, and the only genuine protection against it is—Progress house paint—good old lead, zinc, and oil.

To prove Progress house paint will give the satisfaction that only lead and oil can give—remember—the first 3 gallons of your order can be tested by you with the understanding that if you are not satisfied it costs you nothing and we are to dispose of the balance. (Com. Ex. 43-A, pp. 6, 18, 19, Catalogue.)

PROGRESS HOUSE PAINT

The highest grade lead and oil paint fresh from the factory at wholesale prices.

A strictly first-class lead and oil paint—fast colors—spreads easy under the brush—comes ready for use—requires no thinning—weighs from 16 to 18 pounds to the gallon—covers 300 square feet to the gallon two coats. (Com. Ex. 43-B, Price List.)

Progress house paints are strictly fresh—good old lead—zinc and linseed oil. The best paint money can buy. You have our word and reputation for that. You can't afford to use cheap paint. Remember there is a "joker" in the cheap paint can—it doesn't cover and it doesn't wear. (Com. Ex. 43-C, Customer's Copy of Order Blank.)

DO YOU KNOW THAT— * * *

1. That a local county man is neighborhood service man for the Progress Paint Co.? * * *

7. That they sell you lead and oil paint—fresh from the factory at wholesale prices—cheaper than you could make it up yourself?

No factory can make better paint cheaper than Progress. With storage capacity and tankage that enables us to contract for enormous quantities of raw materials and buying in large quantity prices, turning out lead and oil paint with a minimum of labor in a modern factory with up-to-date machinery. Progress offers you a house paint that will cover better, look nicer, last longer than any other paint that sells for \$4 or \$5 per gallon and after wearing as long as good paint should wear, leaves a perfect surface for repainting. (Com. Ex. 45, Leaflet or handbill.)

40. What has weight got to do with quality of house paint? Absolutely nothing. People have the misguided impression that because white lead is the principal ingredient of good house paint that it should be heavy—but they overlook the fact that there are other substitutes for lead that weigh more than lead but surely don't cover or wear. Such a product is barytes. You can't

¹ Exhibits not published.

tell when that is in paint unless you are a chemist—but it sure does make it feel heavy. Progress paint weighs about 15 to 16 pounds to the gallon and is a strictly lead—zinc and raw linseed oil product.

41. How about when a fellow says he can buy lead and oil paint at lower prices? Get a pencil and paper and tell him that this is what it takes to make $7\frac{1}{2}$ gallons of lead and oil paint and figure it out for him. One hundred pounds of lead—five gallons of oil and one half gallon of turpentine. Figure up what it costs from the prices you could buy that material from your local dealer—divide that by $7\frac{1}{2}$ and you will have the cost of real lead and oil paint. Then point out that you figured nothing for labor and that this other fellow who claims his paint is lead and oil can still sell it for less than your prospect can buy the raw products and mix it himself. Ask him how he can do it when the prospect can't. Ask him how he can furnish lead and oil paint at such a price—make a profit—pay his rent and buy it from a factory that has to make a profit—traveling salesmen and pay high advertising bills and I think you will have him whipped.

42. How can my company make lead and oil paint to sell so cheap? Enormous production and output makes it possible to sell a lot of paint at a small profit—much like the Ford Motor Co., makes lots of cars and a little profit on each. Because of this tremendous sales outlet—we can buy the finest raw materials in such enormous quantities as to command the lowest possible cost price. Then with facilities for storage that includes 500,000 gallon tankage storage for oils, etc., is the reason why we can sell a quality product at from 75 cents to \$1.25 lower than any other manufacturer could market it thru dealers.

52. Why is zinc used with lead in making paint? Zinc is used in paint for the same purpose that copper alloy is used with gold. To make it more firm and to wear properly. Pure gold would be too soft to use alone and so would lead. However, only a factory that knows how to make paint is capable of using zinc as it should be used and paint without zinc is too soft to last. (Com. Ex. 46, pp. 12, 13, 15; also Com. Ex. 136.)

COVERING CAPACITY OF PROGRESS PRODUCTS

House paint (lead and oil), 300 square feet per gallon, 2 coats. (Com. Ex. 46.)

Paint Superintendent Rumberg shows Batchelder, Miller, and aides—Giant grinding mills grinding whitelead, zinc, and linseed oil into Progress house paint. (Here appears depiction of factory scene showing battery of paint grinding mills.)

Here we see our division sales managers learning from actual observation why Progress house paint is so superior to any other house paint on the market—even to lead and oil as mixed by hand. These mills are worked on the same order as a flour mill, only the lead, zinc, and coloring pigments pass between the stones and the oil is permanently ground into the pigment. Where they entered this mill as distinct products, they come out as one finished paint and the oils and pigments will never separate, but combine effectively to give the greatest possible satisfaction wherever used. (Com. Ex. 47, Progress Torch, House organ.)

Don't gamble with cheap paint—you lose every time! Paint is one thing that can't be cheap and at the same time inexpensive. There is only one way you can get paint that is really inexpensive to you and that is to get a paint

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with great covering power (at least 300 to 325 square feet to the gallon), a tough wearing paint film that only rough hard wearing white lead, zinc, and linseed oil can produce and third colors ground in oil by powerful paint mills like Progress uses. Such a paint can't be made and sold for \$2.75 per gallon, etc., as the ingredients are too costly. Remember this and use this argument when you are up against cheap paint competition if you want to call it competition—this month. (Com. Ex. 49, Progress Torch, p. 3.)

Group of Progress salesmen learn why Progress house paint is different from the others. (Here appears the depiction of a factory scene showing a battery of paint grinding mills and a group of visiting individuals.)

Here are a group of Progress salesmen being conducted through our factory and having explained to them—Why Progress ready mixed lead and oil house paint is different and better than lead and oil hand mixed on the job. Here is a series of our powerful grinding mills—where the lead and zinc are ground into the oil in such a manner that there can be no more complete separation.

Contrast to this what a painter attempts to do by stirring with a stick and you will see why hand mixed paint chinks and rubs off a surface even if it is pure lead and oil. There is no blending—and the oil soaks into the wood leaving the dry lead to wash off the surface. With the Progress method—the lead and zinc is so thoroughly a part of the oil that when the oil soaks into the wood—it takes the lead and zinc with it—giving 100 percent protection and wearing power. Progress house paint will not brush off—wears evenly with a protective gloss finish and gives years of service. (Com. Ex. 53, Progress Torch, p. 2.)

You've probably read in magazines and periodicals how one of the nationally known paint manufacturers is exposing this creature in their advertisements—"You can't paint a house with applesauce", and about the joker that's to be found in the cheap paint can! No truer word was ever uttered. Why fool ourselves? We've found nothing yet that can replace the ingredients our forefathers used in making paint and that is lead, zinc, and linseed oil! You can't improve on these products, although modern paint machinery has improved the quality of the finished paint by grinding the lead and zinc into the oil instead of mixing it together with a stick.

When you buy cheap paint something has been put into it that costs less than lead or zinc—some substitute has been added to the linseed oil to cheapen that. Consequently when you buy cheap paint you are getting just what you pay for. You suffer in the cost of application which is the big item and the lack of protection which good paint would give for just a few cents more per gallon. * * * (Com. Ex. 57, Progress Torch, p. 2.)

PAR. 4. The representations with respect to said house paint being a lead and oil paint of highest grade and as having a composition, as more fully set forth hereinabove, of lead, zinc, and linseed oil and as not being a cheap paint or of the inferior class of paints which are loaded with barytes or barium sulphate, were used continuously throughout a period of more than three years prior to the issuance of the complaint and for a period of approximately 10 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 from its direct statements as to the ingredients of the paint, the specific mention of the terms "white lead" or "lead", "zinc oxide" or "zinc" and "linseed oil" or "oil" as constituting the composition thereof, and substituting therefor, or printing in such places, expressions to the effect that—

This paint represents the acme of perfection in high-grade ready-mixed house paints. It is made from selected raw materials—thoroughly tested in our laboratories—and scientifically blended to produce—protection—durability—attractiveness and general service (Resp. Ex. 15); that it is the highest grade of paint made fresh from the factory at wholesale prices; a strictly first class paint (Resp. Ex. 17); that it is the very highest grade of house paint you ever dipped a brush into * * * (Resp. Ex. 16); that it is the best paint money can buy (Resp. Ex. 18); that respondent's paints are made the best way our skilled chemists know how out of the highest class of raw materials obtainable (Resp. Ex. 19, p. 19).

The foregoing changed representations are currently used by respondent. In addition thereto the current sales literature of respondent perpetuates the following representations of the type hereinabove referred to and from which the specific mention of such terms "white lead" or "lead", "linseed oil" or "oil" or the reference to said inferior paint ingredient barium sulphate have not been eliminated:

40. What has weight got to do with quality of House Paint? Absolutely nothing. People have the misguided impression that paint must be heavy to be of good quality—but they overlook the fact that there are many ingredients that can be added to paint to make it heavy—but still will not cover or wear well. Such a product is known as barium sulphate. You can't tell when that is in paint unless you are a chemist—but it sure does make it feel heavy. Progress paint weighs about 15 or 16 pounds to a gallon.

41. How about when a fellow says he can buy lead and oil paint at lower prices? Get a pencil and paper and tell him that this is what it takes to make $7\frac{1}{2}$ gallons of lead and oil paint and figure it out for him. One hundred pounds of lead—five gallons of oil and one half gallon of turpentine. Figure up what it costs from the prices you could buy that material from your local dealer—divide that by $7\frac{1}{2}$ and you will have the cost of real lead and oil paint. Then point out that you figured nothing for labor and that this other fellow who claims his paint is lead and oil can still sell it for less than your prospect can buy the raw products and mix it himself. Ask him how he can do it when the prospect can't. Ask him how he can furnish lead and oil paint at such a price—make a profit—pay his rent and buy it from a factory that has to make a profit—traveling salesmen and pay high advertising bills and I think you will have him whipped.

78. Do you sell linseed oil and white lead separately? We do not sell linseed oil or white lead separately, as we know that a customer can not make as good a paint by hand as we can through our modern machinery nor as economical, (Resp. Ex. 19, pp. 12, 21.)

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The evidence, which was introduced by respondent, shows that respondent has discontinued, some 10 months after the date of the complaint, the practice of issuing the handbill Commission's Exhibit 45 as part of its trade promotional literature; and that in January, 1931, it discontinued publishing said house organ, *The Progress Torch*.

PAR. 5. In truth and in fact said house paint as marketed by respondent throughout said period of years under the representations described in paragraphs 2, 3, and 4 hereof, is not and has not been a lead and oil paint; nor is, nor has it been composed wholly or principally of white lead, zinc oxide and linseed oil with or without the necessary color pigments and dryers, but in fact contained and still contains white lead and zinc oxide only in small or minor proportions with a barium sulphate or barytes content both as a separate ingredient and as a large proportion of a combination ingredient; titanox; and, during a period was made with the oil ingredient containing soya bean oil which was substituted in part for linseed oil as herein-after described.

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

	Percent
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 percent of the paint):

	Percent
Linseed oil	87
Mineral spirits and dryers (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 hereafter, 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 percent of the paint) :

	Percent
Titanox	38
Lead sulphate	4
Zinc oxide	20
Barium sulphate	16
Asbestine	24
Total	100

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

	Percent
Refined linseed oil	87
Oil dryer and thinner	13
Total	100

(c) In 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 formulae. In the manufacture of the paint under said master formula covering the period October 26, 1925, to December 31, 1930, it was not purely linseed oil which was in fact used for the ingredient listed as "refined linseed oil, 87 percent," 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 variation 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 percent barium sulphate, also called barytes, and 25 percent titanium dioxide. Thus, when expressed by its component parts, the item of 36 per cent titanox in the above-stated master formulae may be rendered 9 percent titanium dioxide and 27 percent barium sulphate. The respective items of 8 percent and 16 percent barium sulphate in the above-mentioned master formulae 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 percent barium sulphate and 24 percent asbestine in the currently used master formula above stated, and the 16 percent barium sulphate and 24 percent asbestine in said former master formula, are inert paint pigments, while the remaining pigments listed in said formulae 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 years 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 percent and 60 percent greater bulk than zinc and lead, respectively. Asbestine is a siliceous material which is likewise inert and has little or no opacity in com-

parison 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 facts 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 class 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. Respondent introduced testimony, however, to the effect that it is chemically inert. It has high hiding power, and as shown by the figures above stated, it has about 60 percent greater bulk than lead and 35 percent greater than zinc. The pigment is used by some manufacturers 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. They rank high and are extensively used by paint manufacturers as the principal pigments for paint of highest or best quality. Linseed oil is likewise recognized and considered as a product of highly desirable qualities 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 dryer, and so-called lead and oil paint, are paints which are among those of the highest grade or best quality and have been considered and generally recognized as such among paint manufacturers, dealers, users, and consumers. And paints composed wholly or principally of such ingredients, and so-called lead and oil paint, are in demand by the purchasing and consuming public, and the composition of such paints is a sales advantage and an important factor which is conducive to the sale of such paints. Lead and oil paint has white lead as its pigment, exclusive of coloring pigment, and linseed oil as the oil ingredient. Such paint has long been used by master painters for outside house paint, and is the type of paint which is frequently mixed by hand as used or needed for any par-

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ticular painting job. The reputation and recognition of such lead and oil product as paint of first or best quality has existed among painters and the public generally for many years.

(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, lead and oil paints, and paints manufactured of white lead, zinc oxide, and linseed oil or paints containing only the best or highest 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, lead and oil paints, or paints composed of the highest class or 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 percent 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 percent 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 superintendents of the factory where the paint was made, which superintendents 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. In representing its paint as composed wholly of lead, zinc and linseed oil as set forth in paragraph 3 hereof, respondent also represented in effect that barytes or barium sulphate is a substitute for lead,

is used to load cheap paint, and as a paint ingredient makes the paint feel heavy, but does not cover or wear.

(i) Respondent's said house paint as made under said master formulae used prior to and since January 1, 1931, weighs 14 pounds to the gallon and not 15 or 16 pounds, or 15 to 18 pounds (as represented by respondent on page 12 of Com. Ex. 46 and Resp. Ex. 19) and in price list (Com. Ex. 43-B) quoted in paragraphs 3 and 4 above. (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. 6. 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 exclusive of necessary color pigment and dryer, or lead and oil paint, 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, and that all the ingredients thereof are of the highest class raw paint materials obtainable, as more particularly set forth in paragraphs 2, 3, and 4 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, nor 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. 7. 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 and was not a lead and oil paint as represented, but was in truth manufactured with the ingredients as described in paragraph 5 hereof, contained said barytes or barium sulphate besides asbestine, titanox, and soya bean oil. Throughout the period of years in which said false, misleading, and deceptive representations were used, either prior or subsequent to the issuance

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of the complaint, respondent's customers were not advised or informed by respondent through its trade promotional literature or otherwise that in fact said paint is not in truth composed as stated in its representations above described or that it contained barytes or barium sulphate, or asbestine or any 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. 8. Further, in the course and conduct of the business of promoting and effecting the sale and distribution of its paint and roof coating as hereinabove described, respondent has caused throughout the period of more than 3 years prior to the issuance of the complaint and thereafter, and still causes, its said paints and roof coating to be offered for sale and sold to its customers, the purchasing and consuming public of the several States, upon various representations, statements, and assertions to the following effect:

That respondent is the manufacturer of said products and that it directly owns, operates, or controls a "million-dollar" factory in which it manufactures said products; that in the sale and distribution of said products it acts as a manufacturer and not as middleman or dealer; that it sells and distributes said products directly from itself, as the manufacturer, to the consuming public without the intervention of any middleman, jobber, wholesaler or retailer; that its gross annual sales of its products exceed several million dollars; that its paint factory is "the largest in the land selling direct to users" and that it has investments in said paint factory and other business facilities to the extent of \$1,000,000; that it is a million dollar company, has a million dollar rating; that its rating in Bradstreets is "GAa \$1,000,000.00"; that it "is rated in Bradstreet's Mercantile Book as HAa, or better than one million dollars credit rating"; that respondent is the oldest manufacturer of liquid roofing in the world; that the illustrations or pictorial representations of factory buildings and manufacturing machinery and equipment shown in its aforesaid advertising and sales or trade promotional literature are true illustrations and pictorial representations of factory buildings, manufacturing machinery and equipment which it directly owns, operates, controls, or uses in manufacturing its said product; that it has been engaged in its business and in manufacturing said products for 22 years or more; that because it is the manufacturer thereof said prod-

ucts are of better quality than similar products sold by competing dealers, and that respondent's prices for its products are cheaper and lower than the prices at which similar products of like quality can be purchased from respondent's competitors; that the prices at which respondent sells its products are manufacturer's prices and not dealer's or middleman's prices, and that respondent's prices do not contain any costs, profits, or other charges of middlemen or dealers; that in purchasing said products from respondent the purchasers thereby save to themselves the costs, profits, and other charges of any and all middlemen or dealers; that, by reason of its advantages in being such a large manufacturer and selling at factory prices direct to consumer, its prices on paint are from \$1 to \$1.50, or 40 percent less than competitors' prices for similar quality paints and the prices at which such similar quality paints are sold by or may be purchased by the public from retail stores or other competitors.

PAR. 9. The following described specific instances of the foregoing representations, statements, and assertions are among those which respondent has caused to be set forth in its sales or trade promotional literature:

(a) On the outside cover of its catalogue (Com. Ex. 43-A and Resp. Ex. 16) respondent depicts large factory buildings or factory with the following prominent statement:

Roofing and paint
from this million-dollar factory
to you
on credit

On the inside of the catalogue, which is arranged so as to appeal to the purchasing public and is displayed to purchasers and prospective purchasers by respondent's salesmen, appear such representations as follows:

The Progress Paint Co. has become the largest in the land selling direct to the user.

George E. Spencer, general manager, pledges you superior quality and better service.

Twenty-five years in the harness, serving constantly increasing thousands of customers—over and over again—selling their friends and neighbors thru the good name established by our products in the strongest testimonial I can offer as to the reputation and quality of Progress products.

Twenty-five years which have seen this company grow from a little obscure two-story building, with a force you could count on your finger tips, to the present modern million dollar paint plant, with its towering buildings, acres of floor space, tanks with storage capacity of better than 250,000 gallons of liquids and its hundreds of loyal, efficient employees!

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Twenty-five years devoted to exclusive selling direct from the factory to user at wholesale prices thru thousands of specially trained neighborhood service men who are proud of their house, its reputation, and its merchandise!

LOWER PRICES

Because sold direct from the factory to user

The Progress plan is like a gigantic chain extending across the entire United States—eliminating the store—with its expenses, rent, clerk hire, salesmen, etc.—cutting out the jobbers' warehouse—trucking charges, and all the other odds and ends that are always added to the price you pay! There is but one connection—the direct line that leads from the factory where Progress products are made—to you! Thus again you come into contact with lower prices that only such a plan, worked out to such an extensive degree, makes it possible for you to share in such an effective money-saving manner.

When merchants and dealers say, "buy at home," remember, they are asking you to pay a price that will include their profit—their expense, rent, heat, light, clerk hire—the profit of the jobber who sold to them—the jobber's salesman, and from that to the factory who sold the jobber—plus their profit—their salesman's expense and salary in this business. In back of it all, the paints they offer you—they bought out of town and nine times out of ten, from the same city Progress products come from!

To buy products equal to Progress products under such a system, you would have to pay from \$4.50 to \$5 per gallon and take a chance as to whether the paint was fresh or last year's stock! In comparison, Progress paints—the best that can be made, sells for \$3.45 per gallon in barrels for house paint! Remember, too—it isn't "How much you pay for paint," but it is, "How often you pay!" No matter how well off you are—you can't afford to use cheap paint—for in the end it's too expensive. There is always a joker in the cheap paint can! Play safe! Buy from the factory through the Progress plan and from our local neighborhood service man who is your neighbor!

Our direct from Factory prices on house and barn paint will be found 30% to 40% LESS than the store-price for EQUAL QUALITIES. Where mail-order houses quote a price close to ours, WE GUARANTEE 50% BETTER QUALITY, OR MONEY REFUNDED. It stands to reason, a million dollar factory can sell paint for less money than DEALERS.

The FACTORY is the place to buy PAINT and ROOFING (Com. Ex. 43-A; Resp. Ex. 16.)

When you need paint—Varnish or Roofing—Write us to
send our neighborhood service man.

He can save you from 20% to 40% by DIRECT FROM FACTORY TO CONSUMER wholesale prices—fresh paints—full of life—maximum covering capacity, and greatest durability. (Com. Ex. 43-C.)

(b) On the leaflet (Com. Ex. 43-D) appears a depiction of what purports to be a large factory which depiction is referred to as follows:

Go partners with this million-dollar paint factory.

A gallon of the best paint sells for \$5 to \$6 in a paint store. The factory price is \$3.15 a gallon. The difference goes to pay the traveling salesman's salary and expenses, the wholesaler's profit and expenses, the retailer's profit

and expenses. None of these things add to the quality of the paint, they only increase the price to the user.

This million-dollar factory sells paints and roofing direct to the user at the factory price. Thru our own factory representatives in every county.

Direct-selling from factory to user is here to stay. Developed out of the necessity to eliminate waste in distributing necessities. This huge factory sells several millions of dollars worth of paints and roofing—direct to users. Not a dollar's worth is sold thru dealers.

Here's that opportunity—the kind of a chance you have been waiting for and hoping for. An opportunity to hook up with one of the leading paint and roofing manufacturers in the country. A concern rated at one million dollars in Bradstreet's.

FACTORY WHOLESALE PRICES!

DIRECT TO USERS

Progress salesmen find our prices are lower than those of retail stores or mail-order houses—this proves—the factory is the place to buy paint and roofing—but low prices by itself mean nothing—quality must be considered when you talk price. It is the superior quality of our paints and roofing combined with our extremely low factory wholesale prices that produces the sales made to several thousand satisfied progress customers in every state in the union.

The foregoing circular (Com. Ex. 43-D) was used by respondent until March, 1931.

(c) Respondent's letterheads, appearing on all its trade promotional letters and communications to salesmen and to customers, are as follows:

The Progress Paint Company
Manufacturers of
Asbestoruf
House & barn paints—enamels
Technical paints—varnishes & stains
Cleveland, Ohio, U.S.A.

Such letters also contain the printed slogan:

The factory is the place to buy paint and roofing. (Com. Ex. 43-E.)

(d) Respondent's color card, illustrating the various colors of its paints for the customer's selection, carries the following:

Progress
Paint & varnish
Products
For outside and inside use
The factory is the place to buy paint
Manufactured by
The Progress Paint Co.
Cleveland, Ohio
Facts worth knowing of Progress products

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Everything in the Progress line is made in our modern fireproof factory. Everything is guaranteed fresh as we carry no great stock on hand made up. It comes direct from the mills to you and at wholesale prices. Our aim is not to give you the cheapest paint in price but the lowest price paint in quality that can be purchased. One must consider today, with the high cost of application, that a few cents saved here or there in the cost of material used may mean dollars wasted in the cost of application where it fails to stand up. The best paint is the cheapest as any practical property owner will tell you and the best paint made is the paint you buy direct from this factory as the factory is the place to purchase paint. (Com. Ex. 43-F; Resp. Ex. 15.)

(e) In letters sent to salesmen respondent represents that its paints are sold at a "factory wholesale price" (Com. Ex. 44); that respondent is a "million dollar company" (Com. Ex. 5); that "you're with a twenty-two year old million dollar house * * *" (Com. Ex. 51-A); that the rating in Dun's or Bradstreet's of the Progress Paint Co. is "GAa \$1,000,000 and over, which is the highest rating we could have." (Com. Ex. 132); that the customer "takes no chances for at all times he is fully protected by our money back guarantee—our free trial offer and our million dollar rating. He is not fooling with a new comer—but a company 25 years old and he is getting his paint through the Progress plant at factory prices." (Resp. Ex. 22.)

(f) The handbill, distributed by respondent to the purchasing public for a period ending about 10 months after the date of the complaint, contains the following:

DO YOU KNOW THAT—

2. That this company is rated in Bradstreet's with \$1,000,000 rating and has been manufacturing paint for 22 years?

4. That they can save you from 25 to 50 percent on your paint and roofing bills?

5. That they are the oldest manufacturers of roofing in the world?

Progress paints save you money because they are sold to you direct from the factory at wholesale prices. You buy your paint from Progress at the same price your local dealer buys from the people he deals with. You save the difference. (Com. Ex. 45.)

(g) Printed instructions for salesmen's use in promoting sale of respondent's products, contain the following:

CONFIDENTIAL INFORMATION FOR
PROGRESS NEIGHBORHOOD
SERVICE MEN

1. Who is the Progress Paint Co.? Your company is a manufacturer of the complete line of paints, varnishes, stains, and liquid roofing. Been in business 25 years and is rated in Bradstreet's Mercantile Book as HAa or better than \$1,000,000 credit rating. Your company sells all products direct from factory to consumer at wholesale prices. Your products are never sold through dealers or jobbers or anyone for resale purposes.

49. How can I save people money on paint? By selling them the best paint made at the factory wholesale price. If they were to go to a paint dealer and bring a sample of Progress paint and ask that dealer to have his factory duplicate that sample—such a paint would cost him anywhere from 25 percent to 40 per cent more when bought through the dealer. By dealing with you—he can get that paint at the same price the dealer would buy from his factory. Your paint is fresh—full of life—good covering capacity—you use less paint.

61. Are you manufacturers or just jobbers? Your company is an old established manufacturer. We manufacture every product you sell—we even make our own steel barrels and other containers and employ several hundred men and women. (Com. Ex. 46; Current book, Resp. Ex. 19.)

(h) Among the depictions and other representations of factory scenes and factory equipment are the following published by respondent in its house organ, *The Progress Torch*, distributed as trade promotional literature:

FROM START TO FINISH THIS BUNCH SAW EVERYTHING. HERE THEY ARE
WATCHING THEIR ORDERS BEING FILLED.

[Here appears a depiction of a factory scene showing factory workmen being observed by a company of visitors]

The men you see in this picture won this opportunity to visit the great Progress factory by their constant efforts to get ahead—by their sales and ability to do their share. To-day they are all out on their territories with many salesmen under their control pushing Progress to the utmost to keep up with orders. You, too, may be in such a group some day if you do as they have done. If you work as these men have worked. We aim to have as many men in to inspect our big plant as possible when their business warrants it and when you read the letters of appreciation from these men that will appear in next month's *Torch*, I am sure you will work tooth and nail to be among the next group invited in at our expense. (Com. Ex. 47, p. 3, *The Progress Torch*, April, 1928.)

Every man who has ever owned a Progress selling kit can go out to-day and though he never sold a gallon of paint in his life—will be able to do so now and clean up the big money that has been the lot of every man who has ever pushed this great line.

With the Progress factory keyed up to maximum capacity—a night shift in operation now—several weeks before it was necessary last year—a modern conveyor system to facilitate rapid handling of orders—we are now ready to handle the greatest volume of business any single paint factory ever handled in a season. There will be no delayed orders—or complaining customers if Mr. Tatje, our general superintendent has anything to do with it and consequently—every man is urged now to go out after orders like he has never done before. No matter what has happened—let not a single thing stop you from getting into the field and staying there every day from now on until Christmas! There is great work for Progress salesmen to do. Much ground to cover and we must realize that property owners won't wait—once they make up their minds to order.

In keeping with our policy of doing everything possible to make Progress salesmen the highest paid representatives in the direct selling field—Progress has added to its staff Mr. Carl Rumberg, who, after concluding a scientific

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education dealing with paint subjects has also put in considerable time right in the Progress factory—in order that he might know from the ground up—everything about Progress products and thus be able to render you first-hand information on any problem that you may need assistance that you may grow and thrive and increase your earning powers with this line.

HOW TO USE YOUR CATALOGUE

Your catalogue my friend is your "pick and shovel" in the most remunerative trade you ever tackled. It has been prepared so that handled rightly—it will of itself be able to sell the prospect! It contains the best features and ideas of the cream of Progress salesmen but the only thing it lacks is "legs." You've got to provide them and if you do and take it around to property owners it will do the rest. When you bring it in to a property owner—begin at the first page of the book and take him through it—page by page—calling his attention to each feature—step by step—and it will bring him back to you on the last page as the neighborhood service man ready to take his order and render him the service that will make your presence felt in that community—quality merchandise and at price-saving possibilities. (Com. Ex. 53.)

(i) In magazine advertisement (Com. Ex. 137), published by respondent after the date of the complaint, and setting forth matters as the basis on which salesmen sell its products, appears the following:

Sell paint

Direct from this million-dollar factory
on easy credit terms
at factory wholesale prices
The Progress Paint Co.
Cleveland, Ohio

(In conjunction with the above statement appears a depiction of large factory buildings which depiction is fictitious to the extent that in reality no such factory of the respondent exists or is in operation, and further, in that it is not a true depiction of the factory in which respondent's paint is manufactured or the factory of the Acorn Refining Co. hereinafter referred to. A similar depiction of factory was displayed in the magazine advertisement. (Com. Ex. 41.)

PAR. 10. The true facts in regard to said representations are and have been as follows:

(a) Respondent corporation, The Progress Paint Co., is not a manufacturer and does not manufacture any of the paint, roof coating, or other products which it markets, but procures such products from the Acorn Refining Co. at certain prices charged therefor by such Acorn company. The Progress 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 sales or trade promotional literature, or any other paint manufac-

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turing equipment or facilities. The authorized capital stock of such Progress company is \$25,000, par value, and all its physical property, listed on its books at \$2,474.66, consists of furniture and fixtures such as office desks, chairs, dictaphones, typewriters, files, and other office equipment, which are used in the promotion, sale, and distribution of its products. Its other assets consist of cash, accounts receivable, deferred expenses and money advanced to salesmen, with all assets totaling a little less than \$100,000. Said Progress corporation has no factory superintendent, nor does it employ any paint manufacturing experts, chemists or any other employees engaged in manufacturing. Besides said salesmen respondent corporation's employees number between 50 and 60, and all are engaged under the supervision of a sales manager in the work of promoting and effecting the sale and distribution of its merchandise. It is not a million dollar company or manufacturer as represented, nor does it have gross annual sales of several million dollars, but as stated in paragraph 1 hereof, such gross annual sales averaged about \$1,000,000. Respondent corporation does not purchase, store, test or otherwise handle or use any raw materials for the manufacture of paint or roof coating.

(b) The said Acorn Refining Co. is an Ohio corporation engaged since about the year 1914 in the manufacture of a complete line of paints or paint products and roof coating, 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 products, at prices hereinafter stated, to the respondent and to seven other similarly situated corporations including the Madison Paint Co. and the Franklin Paint Co., respondents in Dockets 1573 and 1567, 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 Progress 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 products to its customers. Besides paint and roof coating, respondent also purchases various other supplies and services used in its business from said Acorn company.

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(c) Respondent's sales manager testified that the picture of the large paint factory appearing on the outside of respondent's catalogue (Com. Ex. 43-A and Resp. Ex. 16) originated in the mind of the artist employed to prepare the same for publication and that the artist was in Chicago and was not familiar with the factory of the Acorn Refining Co. Such depiction of a paint factory, in connection with which also appears the statement "Roofing and paint from this million-dollar factory to you on credit", is wholly fictitious. The depictions of a paint factory elsewhere in said trade promotional literature are also fictitious in that respondent has no such factory or any factory, and such depictions are not accurate depictions of the factory of the Acorn Refining Co. and do not show the sign "Acorn" which is in reality on the front of said Acorn factory and an integral part of said building of the Acorn Refining Co. Said other depictions of factory equipment and manufacturing scenes are in fact depictions of equipment and scenes in the Acorn Refining Co. factory. Such depictions, however, are represented in respondent's literature as being depictions of the Progress factory and of factory equipment and facilities owned or operated by respondent corporation, The Progress Paint Co.

(d) Prior to the issuance of the complaint and until about January, 1930, substantially all of the capital stock of the respondent corporation, The Progress Paint Co., was owned in equal proportions by E. M. Katz and S. S. Sanders, president and secretary-treasurer, respectively, 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 Progress 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 example, it is sold by The Progress Paint Co. as the Progress line of paints; by the Franklin Paint Co. as the Franklin 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 percent to 23 percent 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 Progress Paint Co., for said paint, and roof coating are the Acorn Refining Co.'s so-called "blue book" prices less 15 percent, and that such prices represented only the Acorn Refining Co.'s cost; that all the profits in the distribution of the products sold by respondent to the public are allowed to accumulate in the name of The Progress Paint Co. and are taken out mainly, if not entirely, in the form of salaries to said Katz and Sanders rather than 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, secretary-treasurer 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 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. Until March, 1928, respondent was listed by Bradstreet's as follows:

Progress (The) Paint Co. W÷HAa

Since then such rating was given as W+GAa

Such symbol W designates the business of the company as wholesale. HAa stands for a capital rating of \$750,000 to \$1,000,000 and GAa for \$1,000,000 and up in capital rating. Said division sign means that such rating covers two or more corporations and in this

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of the complaint, respondent's customers were not advised or informed by respondent through its trade promotional literature or otherwise that in fact said paint is not in truth composed as stated in its representations above described or that it contained barytes or barium sulphate, or asbestine or any 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. 8. Further, in the course and conduct of the business of promoting and effecting the sale and distribution of its paint and roof coating as hereinabove described, respondent has caused throughout the period of more than 3 years prior to the issuance of the complaint and thereafter, and still causes, its said paints and roof coating to be offered for sale and sold to its customers, the purchasing and consuming public of the several States, upon various representations, statements, and assertions to the following effect:

That respondent is the manufacturer of said products and that it directly owns, operates, or controls a "million-dollar" factory in which it manufactures said products; that in the sale and distribution of said products it acts as a manufacturer and not as middleman or dealer; that it sells and distributes said products directly from itself, as the manufacturer, to the consuming public without the intervention of any middleman, jobber, wholesaler or retailer; that its gross annual sales of its products exceed several million dollars; that its paint factory is "the largest in the land selling direct to users" and that it has investments in said paint factory and other business facilities to the extent of \$1,000,000; that it is a million dollar company, has a million dollar rating; that its rating in Bradstreets is "GAa \$1,000,000.00"; that it "is rated in Bradstreet's Mercantile Book as HAa, or better than one million dollars credit rating"; that respondent is the oldest manufacturer of liquid roofing in the world; that the illustrations or pictorial representations of factory buildings and manufacturing machinery and equipment shown in its aforesaid advertising and sales or trade promotional literature are true illustrations and pictorial representations of factory buildings, manufacturing machinery and equipment which it directly owns, operates, controls, or uses in manufacturing its said product; that it has been engaged in its business and in manufacturing said products for 22 years or more; that because it is the manufacturer thereof said prod-

ucts are of better quality than similar products sold by competing dealers, and that respondent's prices for its products are cheaper and lower than the prices at which similar products of like quality can be purchased from respondent's competitors; that the prices at which respondent sells its products are manufacturer's prices and not dealer's or middleman's prices, and that respondent's prices do not contain any costs, profits, or other charges of middlemen or dealers; that in purchasing said products from respondent the purchasers thereby save to themselves the costs, profits, and other charges of any and all middlemen or dealers; that, by reason of its advantages in being such a large manufacturer and selling at factory prices direct to consumer, its prices on paint are from \$1 to \$1.50, or 40 percent less than competitors' prices for similar quality paints and the prices at which such similar quality paints are sold by or may be purchased by the public from retail stores or other competitors.

PAR. 9. The following described specific instances of the foregoing representations, statements, and assertions are among those which respondent has caused to be set forth in its sales or trade promotional literature:

(a) On the outside cover of its catalogue (Com. Ex. 43-A and Resp. Ex. 16) respondent depicts large factory buildings or factory with the following prominent statement:

Roofing and paint
from this million-dollar factory
to you
on credit

On the inside of the catalogue, which is arranged so as to appeal to the purchasing public and is displayed to purchasers and prospective purchasers by respondent's salesmen, appear such representations as follows:

The Progress Paint Co. has become the largest in the land selling direct to the user.

George E. Spencer, general manager, pledges you superior quality and better service.

Twenty-five years in the harness, serving constantly increasing thousands of customers—over and over again—selling their friends and neighbors thru the good name established by our products in the strongest testimonial I can offer as to the reputation and quality of Progress products.

Twenty-five years which have seen this company grow from a little obscure two-story building, with a force you could count on your finger tips, to the present modern million dollar paint plant, with its towering buildings, acres of floor space, tanks with storage capacity of better than 250,000 gallons of liquids and its hundreds of loyal, efficient employees!

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Twenty-five years devoted to exclusive selling direct from the factory to user at wholesale prices thru thousands of specially trained neighborhood service men who are proud of their house, its reputation, and its merchandise!

LOWER PRICES

Because sold direct from the factory to user

The Progress plan is like a gigantic chain extending across the entire United States—eliminating the store—with its expenses, rent, clerk hire, salesmen, etc.—cutting out the jobbers' warehouse—trucking charges, and all the other odds and ends that are always added to the price you pay! There is but one connection—the direct line that leads from the factory where Progress products are made—to you! Thus again you come into contact with lower prices that only such a plan, worked out to such an extensive degree, makes it possible for you to share in such an effective money-saving manner.

When merchants and dealers say, "buy at home," remember, they are asking you to pay a price that will include their profit—their expense, rent, heat, light, clerk hire—the profit of the jobber who sold to them—the jobber's salesman, and from that to the factory who sold the jobber—plus their profit—their salesman's expense and salary in this business. In back of it all, the paints they offer you—they bought out of town and nine times out of ten, from the same city Progress products come from!

To buy products equal to Progress products under such a system, you would have to pay from \$4.50 to \$5 per gallon and take a chance as to whether the paint was fresh or last year's stock! In comparison, Progress paints—the best that can be made, sells for \$3.45 per gallon in barrels for house paint! Remember, too—it isn't "How much you pay for paint," but it is, "How often you pay!" No matter how well off you are—you can't afford to use cheap paint—for in the end it's too expensive. There is always a joker in the cheap paint can! Play safe! Buy from the factory through the Progress plan and from our local neighborhood service man who is your neighbor!

Our direct from Factory prices on house and barn paint will be found 30% to 40% LESS than the store-price for EQUAL QUALITIES. Where mail-order houses quote a price close to ours, WE GUARANTEE 50% BETTER QUALITY, OR MONEY REFUNDED. It stands to reason, a million dollar factory can sell paint for less money than DEALERS.

The FACTORY is the place to buy PAINT and ROOFING (Com. Ex. 43-A; Resp. Ex. 16.)

When you need paint—Varnish or Roofing—Write us to
send our neighborhood service man.

He can save you from 20% to 40% by DIRECT FROM FACTORY TO CONSUMER wholesale prices—fresh paints—full of life—maximum covering capacity, and greatest durability. (Com. Ex. 43-C.)

(b) On the leaflet (Com. Ex. 43-D) appears a depiction of what purports to be a large factory which depiction is referred to as follows:

Go partners with this million-dollar paint factory.

A gallon of the best paint sells for \$5 to \$8 in a paint store. The factory price is \$3.15 a gallon. The difference goes to pay the traveling salesman's salary and expenses, the wholesaler's profit and expenses, the retailer's profit

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and expenses. None of these things add to the quality of the paint, they only increase the price to the user.

This million-dollar factory sells paints and roofing direct to the user at the factory price. Thru our own factory representatives in every county.

Direct-selling from factory to user is here to stay. Developed out of the necessity to eliminate waste in distributing necessities. This huge factory sells several millions of dollars worth of paints and roofing—direct to users. Not a dollar's worth is sold thru dealers.

Here's that opportunity—the kind of a chance you have been waiting for and hoping for. An opportunity to hook up with one of the leading paint and roofing manufacturers in the country. A concern rated at one million dollars in Bradstreet's.

FACTORY WHOLESALE PRICES!

DIRECT TO USERS

Progress salesmen find our prices are lower than those of retail stores or mail-order houses—this proves—the factory is the place to buy paint and roofing—but low prices by itself mean nothing—quality must be considered when you talk price. It is the superior quality of our paints and roofing combined with our extremely low factory wholesale prices that produces the sales made to several thousand satisfied progress customers in every state in the union.

The foregoing circular (Com. Ex. 43-D) was used by respondent until March, 1931.

(c) Respondent's letterheads, appearing on all its trade promotional letters and communications to salesmen and to customers, are as follows:

The Progress Paint Company
Manufacturers of
Asbestoruf
House & barn paints—enamels
Technical paints—varnishes & stains
Cleveland, Ohio, U.S.A.

Such letters also contain the printed slogan:

The factory is the place to buy paint and roofing. (Com. Ex. 43-E.)

(d) Respondent's color card, illustrating the various colors of its paints for the customer's selection, carries the following:

Progress
Paint & varnish
Products
For outside and inside use
The factory is the place to buy paint
Manufactured by
The Progress Paint Co.
Cleveland, Ohio
Facts worth knowing of Progress products

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Everything in the Progress line is made in our modern fireproof factory. Everything is guaranteed fresh as we carry no great stock on hand made up. It comes direct from the mills to you and at wholesale prices. Our aim is not to give you the cheapest paint in price but the lowest price paint in quality that can be purchased. One must consider today, with the high cost of application, that a few cents saved here or there in the cost of material used may mean dollars wasted in the cost of application where it fails to stand up. The best paint is the cheapest as any practical property owner will tell you and the best paint made is the paint you buy direct from this factory as the factory is the place to purchase paint. (Com. Ex. 43-F; Resp. Ex. 15.)

(e) In letters sent to salesmen respondent represents that its paints are sold at a "factory wholesale price" (Com. Ex. 44); that respondent is a "million dollar company" (Com. Ex. 5); that "you're with a twenty-two year old million dollar house * * *" (Com. Ex. 51-A); that the rating in Dun's or Bradstreet's of the Progress Paint Co. is "GAa \$1,000,000 and over, which is the highest rating we could have." (Com. Ex. 132); that the customer "takes no chances for at all times he is fully protected by our money back guarantee—our free trial offer and our million dollar rating. He is not fooling with a new comer—but a company 25 years old and he is getting his paint through the Progress plant at factory prices." (Resp. Ex. 22.)

(f) The handbill, distributed by respondent to the purchasing public for a period ending about 10 months after the date of the complaint, contains the following:

DO YOU KNOW THAT—

2. That this company is rated in Bradstreet's with \$1,000,000 rating and has been manufacturing paint for 22 years?

4. That they can save you from 25 to 50 percent on your paint and roofing bills?

5. That they are the oldest manufacturers of roofing in the world?

Progress paints save you money because they are sold to you direct from the factory at wholesale prices. You buy your paint from Progress at the same price your local dealer buys from the people he deals with. You save the difference. (Com. Ex. 45.)

(g) Printed instructions for salesmen's use in promoting sale of respondent's products, contain the following:

CONFIDENTIAL INFORMATION FOR
PROGRESS NEIGHBORHOOD
SERVICE MEN

1. Who is the Progress Paint Co.? Your company is a manufacturer of the complete line of paints, varnishes, stains, and liquid roofing. Been in business 25 years and is rated in Bradstreet's Mercantile Book as HAA or better than \$1,000,000 credit rating. Your company sells all products direct from factory to consumer at wholesale prices. Your products are never sold through dealers or jobbers or anyone for resale purposes.

49. How can I save people money on paint? By selling them the best paint made at the factory wholesale price. If they were to go to a paint dealer and bring a sample of Progress paint and ask that dealer to have his factory duplicate that sample—such a paint would cost him anywhere from 25 percent to 40 per cent more when bought through the dealer. By dealing with you—he can get that paint at the same price the dealer would buy from his factory. Your paint is fresh—full of life—good covering capacity—you use less paint.

61. Are you manufacturers or just jobbers? Your company is an old established manufacturer. We manufacture every product you sell—we even make our own steel barrels and other containers and employ several hundred men and women. (Com. Ex. 46; Current book, Resp. Ex. 19.)

(h) Among the depictions and other representations of factory scenes and factory equipment are the following published by respondent in its house organ, *The Progress Torch*, distributed as trade promotional literature:

FROM START TO FINISH THIS BUNCH SAW EVERYTHING. HERE THEY ARE
WATCHING THEIR ORDERS BEING FILLED.

[Here appears a depiction of a factory scene showing factory workmen being observed by a company of visitors]

The men you see in this picture won this opportunity to visit the great Progress factory by their constant efforts to get ahead—by their sales and ability to do their share. To-day they are all out on their territories with many salesmen under their control pushing Progress to the utmost to keep up with orders. You, too, may be in such a group some day if you do as they have done. If you work as these men have worked. We aim to have as many men in to inspect our big plant as possible when their business warrants it and when you read the letters of appreciation from these men that will appear in next month's *Torch*, I am sure you will work tooth and nail to be among the next group invited in at our expense. (Com. Ex. 47, p. 3, *The Progress Torch*, April, 1928.)

Every man who has ever owned a Progress selling kit can go out to-day and though he never sold a gallon of paint in his life—will be able to do so now and clean up the big money that has been the lot of every man who has ever pushed this great line.

With the Progress factory keyed up to maximum capacity—a night shift in operation now—several weeks before it was necessary last year—a modern conveyor system to facilitate rapid handling of orders—we are now ready to handle the greatest volume of business any single paint factory ever handled in a season. There will be no delayed orders—or complaining customers if Mr. Tatje, our general superintendent has anything to do with it and consequently—every man is urged now to go out after orders like he has never done before. No matter what has happened—let not a single thing stop you from getting into the field and staying there every day from now on until Christmas! There is great work for Progress salesmen to do. Much ground to cover and we must realize that property owners won't wait—once they make up their minds to order.

In keeping with our policy of doing everything possible to make Progress salesmen the highest paid representatives in the direct selling field—Progress has added to its staff Mr. Carl Rumberg, who, after concluding a scientific

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education dealing with paint subjects has also put in considerable time right in the Progress factory—in order that he might know from the ground up—everything about Progress products and thus be able to render you first-hand information on any problem that you may need assistance that you may grow and thrive and increase your earning powers with this line.

HOW TO USE YOUR CATALOGUE

Your catalogue my friend is your "pick and shovel" in the most remunerative trade you ever tackled. It has been prepared so that handled rightly—it will of itself be able to sell the prospect! It contains the best features and ideas of the cream of Progress salesmen but the only thing it lacks is "legs." You've got to provide them and if you do and take it around to property owners it will do the rest. When you bring it in to a property owner—begin at the first page of the book and take him through it—page by page—calling his attention to each feature—step by step—and it will bring him back to you on the last page as the neighborhood service man ready to take his order and render him the service that will make your presence felt in that community—quality merchandise and at price-saving possibilities. (Com. Ex. 53.)

(i) In magazine advertisement (Com. Ex. 137), published by respondent after the date of the complaint, and setting forth matters as the basis on which salesmen sell its products, appears the following:

Sell paint

Direct from this million-dollar factory
on easy credit terms
at factory wholesale prices
The Progress Paint Co.
Cleveland, Ohio

(In conjunction with the above statement appears a depiction of large factory buildings which depiction is fictitious to the extent that in reality no such factory of the respondent exists or is in operation, and further, in that it is not a true depiction of the factory in which respondent's paint is manufactured or the factory of the Acorn Refining Co. hereinafter referred to. A similar depiction of factory was displayed in the magazine advertisement. (Com. Ex. 41.)

PAR. 10. The true facts in regard to said representations are and have been as follows:

(a) Respondent corporation, The Progress Paint Co., is not a manufacturer and does not manufacture any of the paint, roof coating, or other products which it markets, but procures such products from the Acorn Refining Co. at certain prices charged therefor by such Acorn company. The Progress 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 sales or trade promotional literature, or any other paint manufac-

turing equipment or facilities. The authorized capital stock of such Progress company is \$25,000, par value, and all its physical property, listed on its books at \$2,474.66, consists of furniture and fixtures such as office desks, chairs, dictaphones, typewriters, files, and other office equipment, which are used in the promotion, sale, and distribution of its products. Its other assets consist of cash, accounts receivable, deferred expenses and money advanced to salesmen, with all assets totaling a little less than \$100,000. Said Progress corporation has no factory superintendent, nor does it employ any paint manufacturing experts, chemists or any other employees engaged in manufacturing. Besides said salesmen respondent corporation's employees number between 50 and 60, and all are engaged under the supervision of a sales manager in the work of promoting and effecting the sale and distribution of its merchandise. It is not a million dollar company or manufacturer as represented, nor does it have gross annual sales of several million dollars, but as stated in paragraph 1 hereof, such gross annual sales averaged about \$1,000,000. Respondent corporation does not purchase, store, test or otherwise handle or use any raw materials for the manufacture of paint or roof coating.

(b) The said Acorn Refining Co. is an Ohio corporation engaged since about the year 1914 in the manufacture of a complete line of paints or paint products and roof coating, 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 products, at prices hereinafter stated, to the respondent and to seven other similarly situated corporations including the Madison Paint Co. and the Franklin Paint Co., respondents in Dockets 1573 and 1567, 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 Progress 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 products to its customers. Besides paint and roof coating, respondent also purchases various other supplies and services used in its business from said Acorn company.

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(c) Respondent's sales manager testified that the picture of the large paint factory appearing on the outside of respondent's catalogue (Com. Ex. 43-A and Resp. Ex. 16) originated in the mind of the artist employed to prepare the same for publication and that the artist was in Chicago and was not familiar with the factory of the Acorn Refining Co. Such depiction of a paint factory, in connection with which also appears the statement "Roofing and paint from this million-dollar factory to you on credit", is wholly fictitious. The depictions of a paint factory elsewhere in said trade promotional literature are also fictitious in that respondent has no such factory or any factory, and such depictions are not accurate depictions of the factory of the Acorn Refining Co. and do not show the sign "Acorn" which is in reality on the front of said Acorn factory and an integral part of said building of the Acorn Refining Co. Said other depictions of factory equipment and manufacturing scenes are in fact depictions of equipment and scenes in the Acorn Refining Co. factory. Such depictions, however, are represented in respondent's literature as being depictions of the Progress factory and of factory equipment and facilities owned or operated by respondent corporation, The Progress Paint Co.

(d) Prior to the issuance of the complaint and until about January, 1930, substantially all of the capital stock of the respondent corporation, The Progress Paint Co., was owned in equal proportions by E. M. Katz and S. S. Sanders, president and secretary-treasurer, respectively, 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 Progress 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 example, it is sold by The Progress Paint Co. as the Progress line of paints; by the Franklin Paint Co. as the Franklin 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 percent to 23 percent 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 Progress Paint Co., for said paint, and roof coating are the Acorn Refining Co.'s so-called "blue book" prices less 15 percent, and that such prices represented only the Acorn Refining Co.'s cost; that all the profits in the distribution of the products sold by respondent to the public are allowed to accumulate in the name of The Progress Paint Co. and are taken out mainly, if not entirely, in the form of salaries to said Katz and Sanders rather than 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, secretary-treasurer 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 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. Until March, 1928, respondent was listed by Bradstreet's as follows:

Progress (The) Paint Co. W+HAa

Since then such rating was given as W+GAa

Such symbol W designates the business of the company as wholesale. HAa stands for a capital rating of \$750,000 to \$1,000,000 and GAa for \$1,000,000 and up in capital rating. Said division sign means that such rating covers two or more corporations and in this

particular case it covers jointly the respondent, the Acorn Refining Co. and seven other corporations, and is not a separate rating upon respondent corporation only. In meeting the requirements of Bradstreet's for such rating, arrangements were made whereby the Acorn Refining Co. by its board of directors passed a resolution to the effect that it would guarantee payment of the debts or obligations of said other corporations including the respondent. In Dun's commercial rating publication respondent is classified as a dealer with a rating of B-2, which means a rating of financial responsibility from \$20,000 to \$35,000 and first class credit.

(h) As a part of its plan of distribution of its product to the consuming public, respondent used, during a period from two to three years, its so-called "Neighborhood distributive service plan," by which plan its salesmen were to purchase and carry a stock of respondent's paint and resell the same in their immediate neighborhoods. The difference between the net price charged by respondent to such salesmen and the price at which such salesmen resold the paint represented the latter's gross profit. Under such plan certain of the salesmen purchased a stock of said paint from respondent and resold the same at such prices as they saw fit. To the extent that such salesmen operated under said plan they became and acted as dealers or middlemen in the channels of distribution between respondent and the consumer. In promoting the plan respondent referred to its use by certain of its salesmen as follows:

Do you know that fellows like Batchelder—Miller—Carter—Cox and hundreds of others—men who are making big money, carry a stock of paint like this that runs into hundreds of dollars? Of course, I wouldn't advocate you doing anything like that right now—but it would be a good idea for you to lay in a few dollars worth of paint and especially Asbestoruf for just these purposes and this little folder tells you a way in which you can turn this into a mighty profitable venture. Read it over and make up your mind today that what is good for the prosperous men in my outfit must be good for you and write out a little stock order for yourself. (Com. Ex. 58-A.)

Respondent's sales manager testified, however, that such "Neighborhood distributive service plan" was not successful enough and so it was abandoned by respondent. He also testified that, as an estimate, there was less than 500 gallons of paint sold under the plan.

(i) In the sale and distribution of its paint and other products, 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 middleman's costs and profits. The

relative costs and prices of its paint 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 Progress Paint Co.'s price at which it sold such paint to the public was \$3.75 less 5 percent discount for cash with order or net within 60 days, and with freight paid on all orders amounting to more than \$10. The price per 1-gallon can of the same paint as sold throughout the same States and on similar terms by the Franklin Paint Co. was \$3.32, and by the Madison Paint Co., \$3.85 with a 20 cent to 25 cent reduction during the latter part of the year.

(j) 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 at retail prices from \$2.50 to \$2.75 per 1-gallon 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 paints 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 from 20 percent to 40 percent, 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. 11. The representations, statements, and assertions of The Progress Paint Co., respondent corporation, referred to and described in paragraph 8 hereof and used by respondent as hereinabove set forth, are and have been false, misleading, and deceptive, and have and had the capacity and tendency to mislead, deceive, and induce the purchasing and consuming public into purchasing re-

spondent's paint and roof coating in the beliefs, which are erroneous, that said representations, statements, and assertions are and were true in fact.

PAR. 12. Also, in the course and conduct of its said business of promoting and effecting the sale and distribution of its roof coating, which is designated "Asbesto-Ruf", respondent caused said roof coating to be offered for sale, sold and distributed to its customers, the purchasing and consuming public throughout the several States, upon various representations, statements, and assertions to the effect that said roof coating Asbesto-Ruf contains gilsonite in substantial proportions; that said roof coating does not contain any coal tar; and that such product when applied to roofs will endure and cause the roofs to become and remain waterproof for a period of 10 years.

(a) Respondent's said Asbesto-Ruf product is a roof coating of the class of material generally known as liquid asbestos roof coating. Testimony was introduced by counsel for the Commission tending to show that the effective life of liquid asbestos roof coating is four or five years. Testimony was also given by an investigator of the Commission that, in the course of his investigation of the matter prior to the issuance of the complaint, respondent's sales manager informed him said Asbesto-Ruf was primarily a coal tar product. Respondent introduced testimony by the superintendent of the factory of the Acorn Refining Co. where the product is made to the effect that it contains no coal tar, but that in some cases respondent does sell a tar roof coating, not, however, under said name Asbesto-Ruf. Upon consideration of the record the Commission does not deem the evidence sufficient to sustain the charges that said representations with respect to such Asbesto-Ruf containing no coal tar and enduring or waterproofing roofs for a period of 10 years are false, misleading or deceptive, and therefore finds that such allegations are not sustained.

(b) Respondent admits that said Asbesto-Ruf does not contain gilsonite in substantial proportion, and alleged that gilsonite is a solid asphalt and that Asbesto-Ruf is made chiefly from liquid asphalt. Gilsonite is an asphalt which is mined in the west principally in the States of Utah and Colorado. It is a standard material on the market and is used as an ingredient in roof coating products. Typical representations which were printed by respondent in its sales or trade promotional literature with respect to said Asbesto-Ruf containing gilsonite are as follows:

Asbesto-Ruf contains costly asbestos, gilsonite gums, asphaltum, and other materials which, when blended in our secret formula and process, yields, on the average 12 to 15 years of waterproof, fire-resisting protection to roofs. It does not contain any coal tar.

Asbesto-Ruf positively does not contain one drop of coal tar. It is composed of genuine Canadian asbestos fiber—gilsonite, an exceptionally elastic gum—Lake Trinidad asphalt—as durable as the earth itself, and our secret formula—nonevaporating oil. We create a gum by fusing gilsonite, asphalt and this nonevaporating oil, and later reduced by heat to a liquid where the addition of other solvents and dryers keeps it in the liquid form and the asbestos fiber is added. * * * (Com. Ex. 43-A, Catalogue, pp. 7, 15.)

Asbesto-Ruf is composed of materials especially selected for their fire retardent as well as weather and waterproof qualities. The base of Asbesto-Ruf being a special gum derived by treating gilsonite the highest form of asphalt with a special nonevaporating oil, a product of our own composition of which the formula is secret. * * * (Com. Ex. 43-L, Leaflet, p. 2.)

37. *What if they say the other fellow's circular guarantees for 10 years?* Ask him to let you see the circular and then ask him to show you anywhere on the circular where it says that the product is made from asphalt—gilsonite—nonevaporating oil and genuine Canadian asbestos fiber. You will find he can not. They hide the construction of their product by telling you it is made from waterproofing oils and gums which gets around the coal tar description. They use silica or fine powdered sand and wood-pulp fiber to imitate asbestos fiber and when mixed up with the black coal tar can not be detected. Genuine Canadian asbestos costs money—you have to pay a tariff tax on it to get it into the country—Canada is the only place you can buy real asbestos fiber. Asphalt comes from Lake Trinidad and gilsonite from Utah. You can not buy these raw materials even in the enormous quantities we purchase, and be able to turn out a product that will sell as low as the mail orders offer to sell at. The only thing they can do is imitate with coal tar. (Com. Ex. 46, p. 11; instructions to salesmen.)

(c) Respondent continued its said representations to the effect that said product contains gilsonite in substantial proportions throughout a period of more than three years prior to the issuance of the complaint and for a period of about 10 months subsequent thereto. Thereupon it changed said representation by eliminating therefrom the specific mention of "gilsonite" as a constituent of the product, and substituted or printed in such places representations to the effect that said product contains "Asbestos fiber, asphalt, waterproofing oils and gums blended in our secret formula and process * * *" (Resp. Ex. 16, p. 7, catalogue); that "It is a combination of asphalt, waterproofing oils and gums, together with asbestos rock fiber, blended together in a process that keeps it in liquid form until exposed to the air and spread over the old roofing surface. (Resp. Ex. 16, p. 15, catalogue.)

(d) The use by respondent of the said representations to the effect that said Asbesto-Ruf contains gilsonite in substantial proportions was false, misleading, and deceptive, and was calculated, and had the capacity and tendency, to mislead and deceive the purchasing and consuming public into buying said product in the erroneous belief that the product in fact contained such gilsonite.

Findings

16 F. T. C.

The said false, misleading, and deceptive representations were continued by respondent throughout said period of more than three years prior to the issuance of the complaint and for approximately 10 months thereafter, without respondent disclosing to its customers, through its trade promotional literature or otherwise, that such representations were not true in fact or that said product did not in fact contain such gilsonite as represented.

PAR. 13. 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 competi-

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Order

tion 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. 14. 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",

Order

16 F. T. C.

It is now ordered, That, in the course of the sale or distribution in interstate commerce of paints or roof coating, the respondent corporation, The Progress 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 by any other means, to the effect that any such paint is a lead and oil paint, or is composed wholly or principally of white lead, zinc oxide, and linseed oil with or without necessary color pigments and dryers; or that any such paint does not contain titanox, barium sulphate, asbestine, siliceous material, or any inert material, or that said roof coating contains gilsonite in substantial or other proportion, if and when such representations, statements, or assertions are 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 by any other means, to the effect that respondent corporation is the manufacturer of any of said paints or roof coating; 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 roof coating; 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 by any other means, 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 paint products 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 saving is a certain definite amount, such as \$1 to \$1.50 per gallon, or 40 percent, 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.

(d) From directly or indirectly making or causing to be made any representation, statements, or assertion, in advertisements, trade promotional literature, or by any other means, to the effect that respondent is a million dollar company, or that it owns or operates a million dollar factory, or that it has investments to the extent of \$1,000,000 in a paint or roof coating factory or similar manufacturing equipment, or that its gross annual sales of paints and roof coating exceed several million dollars, or that it has been engaged in manufacturing paints and roof coating for a period of 22 years or more, unless and until such representations, statements, or assertions are true in fact.

It is further ordered, That respondent corporation The Progress 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.

This case involves a method of business conduct that it is admitted increases the sale 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.

Complaint

IN THE MATTER OF

A. S. DOUGLIS AND DAVID HELFINBEIN INDIVIDUALLY
AND AS COPARTNERS TRADING AS A. S. DOUGLIS &
COMPANY AND LINCOLN SALES COMPANYCOMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 1862. Complaint, Aug. 12, 1930—Decision, June 28, 1932*

Where a firm engaged in the sale of knives, candy, tableware, clocks, and various other small articles of merchandise to wholesale and retail dealers in the various States, supplied said dealers with punch boards, push cards, and fortune boards for retailer's use in selling said various articles in accordance with chance selection by ultimate purchaser of the concealed winning name or number or last purchase or punch on the board, pursuant to a plan under which the purchaser received an article of a value exceeding the price of his punch or nothing, depending upon his fortune or lack of fortune in making his selection and the retailer received an aggregate sum exceeding the cost to him of the articles thus disposed of;

With result that prospects were induced to purchase a punch in the hope and expectation of securing an article, or the desired article for 5 or 10 cents, or to engage in a game of chance, and a great number purchased and continued to purchase punches until all the articles had been distributed, and trade was diverted from competing manufacturers and jobbers of similar merchandise who declined to employ such a means of selling and distributing their merchandise due to its illegality in practically all the States, their belief that it constituted the merchandising of a chance and that it was not good business for a small number of customers to be winners and a much larger number losers, that the practice was morally bad, encouraging both adult and child "to take a chance", that sanction of such methods would result in a progressive increase in the gambling aspects thereof, and that manufacturers, distributors, and wholesalers were not in the gambling but merchandising business, and should not be compelled to adopt such sales methods in order to meet competition:

Held, That such practices, under the circumstances set forth, were to the injury and prejudice of the public and competitors and suppressed and tended to suppress competition in the sale of merchandise and constituted unfair methods of competition.

Mr. Henry C. Lank for the Commission.

Mr. J. Bond Smith and *Mr. Lucius Q. C. Lamar*, of Washington, D.C., and *Mr. John A. Nash*, of Chicago, Ill., for respondents.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission