

Syllabus

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IN THE MATTER OF
THE BILLINGS-CHAPIN COMPANY

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

Docket 1733. Complaint, Dec. 14, 1929—Decision, Nov. 27, 1935

Where a corporation, engaged in the manufacture of paints, with an annual business normally amounting to about \$1,000,000 a year, and selling its product principally in cans or containers of 1-gallon capacity or less for display as shelf goods in stores, and distributing its output, between 90 and 95 percent of which was disposed of at retail and consumed by the purchasing public in painting inside and outside of dwellings, etc., and on yachts, steamships, and fishing boats, through various large wholesalers and some nine hundred retail stores scattered throughout the United States, but primarily east of the Mississippi—

- (a) Conspicuously displayed the letters "U. S. N." or, later, "U. S.", on the labels of its deck paint and various other brands, representing normally between 60 and 70 percent of its total business, printed in white letters larger than any other wording on the container and on a navy blue background, and which resembled, in the striking color combination involved, official colors of the Navy, and depicted thereon the battleship *Maine*, first with, and later without, name "Maine";
- (b) Distributed large advertising display placards for paint store counters and windows which frequently depicted enlarged cans of its said paint in color, bearing the designation "U. S. N. Deck Paint" or "U. S. Deck Paint" in letters 2 inches or more high, above a battleship at sea, together with sea scenes and pictures of ship's officers in uniform, about two-thirds life size, on duty on the bridge of a vessel, in uniform very similar to that used by naval officers and in close proximity to a legend, in letters over 2 inches high, reading "U. S. Deck Paint for Sea-Swept Decks and Well Kept Homes", and in another sea scene set forth under caption "Sea Tried" and over words "The Commodore", the statement "For more than thirty years I've seen U. S. N. Deck Paint give unfailing service on ships. I recommend it for your home"; and
- (c) Reproduced, in its advertising in magazines, newspapers, circulars, etc., its said labels, both plain and in said color combination of white and navy blue, but stressing, in all cases, letters "U. S." or "U. S. N." over picture of a battleship, and frequently depicting the ocean, ships, and ships' officers in uniform, together with statements emphasizing product's successful use on vessels, such as "Sea Tried for Fine Homes", "Paint Good for Ships is Better for Homes", "U. S. Deck Paint—the famous sea tried paint is adaptable alike for outside painting, inside painting," etc.;

The facts being that while its said paint had been used on seagoing vessels for many years, it had never been used or tried upon ships of the United States Navy or Government, and it was not made for or in accordance with or in conformity with requirements, formulae, directions, or instructions of said Navy or Government, and had not been regularly used, adopted, approved, or tested thereby; said product differed in composition from that

used or made in accordance with the formulae, specifications, or standards of the Navy or Government, in that, among other things, it contained a greater proportion of added "inert" pigment than was required or permitted in the Navy or Government specifications, and which was cheaper and bulkier than such standard pigments as white lead, zinc or titanox, and substantially decreased the raw material cost for its product as compared with that made in accordance with official Navy specifications;

With effect of misleading and deceiving substantial numbers of the purchasing public into the erroneous belief that said paints and varnishes had been made for or in accordance with specifications, formulae, directions, or requirements of the Navy or Government or had been approved, adopted, used or tested thereby on ships or on Government property and were of equal quality with paints and varnishes so approved, adopted, or used, and with capacity and tendency so to mislead and deceive, and effect of causing certain of the purchasing public to buy its said products by reason of such erroneous beliefs, and of unfairly diverting trade from and otherwise injuring the business of its competitors, and with capacity and tendency so to do:

Held, That such false, misleading and deceptive acts and practices, under the circumstances set forth, were to the prejudice and injury of the public and competitors and constituted unfair methods of competition.

Before *Mr. John W. Bennett*, trial examiner.

Mr. Henry Miller and *Mr. James M. Hammond* for the Commission.

Baker, Hostetler, Sidlo & Patterson and *Garfield, Cross, Daoust, Baldwin & Vrooman*, of Cleveland, Ohio, for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that The Billings-Chapin Company, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", and it appearing to the Commission that proceeding by it in respect thereof would be to the interest of the public, issues this its complaint and states its charges in that respect as follows:

PARAGRAPH 1. Respondent, The Billings-Chapin Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio having, at all times herein mentioned, its principal office and place of business in the city of Cleveland, in said State, and branch offices and warehouses in the cities of Boston, Mass., and New York, N. Y. It is engaged in carrying on the business of manufacturing, selling, and distributing in large and substantial quantities to dealers, users, and consumers of the purchasing

public of the United States certain paints and varnish to which it applies as the respective brand names and designations thereof the several phrases, "U. S. N. Deck Paint", "U. S. Deck Paint", "U. S. N. Armor Paint", "U. S. Armor Paint", "U. S. N. Marine Green Paint", "U. S. Marine Green Paint", "U. S. N. Marine White Paint", "U. S. Marine White Paint", "U. S. N. Marine Tints", "U. S. Marine Tints", "U. S. N. Varnish", and "U. S. Varnish." Said business is and for more than three years last past has been conducted by respondent as follows:

Respondent packs said products in commercial paint and varnish containers of graduated sizes and affixes to each container its own labels, in which containers and under which labels said products are marketed by said respondent and by dealers to the purchasing public in the several States. Respondent offers for sale and sells said paints and varnish to dealers, users, and consumers throughout the United States (a) through and by means of its officers, salesmen, and agents whom it employs to solicit purchase orders for said products from its customers and prospective customers, (b) also through and by means of advertisements of said paints and varnish published by it from time to time in newspapers, magazines, trade journals, and other publications circulating among the trade and consuming public throughout the United States and in various sections thereof; and (c) through and by means of certain trade promotional literature such as catalogs, color cards, pamphlets, letters, and other written communications which it sends from time to time from its place of business in Cleveland, Ohio, Boston, Mass., and New York, N. Y., to its customers and prospective customers located respectively in the several States of the United States. As a result of and in response to said offering for sale and solicitation many sales of said products are regularly and continuously made by respondent to a large and substantial number of dealers, users, and consumers throughout the United States, who in purchasing from respondent said paints and varnishes send and transmit by mail and otherwise among the States their several purchase orders therefor to respondent at its aforesaid places of business.

Pursuant to said purchase orders and to consummate the sale and distribution of its products respondent causes the several lots or parcels of said paints and varnish so ordered and sold to be shipped and transported between different States from its places of business in Cleveland, Ohio, Boston, Mass., and New York, N. Y., into States other than the States in which such shipments originated respectively, and to be delivered to the respective purchasers thereof in such other States. In the sale and distribution of its paints and

varnish respondent is and for more than three years last past has been engaged in interstate commerce and in direct active competition with many individuals, partnerships, and other corporations also engaged in the sale and distribution of paints and varnish in commerce among the several States of the United States.

PAR. 2. In the course and conduct of its business and in promoting, and furthering the sale and distribution of its paints and varnish, as set forth in paragraph 1 hereof, respondent has for more than one year last past:

(1) Caused and continues to cause said paints and varnish to be advertised, represented, described, offered for sale and sold, by its officers, agents, salesmen and in and through its aforesaid advertising matter and trade promotional literature, as and for, respectively, "U. S. N. Deck Paint", "U. S. Deck Paint", "U. S. N. Armor Paint", "U. S. Armor Paint", "U. S. N. Marine Green Paint", "U. S. Marine Green Paint", "U. S. N. Marine White Paint", "U. S. Marine White Paint", "U. S. N. Marine Tints", "U. S. Marine Tints", "U. S. N. Varnish", and "U. S. Varnish".

(2) Caused and continues to cause aforesaid phrases containing the letters "U. S. N." and "U. S." to be used as the respective brand names and designations of said paints and varnish, and to be set forth severally as such, in its aforesaid advertising matter and trade promotional literature and on said labels affixed to the containers in which said paints and varnish are marketed by respondent and by dealers to the purchasing public.

(3) Caused and continues to cause said letters "U. S. N." and "U. S." of said names, wherever appearing in said labels, advertising matter, and trade promotional literature, to be set forth predominantly and to be printed in letters larger and more conspicuous than the words in said names and in the text used in conjunction therewith.

(4) Caused and continues to cause a depiction of a United States battleship to be prominently and conspicuously displayed in conjunction with said letters, "U. S. N." and "U. S." in said advertising matter, trade promotional literature, and upon said labels under which said paints and varnish are marketed as above set forth.

(5) Caused and continues to cause the letters and words and the depiction of said battleship which appear on said labels to be printed in white on a navy blue field, which colors of white and blue are symbolic and emblematic of the United States Navy.

(6) Caused and continues to cause facsimiles of said labels in the colors of navy blue and white to be set forth in said advertising matter and trade promotional literature.

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(7) Caused and continues to cause said paints and varnish to be further represented, described, and advertised, by its officers, salesmen, agents, and in its aforesaid advertising matter and trade promotional literature, as "Sea tried" and as "The sea-roving paint that came home", and as having been manufactured for, successfully tested and used on the decks and other parts of ships which encounter and are subjected to salt water atmosphere and the severe and varying weather conditions of the arctic and tropical regions of the oceans.

(8) Caused and continues to cause to be set forth in its aforesaid advertising matter and trade promotional literature, and as pertaining to said paints and varnish, certain depictions of marine scenes such as (a) pictures of a ship's officer in uniform on the deck of a sea-going vessel, and (b) pictures of ships at sea and in or approaching harbor.

PAR. 3. Said letters "U. S. N." and "U. S." are abbreviations and insignia of the United States Navy and of the United States; and they are and at all times herein mentioned have been understood and recognized by the purchasing public of the United States as signifying and indicating respectively the United States Navy and the United States Government.

PAR. 4. Said paints and varnish manufactured and sold by respondent under the representations, descriptions and names set forth in paragraphs 1 and 2 hereof were not and are not manufactured for nor in accordance with or conformity to requirements, formulae, specifications, directions, or instructions of the United States Navy or of the United States Government; nor have said paints and varnish been used, adopted, approved, or tested by the United States Navy or by the United States Government as deck paint or varnish or for any marine or other uses.

PAR. 5. Said paints and varnishes of respondent differ in constituent ingredients from, and are inferior in quality to, paints and varnish manufactured in accordance with the specification or requirements of the United States Navy or the United States Government for use on ships or for other uses.

PAR. 6. Respondent's use of said letters "U. S. N." and "U. S." in advertising, representing, describing, and branding its paints and varnish, as hereinbefore set forth, is false, misleading, and deceptive, and is calculated to have and has the capacity and tendency to and does mislead and deceive substantial numbers of the purchasing public into, and to cause them to purchase said products in and because of, the erroneous beliefs that said paints and varnish have been manufactured for or in accordance with, or in conformity to, specifi-

cations, formulae, directions, instructions, or requirements of the United States Navy or of the United States Government, or that said paints and varnish have been approved, adopted, used, or tested by the United States Navy or by the United States Government on ships or on other Government property, and is of equal quality with paints and varnish which has been so approved, adopted, or used.

PAR. 7. The above-alleged false, misleading, and deceptive acts and practices of respondent under the circumstances and conditions hereinabove set forth have the capacity, tendency, and effect of unfairly diverting trade from and otherwise injuring the business of respondent's competitors, are to the prejudice and injury of the public and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission on December 14, 1929, issued and served its complaint in this proceeding upon the Billings-Chapin Company, a corporation, respondent herein, charging it with the use of unfair methods of competition in commerce, in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and evidence, in support of the allegations of said complaint and in opposition thereto, were introduced before John W. Bennett, an examiner of said Commission, theretofore duly designated by the Commission, by Henry Miller, and James M. Hammond, attorneys for the Commission, and by Baker, Hostetler, Sidlo, and Patterson, and by Garfield, Cross, Daoust, Baldwin, and Vrooman, attorneys for the respondent; and said testimony and evidence was duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and evidence, briefs in support of the complaint and in defense thereto, and the oral argument of counsel aforesaid; and the Commission having duly considered the same, and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Billings-Chapin Company, is a corporation, organized and existing under and by virtue of the laws of the State of Ohio, having at all times herein maintained its office, factory and principal place of business in the city of Cleveland, in that State, with branch offices and warehouses in the cities of Boston, Mass., and New York, N. Y. The business of respondent was initiated by a predecessor in interest in 1879. After several changes of name, it was finally organized in 1899 as the Billings-Chapin Company, the respondent herein.

Respondent is now, and for many years prior thereto; has been engaged in the manufacture, sale, and distribution in commerce among the various States of the United States, of paints, varnishes, and paint products. Respondent Billings-Chapin Company causes merchandise sold by it to be transported from points of origin at its factory and warehouse at Cleveland, Ohio, and from its branch warehouses at Boston, Mass., and New York, N. Y., through and to various other States of the United States to the respective purchasers thereof and, in the course and conduct of its business, respondent has been and is now in active competition with our corporations, partnerships, and individuals engaged in the similar sale and distribution of paints, varnishes, and paint products in commerce in, between, and among the several States of the United States and in the District of Columbia.

The business of respondent results from sales negotiated through the medium of salesmen and agents and through and as a result of advertisements of its said paints, varnishes, and paint products inserted from time to time in newspapers, magazines, trade journals, and other publications having general circulation among the trade and the consuming public throughout the United States. In furtherance of its sales respondent company also distributes through its main and branch offices to customers and prospective customers located in the several States of the United States, trade promotional literature including catalogs, color cards, pamphlets, letters, and other written communications. Dealers to whom the respondent sells its products, in turn offer them for sale and sell the same to the general purchasing public.

Respondent packs its paint and varnish products in containers of graduated sizes, running from half-pints to barrels, but principally in cans of 1 gallon or less capacity for display as shelf goods in stores. Respondent affixes its labels to such containers, sometimes by lithographing of the same direct on the cans, and at other times by the use of paper labels affixed thereto.

Respondent manufactures and sells large quantities of the paints and varnishes in question and its business normally amounts to approximately \$1,000,000 per year. The brands in question, described in paragraph 3 hereof, normally amount to between 60 and 70 percent of its total business. In addition to its two branches at New York and Boston, its paint output is handled by various large wholesalers and some 900 retail stores scattered throughout the United States but primarily east of the Mississippi River. Between 90 and 95 percent of respondent's product is disposed of at retail and is consumed by the purchasing public in this manner. It is used in painting the outside and inside of dwellings, porches, floors, porch furniture, woodwork, etc.; in fact, for almost any type of painting, both inside or outside, which the average member of the public might desire. It is also used extensively on yachts, steamships, and fishing boats but, as hereinafter shown, not on United States Navy vessels.

PAR. 2. For many years prior to 1912 a corporation known as Billings, King & Company, engaged in the paint and varnish business, operating out of New York City and Boston. In the year 1892 Billings, King & Company requested respondent to make for it the highest grade porch and deck paint respondent could produce. Respondent submitted samples of such paint which were acceptable and Billings, King & Company proceeded to market the paint. At that time Billings, King & Company was selling material to the Brooklyn Navy Yard where the battleship "*Maine*" was being built. The vice president of Billings, King & Company conceived the idea of calling this paint "U. S. N. Deck Paint". The Brooklyn Navy Yard, thereupon furnished the vice president of Billings, King & Company with an architect's drawing of the "*Maine*" to go on the label. This was the manner in which the label for this paint originated. There is no evidence that this paint was ever used on the battleship "*Maine*".

On October 10, 1906, Billings, King & Company of New York and Boston, Mass., made application to the United States Patent Office for the registration of a trade mark for paints and varnishes. The trade mark in question consisted of a drawing of a two-funneled, three-masted ship of the general design of a battleship, having masts built to resemble fighting tops, a right forward gun turret being visible, but with its rigging lines shaded so as to resemble or give the aspect of sails. The design, as registered, did not show any name on the side of the vessel, either on bow or stern. The application for registration was approved and the trade mark was registered at the United States Patent Office on February 12, 1907. Billings, King

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& Company, it appears, thereafter added the name "*Maine*" to the picture of this vessel as used on its labels. Some twenty years later Billings, King & Company encountered financial difficulties and offered respondent a controlling interest in its business, which respondent decided to buy. Respondent thereupon invested a considerable sum of money in this venture, at first apprehensively, eventually managing to put the purchased property on its feet. Subsequent to purchasing this property, respondent had renewed at the Patent Office, as successor in interest to the Billings, King & Company, the paint and varnish design of the ship or war vessel which had originally been registered in the name of Billings, King & Company. The latter company went out of business following its purchase by respondent. The trade mark rights and property of Billings, King & Company passed to respondent company as a result of the latter acquiring and taking over the former company.

Respondent, having bought out the company which had been selling respondent's goods in the east, decided to introduce such goods in the west. Respondent thereupon adopted Billings, King & Company's "U. S. N. Deck Paint" label in connection with this plan and purpose.

Under date of May 12, 1919, respondent, The Billings-Chapin Company filed a petition with the United States Patent Office, requesting registration for a trade mark for paints and painters materials, said mark consisting of the letters or legend:

"U. S. N."

It was recited in respondent's petition that this trade mark has been used continuously in the business of the corporation since 1912, having been applied or affixed to respondent's goods by stamping or painting it directly on packages containing such goods.

Under date of June 6, 1919, an examiner of the Patent Office refused registration of the "U. S. N." mark for the following stated reason:

Registration is refused the letters "U. S. N." on the ground that they are a simulation of public insignia, being used by the Government to indicate the United States Navy.

Under date of September 16, 1919, The Billings-Chapin Company was again advised by an examiner of the Patent Office:

Registration is again refused for the reason of record. The marks cited by the applicant cannot be considered as including insignia of the United States.

The above ruling was reaffirmed by the Patent Office under date of November 1, 1919, in reply to a letter of October 22, 1919, from The

Billings-Chapin Company, the Patent Office again calling attention to the fact that to use the mark "U. S. N." on deck paint, which at once connects it with ships, would be deceptive, saying:

It is commonly recognized that paint looms large in the construction and upkeep of the Navy. That the public recognizes even its color to be a matter of interest and importance, is shown by the general use in various lines of merchandise of the term "Battleship Grey" to designate colors approaching that of the paint used by the Navy. To use the mark "U. S. N." on deck paint, which at once connects it with ships, would be to deceive the purchaser with the idea that this particular paint has the approval of the naval authorities or is used by them upon the ships of the Navy. It is accordingly held to be against public policy to sanction the use of this insignia for such purpose or with such effect. * * *

Under date of December 28, 1919, The Billings-Chapin Company appealed this decision to the Commissioner of Patents.

Under date of June 16, 1920, the Patent Office acted on the appeal, holding that the prior refusal of registration was proper.

The above comprises, briefly, the history of the two marks, the one as to the vessel granted registration, and the other as to the mark "U. S. N." refused registration, which form the basis of the trade marks and labels involved in this proceeding. It is considered advisable to remark, in passing, however, that the mere fact the Commissioner of Patents allowed the registration of a trade mark would not be available as the basis for a defense to a charge of improper or deceptive use of such a mark in interstate commerce.

PAR. 3. Respondent company, in connection with the sale of its products in various States, sells, manufactures, and distributes and has manufactured and sold and distributed, several lines and brands of paints known, described, and designated as follows:

"U. S. N. Deck Paint" or "U. S. Deck Paint";

"U. S. N. Marine Green" or "U. S. Marine Green";

"U. S. N. Marine White and Tints" or "U. S. Marine White and Tints";

"U. S. N. Armor Paint" or "U. S. Armor Paint";

"U. S. N. Deck Varnish" or "U. S. Deck Varnish";

"U. S. Marine Varnish";

"U. S. Deck Enamel".

Each of these lines or brands of paint has comprised and included many different shades and colors, thereby offering a wide range of selection to the public. The respondent manufactures and sells other lines or brands of paints, varnishes or paint products which are not marked, branded or labeled as next above stated and are not covered by or involved in this proceeding.

PAR. 4. The so-called "U. S. N. Deck Paint" line of respondent, first made in 1892, was later expanded, from time to time, to include all the other lines of paints and varnishes referred to in paragraph 3 hereof.

For many years all of respondent's labels on the lines of paint and varnish referred to herein featured the letters "U. S. N.", as more particularly described hereinafter, printed in white letters larger than any other wording on the container, on a Navy blue background over a picture of the battleship "*Maine*", and after 1930, over the picture of the same ship, unnamed and as registered at the United States Patent Office. No name appeared on this picture as originally trade-marked, as hereinbefore shown, but as used by respondent on its labels prior to the gradual change of its "U. S. N." brand to "U. S." in 1929 and 1930, it carried the name "*Maine*" on its bow.

The paints now in use are not the same as those used when the "*Maine*" was built, as titanox, one of respondent's most commonly used pigments, was not invented until about 1910, and was not available in commercial quantities for seven or eight years later.

PAR. 5. The Navy Department, through its Bureau of Construction and Repair, notified the respondent that it was possibly misleading the public by the use of the letters "U. S. N." on its paint by letter dated June 19, 1922, as follows:

The Bureau has received your letter of May 13, 1922, in answer to its letter of May 11, 1922, regarding the use of the letters "U. S. N." as applied to deck paint and deck varnish as manufactured by you, and notes that you have advertised your goods under this brand for more than 30 years.

In connection with the inquiry contained in the last paragraph of your letter as to whether there is any objection on the part of the Navy to the use of these letters as descriptive of your materials, the Bureau suggests they are possibly misleading to the public, creating the impression that the goods are identical with materials of this nature used by the Navy.

PAR. 6. Respondent never made any attempt to inform the public that its "U. S." or "U. S. N." deck paint and its other "U. S." and "U. S. N." lines described in paragraph 3 hereof, were not the same as paint manufactured for or used by the United States Navy until 1933, at which time the following legend was placed on its paint and varnish containers:

U. S. Deck Paint should not be confused with any paint made by any department of the United States Government for it is and always has been made under our own formulae.

This legend, in some cases, was printed vertically and inconspicuously on the side of the container in letters approximately one-eighth

the size of the letters "U. S. Deck Paint" featured on the front of the can. It was not visible from a front view of the can, or as shown in the pictures of cans set out in the large cardboard displays distributed by respondent to retailers and dealers for use in windows or on counters. In other instances, it was printed in inconspicuous type at the foot of the face of the labels. Several of the witnesses called by the Commission testified they would not have observed or read this small inconspicuous legend in any event.

PAR. 7. Respondent sold its "U. S. N." lines of paint and varnish to the public for many years but in 1929, after the propriety of using that designation was brought into question by the Commission's investigation, it decided to change the designation "U. S. N." as used on its containers and in its literature, to read simply "U. S." It accordingly made an announcement to that effect in the American Paint & Oil Dealer in October 1929, stating, in part, that "as fast as our labels, sample cards and other advertising matter are set up, the new brand will appear."

Respondent did make this gradual change as announced but both types of lettering were continued in use long after the complaint in this case was served.

Concurrently with the accomplishment of this change the name "*Maine*" which had theretofore appeared on the bow of the battleship pictured on respondent's labels was also eliminated.

PAR. 8. Respondent's method of labeling its product was through the medium of the letters "U. S. N." in white on a blue background. These letters "U. S. N." were printed in very large type and were placed at the top of the label and immediately below them the picture of the battleship "*Maine*" appeared. For example, the label for its deck paint read as follows:

U. S. N.
DECK PAINT

and immediately below this a picture of the battleship "*Maine*." After dropping the letter "N" in 1929 and 1930 the deck paint label read as follows:

U. S.
DECK PAINT

together with a picture of the same ship with the word "*Maine*" deleted.

All of respondent's paints and varnishes involved herein were similarly labeled. The only difference in the wording or color design was in the name of the paint, such as "U. S. N. Marine Green", "U. S. N. Marine White and Tints", "U. S. N. Deck Varnish", etc.,

except "U. S. Deck Enamel", on which the name of the paint was printed in an orange color.

The color combination of blue and white used on all of these labels was striking to the eye and its similarity to the official colors of the Navy is shown by Commission's Exhibits 49 to 52, inclusive, being the Union Jack and the official flags or colors for an admiral, vice admiral, rear admiral, and commodore, the Secretary of War, and the President, who is commander in chief of the Navy. All of these flags represent a color combination of white on a blue background. These colors are used by high command in the Navy and have been so used throughout its history and are familiar to the public as the official colors of the Navy. The use by respondent of a similar shade of Navy blue as a background on which are printed in large letters "U. S." or "U. S. N." in white over the picture of a battleship is sufficient to impress substantial numbers of the public with the idea that respondent's products have some official naval significance. This striking color combination is carried out through respondent's promotional literature depicting the paint containers, sometimes in greatly enlarged size in actual colors.

PAR. 9. The respondent also distributes large advertising scenes on placards for display on counters and in windows of paint stores. These frequently consist of pictures of enlarged cans of paint, in color, bearing the designation "U. S. N. Deck Paint" or "U. S. Deck Paint" in letters 2 inches or more high above a battleship at sea, thus bringing them into greater prominence, and which, when flanked by sea scenes and pictures of ship's officers in uniform strikingly convey the impression of some official Naval connection with the product involved. One of these scenes depicts a ship's officer about two-thirds life size on duty on the bridge of a vessel in a uniform very similar to that used by naval officers, in close proximity with a legend in letters over 2 inches high reading: "U. S. Deck Paint for sea swept decks and well kept homes."

In another one of these larger placards is a picture of an enlarged paint can marked "U. S. N. Deck Paint." Below this is shown a sea scene with a lighthouse, a vessel at sea and bearing a picture of a ship's officer in uniform together with the following legend:

SEA TRIED

For more than 30 years I've seen U. S. N. Deck Paint give unfailing service on ships. I recommend it for your home.

The Commodore.

The rank of "Commodore" was for many years an official designation for an officer of high rank of the United States Navy.

Advertising is also done through the medium of magazines, newspapers, circulars as well as color cards, leaflets, etc. These contain reproductions of respondent's labels, both plain and with the color combination of white and Navy blue, all stressing the letters "U. S." or "U. S. N." over the picture of a battleship. In addition there are frequently shown pictures of the ocean, of ships and of ships' officers in uniform. Coupled with these pictures statements are generally made as follows:

U. S. N. Deck Paint.

Sea Tried for Fine Homes.

U. S. Deck Paint,

Paint Good for Ships

Is Better for Homes.

U. S. Deck Paint

Sea Tried for Fine Homes.

U. S. Deck Paint

For Sea Swept Decks

And Well Kept Homes.

U. S. N. Deck Paint is Sea Tried

For Fine Homes.

Paint good for ships is better for homes.

That's the U. S. Deck Paint story in a sentence.

You can rely on U. S. N. Deck Paint.

* * * To find out how good a paint can really be get acquainted with the sea-tried U. S. N. Deck Paint.

U. S. N. Deck Paint is sturdy. It defies the elements which ravage lesser paint.

U. S. Deck Paint—the famous sea tried paint is adaptable alike for outside house painting, inside painting, walls, porches, floors, woodwork, etc.

On the decks of ships U. S. N. Deck Paint first proved its claim to longer life and lasting beauty. But now its faithful service in the home exceeds by far its use on ships. * * *

Respondent's paint has been used and tested on seagoing vessels for many years. The statement of that fact, however, accompanied by the letters "U. S." or "U. S. N." in blue and white over the picture of a battleship or in the other ways hereinbefore described, has and has had, a tendency to and does create and has created the impression in the public mind that the ships on which respondent's paint has been tried, or is being used, are in fact United States Navy ships, when, as a matter of fact, respondent's paints have not been used or tried upon ships of the United States Navy or of the United States Government.

PAR. 10. The aforesaid paints and varnishes, in connection with which respondent has used said letters "U. S." and "U. S. N.", as hereinbefore described, have not been manufactured for or in accordance with, or in conformity to requirements, formulae, speci-

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fications, directions, or instructions of the United States Navy or of the United States Government, nor have said paints or varnishes been regularly used, adopted, approved or tested by the United States Navy or the United States Government as deck paint or varnish or otherwise. Respondent's said paint differs in composition from that used by or manufactured in accordance with the formulae, specifications, or standards of the United States Navy or the United States Government. One of such differences is that respondent's said paint contains and has contained a greater proportion of added "inert" pigment that is required or permitted in Navy or Government specification paint. For example, the quantity of added "inerts" contained in the solids of the six formulae of respondent's paints available to the Commission, are as follows:

Respondent's paint

Commission's exhibit number	Respondent's color number	Color or shade	Percent of solids in paint	Percent of added "inerts" in solids
58.....	Y-30.....	White.....	54	19.7
59.....	Y-15.....	Bluish Gray.....	57	33.7
60.....	Y-37.....	Light Gray.....	52.7	33.3
61.....	Y-58.....	French Gray.....	56	21.8
63.....	Y-25.....	Shamrock.....	48	55.4
63-B.....	Y-47.....	Colonial Cream.....	52.71	32.85

The same data pertaining to official United States Navy paint is as follows:

Official Navy paint

Commission's exhibit number	Type of paint	Percent of solids in paint	Percent of added "inerts" in solids
64-A.....	Light Gray Outside.....	53.81	0
64-B.....	Outside White.....	63.50	0
64-C.....	Outside Green.....	45.85	0
64-D.....	Inside White.....	67.82	0
64-E.....	Inside Green Gloss.....	41.58	0

Such "inert" material is cheaper and bulkier than such standard pigments as white lead, zinc, or titanox and for that reason the cost of raw materials per gallon of paint made in accordance with Navy or Government specifications is greater than in the case of respondent's paint. Outside white paint manufactured in accordance with official Navy specifications entails a cost for raw materials at open market prices, of \$1.11 per gallon, whereas the cost of raw materials for respondent's outside white paint, computed on the same basis, and sold under the name "U. S. Deck Paint" and "U. S. N.

Deck Paint" is \$0.95. Upon the same cost basis the official Navy outside green paint costs \$1.39 per gallon and the respondent's "Sham-rock" U. S. N. deck paint costs \$1.14 per gallon.

PAR. 11. In January of 1934 the respondent company decided to abandon use of the letters "U. S." on all of its lines, it previously having dropped the letter "N", and orders were placed immediately for the necessary printing of new labels and the lithographing of new cans so that thereafter, or as soon as the current supply of cans and labels were exhausted, the respondent's labels would all read:

BILLINGS-CHAPIN DECK PAINT

in white letters on a blue field superimposed above the picture of a ship.

Simultaneously the legend set out in paragraph 5 hereof was likewise dropped. Respondent's factory superintendent estimated that it would take from a year to 18 months to exhaust the old supply of "U. S." paint in the factory and warehouse on April 3, 1934. The respondent notified the Commission of this change but failed to stipulate or otherwise bind itself not to resume the relabeling of its products with the letters "U. S." or "U. S. N." in the manner herein described.

PAR. 12. Respondent's use of said letters "U. S." and "U. S. N." in advertising, representing, describing, and branding its paints and varnishes, as hereinbefore set forth, either in association with a picture of the battleship "*Maine*" or not so associated, and in association with the pictures and statements referred to in paragraph 9 hereof or not so associated, is false, misleading, and deceptive, and is calculated to, had and has the capacity and tendency to and does mislead and deceive substantial numbers of the purchasing public into the erroneous belief that said paints and varnishes have been manufactured for or in accordance with, or conformity to, specifications, formulae, directions, instructions, or requirements of the United States Navy or of the United States Government, or that said paints and varnishes have been approved, adopted, used, or tested by the United States Navy or by the United States Government on ships or on other Government property, and are of equal quality with paints and varnishes which have been so approved, adopted or used, and have caused certain of the purchasing public to purchase respondent's products by reason of such erroneous beliefs.

PAR. 13. The above-alleged false, misleading, and deceptive acts and practices of respondent under the circumstances and conditions hereinabove set forth have the capacity, tendency, and effect of unfairly diverting trade from and otherwise injuring the business of

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respondent's competitors, are to the prejudice and injury of the public and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914.

CONCLUSION

The practices of said respondent under the circumstances described in the foregoing findings are all to the injury and prejudice of the public and of respondent's competitors and constitute unfair methods of competition in commerce and are in violation of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the record, including the complaint of the Commission, the answers of respondent thereto, the testimony and evidence adduced in support of the allegations of the complaint and in opposition thereto, upon the exceptions taken by counsel for respondent to the trial examiner's report upon the facts, and upon the briefs and oral arguments submitted by counsel for the Commission and for the respondent; and the Commission having made its findings as to the facts, with its conclusion that respondent has violated the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes"—

It is now ordered, That the respondent, The Billings-Chapin Company, a corporation, its officers, agents, directors, representatives, and employees, in connection with the offering for sale, sale, or distribution in interstate commerce of any paint, enamel, or varnish products, do cease and desist:

(1) From the use of the words "United States", "United States Navy", "U. S. Navy", or the abbreviations or letters "U. S." or "U. S. N.", and from the use of any other word or words, phrases, abbreviations, letters, statements, representations, pictorial or otherwise, alone or in conjunction with any other word, words, abbreviations, or letters, to describe the aforesaid products, which import or imply that any such products of respondent are manufactured for or in conform-

ity with the formulae, specifications, or requirements of the United States Navy or the United States Government, or that any such products have been used, approved, tested, or adopted by the United States Navy or the United States Government when such is not the fact.

(2) From, directly or indirectly, using or causing to be used in advertisements, placards or in any other trade promotional literature of its aforesaid paint, enamel, or varnish products, any depiction of an officer or man, or of officers or men, in the uniform of the United States Navy or in the uniform of the United States Government or any depiction of any ship or ships of the United States Navy in such manner as to import or imply that the said products of respondent or any of them are manufactured for or in conformity with the formulae, specifications, or requirements of the United States Navy or the United States Government or that any such products have been used, approved, tested, or adopted by the United States Navy or the United States Government unless and until such is the fact.

It is further ordered, That respondent within 60 days from and after the date of the service upon it of this order shall file with the Commission a report in writing setting forth in detail the manner and form in which it is complying with the order to cease and desist as hereinbefore set forth.

Complaint

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IN THE MATTER OF

ROSE R. SCOTT, TRADING AS KOTALKO SALES
COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2282. Complaint, Jan. 22, 1935—Decision, Nov. 27, 1935*

Where an individual, engaged in the sale and distribution of two proprietary preparations, consisting of a product to be rubbed into the scalp and over the hair, and an auxiliary soap, which it sold under the names "Kotalko" and "Kotalko Soap", respectively, to the consuming public throughout the several States—

Represented that said preparations would eliminate dandruff, stop falling hair, and grow hair on bald heads, through advertisements in newspapers and magazines, and that, as a result of use thereof, beautiful hair had replaced baldness and dandruff had entirely disappeared, through form letters, circulars, and pamphlets setting forth purported testimonials, accompanied by alleged photographs exhibiting users' fine hair, and emphasized such purported letters or testimonials as supplying proof of the results and merits of said product;

Facts being that preparations in question, as disclosed by expert testimony bearing on therapeutic uses and efficacy thereof, were not an effective remedy or cure for the various forms of alopecia, and that aforesaid representations as to the merits, functioning, or efficacy thereof were exaggerated, misleading, and unwarranted, and did not truthfully and accurately state their therapeutic value;

With tendency and capacity to confuse, mislead, and deceive members of the public into the belief that said products would eliminate dandruff, grow hair on bald heads and beautify the hair, and to induce them to buy and use the same because of such erroneous beliefs, and to divert trade to said individual from competitors engaged in the sale of treatments for hair and scalp, among whom there are those who in no wise misrepresent the efficacy or therapeutic value of their competing products, and with effect of so diverting, to the substantial injury and prejudice of such competitors:

Held, That such acts and practices were to the prejudice of the public and competitors, and constituted unfair method of competition.

Before *Mr. John W. Addison*, trial examiner.

Mr. DeWitt T. Puckett for the Commission.

Mr. J. Bond Smith and *Mr. Benjamin G. Wilkinson*, of Washington, D. C., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress entitled, "An Act to create a Federal Trade Commission, to define its powers and