

Complaint

IN THE MATTER OF

CAPITOL PAINT & VARNISH WORKS, INC.

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

Docket 4536. Complaint, July 9, 1941—Decision, Aug. 31, 1942

Where a corporation, engaged in the manufacture and interstate sale and distribution of a general line of paints and varnishes under the trade name "Capco House Paint," in competition with many who do not misrepresent their products—

(a) Represented and implied, through use of words "Pure Lead—Pure Zinc—Pure Oil" in advertisements and labels referring to the ingredients in said products, and which it featured as to place, type, and lettering as compared with matter purportedly giving the actual composition, that such paints were composed wholly of lead, zinc, and oil, and did not contain additional ingredients other than a normal percentage of drier; notwithstanding the fact that its said products contained excessive amounts of drier and ingredients other than those mentioned, and, in the case of some, contained no lead or zinc at all; and

(b) Set forth on labels statements purportedly showing the actual percentage of the various ingredients used in paint concerned, which were not always accurate in that the percentage of lead, zinc, and oil present was much less than stated, and in some instances less than 50 percent of quantity stated; With effect of misleading and deceiving a substantial portion of the purchasing public into the mistaken belief that said representations were true, thereby causing it to purchase paints in question; whereby trade was unfairly diverted from competitors to it:

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

Mr. S. F. Rose for the Commission.

Mr. Frank E. Gettleman and *Mr. A. Schwarzbach*, of Chicago, Ill., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Capitol Paint & Varnish Works, Inc., hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Capitol Paint & Varnish Works, Inc., is a corporation, organized, existing, and doing business under and by

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virtue of the laws of the State of Illinois, with its offices and principal place of business located at 1346 West Concord Street, Chicago, Ill.

PAR. 2. Said respondent is now and for more than 4 years last past has been engaged in the manufacture and sale of a general line of paints and varnishes, which products are manufactured at its place of business in the city of Chicago, State of Illinois.

The respondent causes its said products, when sold, to be transported from its said place of business in the State of Illinois to the purchasers thereof located at various points in the several States of the United States other than the State of Illinois and in the District of Columbia. Respondent maintains a course of trade in said products in said commerce.

PAR. 3. In the course and conduct of its said business, the respondent is in competition with individuals, partnerships, and other corporations engaged in the sale and distribution of paint and paint materials in commerce between and among the various States of the United States and in the District of Columbia. The products manufactured by the respondent are sold and distributed in said commerce under the trade name "Capco House Paint."

PAR. 4. In advertising matter used in soliciting the sale of said paints in said commerce and on the labels attached to the containers in which said paints are delivered to retailers for resale and to ultimate users, the respondent uses the words "Pure Lead—Pure Zinc—Pure Oil" in designating, describing and referring to the ingredients found in said paints. The words "Pure Lead—Pure Zinc—Pure Oil" are placed in such advertisements and on such labels in a conspicuous place in type and lettering larger than and distinctive from the type and lettering which purport to give the actual composition of such paints.

Through the use of the words "Pure Lead—Pure Zinc—Pure Oil," the respondent represents and implies, and the purchasers and users of such paints are thereby led to believe, that such paints are composed wholly of lead, zinc, and oil, and do not contain additional ingredients other than the normal percentage of drier found in all paints of the type sold by respondent.

In truth and in fact, none of respondents' said paints are composed wholly of lead, zinc, oil, and the normal percentage of drier, for all of said paints contain an excessive amount of drier and ingredients other than lead, zinc, and oil. Some of said paints do not contain any lead or zinc at all.

The statements placed on the labels by respondent purportedly showing the actual percentage of the various ingredients used in the paint and are not always accurate in showing the actual composition of the paint in that the percentage of lead, zinc, or oil present in said paint is much less than the percentage stated on the label. In some in-

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stances, said paints actually contain less than 50 percent of the quantity of lead, zinc, or oil stated on the label.

PAR. 5. There is a preference on the part of a substantial portion of the purchasing public for paints composed wholly of lead, zinc, and oil and the usual percentage of drier.

PAR. 6. There are among respondent's competitors many who sell paint and paint products and who do not misrepresent their products or matters pertaining thereto.

PAR. 7. The use by the respondent of the aforesaid false, misleading, and deceptive representations and implications has the tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said representations and implications are true and causes a substantial number of members of the public to purchase respondent's said paints, thereby unfairly diverting trade in said commerce to respondent from its competitors to their injury and to the injury of the public.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on the 9th day of July, A. D. 1941, issued, and thereafter served its complaint in this proceeding upon respondent, Capitol Paint & Varnish Works, Inc., a corporation, charging it with the use of unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of fact set forth in said complaint and waiving all procedure and further hearing as to said facts, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint and substitute answer, and the Commission having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Capital Paint & Varnish Works, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its offices and principal place of business located at 1346 West Concord Street, Chicago, Ill.

PAR. 2. Respondent is now, and for more than 4 years last past has been, engaged in the manufacture and sale of a general line of paints and varnishes, which products are manufactured at its place of business in the city of Chicago, State of Illinois.

The respondent causes its said products, when sold, to be transported from its said place of business in the State of Illinois to the purchasers thereof located at various points in the several States of the United States other than the State of Illinois and in the District of Columbia. Respondent maintains a course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its said business, the respondent is in competition with individuals, partnerships, and other corporations engaged in the sale and distribution of paint and paint materials in commerce between and among the various States of the United States and in the District of Columbia. The products manufactured by the respondent are sold and distributed in said commerce under the trade name of "Capco House Paint."

PAR. 4. In advertising matter used in soliciting the sale of said paints in said commerce and on the labels attached to the containers in which said paints are delivered to retailers for resale and to ultimate users, the respondent uses the words "Pure Lead—Pure Zinc—Pure Oil" in designating, describing, and referring to the ingredients found in said paints. The words "Pure Lead—Pure Zinc—Pure Oil" are placed in such advertisements and on such labels in a conspicuous place in type and lettering larger than and distinctive from the type and lettering which purport to give the actual composition of such paints.

Through the use of the words "Pure Lead—Pure Zinc—Pure Oil," the respondent represents and implies, and the purchasers and users of such paints are thereby led to believe, that such paints are composed wholly of lead, zinc, and oil, and do not contain additional ingredients other than the normal percentage of drier found in all paints of the type sold by respondent.

In truth and in fact, none of respondent's said paints is composed wholly of lead, zinc, oil, and the normal percentage of drier, for all of said paints contain an excessive amount of drier and ingredients

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other than lead, zinc, and oil. Some of said paints do not contain any lead or zinc at all.

The statements placed on the labels by respondent purportedly showing the actual percentage of the various ingredients used in the paint are not always accurate in showing the actual composition of the paint in that the percentage of lead, zinc, or oil present in said paint is much less than the percentage stated on the label. In some instances, said paints actually contain less than 50 percent of the quantity of lead, zinc, or oil stated on the label.

PAR. 5. There is a preference on the part of a substantial portion of the purchasing public for paints composed wholly of lead, zinc, and oil and the usual percentage of drier.

PAR. 6. There are among respondent's competitors many who sell paint and paint products and who do not misrepresent their products or matters pertaining thereto.

PAR. 7. The use by the respondent of the aforesaid false, misleading, and deceptive representations and implications has the tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said representations and implications are true, and causes a substantial number of members of the public to purchase respondent's said paints, thereby unfairly diverting trade in said commerce to respondent from its competitors to their injury and to the injury of the public.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, are all to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that it waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondent, Capitol Paint & Varnish Works, Inc., a corporation, its officers, representatives, agents, and employees,

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directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of its paints in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Pure Lead—Pure Zinc—Pure Oil," or other words of like import, to designate, describe, or refer to any paint not exclusively composed of lead, zinc, and oil, except for the addition of the usual and customary quantities of tinting material, thinner, and drier.

2. Representing, directly or by implication, that any paint contains any material or ingredient which it does not actually contain.

3. Representing, directly or by implication, that any paint contains materials or ingredients in quantities or proportions different from the actual quantities or proportions of such materials or ingredients in such paint.

It is further ordered, That the respondent shall, within 60 days after service upon it of this order file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Syllabus

IN THE MATTER OF

GEORGE S. MOGILNER AND JAMES WALKER, TRADING
AS MERIT HEALTH APPLIANCE CO.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914*Docket 4543. Complaint, July 21, 1941—Decision, Aug. 31, 1942*

Where two individuals, engaged in interstate sale and distribution of their "Merit Short Wave Diathermy" therapeutic apparatus; by means of advertisements in newspapers which circulated widely in different States, and through advertising circulars and frequent radio broadcasts, directly or by implication—

- (a) Represented that the unsupervised use of their device by the lay public for self-diagnosed conditions, through self-application in the home, constituted a competent and effective treatment for numerous ailments, including rheumatism, arthritis, neuritis, bursitis, lumbago, sciatica, neuralgia, sinus trouble, and female disorders, and for the alleviation of pain resulting from such conditions; and that use of the device was entirely safe and harmless;

The facts being that while diathermy machines are in fairly common use among physicians, particularly those who specialize in physical therapy, it is their practice never to employ diathermy until after thorough diagnosis and definite establishment of the fact that the condition is one in which its use is proper, and never to leave application of the treatment, delegated, usually, to a trained technician, to the patient; physicians' use of diathermy in the treatment of ailments above set forth is limited to chronic cases since use in acute cases has a tendency to aggravate rather than alleviate the pain; there are various specific conditions in which its use is positively contraindicated, including menstruation, pregnancy, tuberculosis, cancer, acute appendicitis, and gastric ulcers, while use or excessive use in other conditions may spread the infection and lead to gangrene and amputation of the limb; in cases in which the skin has lost sense of heat, application may result in severe burns; due to the impossibility of a member of the lay public correctly diagnosing his condition or determining the underlying cause of the disorder, necessary medical treatment may be delayed; and in instances in which diathermy would be of therapeutic benefit, it is impossible for the layman to determine the method of application or frequency and extent of the treatment; and

- (b) Failed to reveal all the facts material in the light of such representations, under prescribed or usual conditions, and that such device might safely be used only after competent medical diagnosis has determined that diathermy is indicated, and has prescribed the frequency and extent of the treatment, and the user has received adequate instruction by a trained technician in the use of the device;

With tendency and capacity to mislead and deceive the purchasing public into the mistaken belief that said device possessed therapeutic values which it did not, and that it might safely be used indiscriminately by the lay public,