

IN THE MATTER OF

DURAKOTE PAINT CORPORATION, AND PHILIP H. EISGRAU,
CELE EISGRAU, NATHAN PASHMAN, AND THEODORE
SHAPIRO, AS OFFICERS THEREOF

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

Docket 5018. Complaint, July 28, 1943—Decision, Feb. 24, 1945

Where a corporation engaged in the interstate sale and distribution of paint and paint products, and its four officers, who owned all its stock, and of whom two were engaged as partners under a trade name in the manufacture of paint and paint products which they sold to it; through advertisements circulated to purchasers and prospective purchasers in various states, including form letters—

- (a) Represented that they had for sale a limited quantity of their "Durakote Outside White Paint," worth \$3.25 a gallon, which was being offered at a special or sacrifice price of \$1.85 a gallon; that it was a high-grade paint, superior in quality to the most expensive brands of outside white paint; and was durable and dried to a hard finish within a few hours and was capable of enduring the severest exposure without cracking, chipping, or flaking; and that the supply thereof was limited to a few gallons stored in a warehouse;

The facts being that the quantity thereof was not limited as so specified, but orders received were filled by them in unlimited quantities; the price of \$1.85 a gallon was not a sacrifice or reduced price for said paint but was the usual price charged by them therefor; said paint was not of a quality similar to paint regularly sold at \$3.25 a gallon nor superior in quality and composition to the most expensive brands of outside paint; would not endure severest exposure without cracking, chipping, or flaking and did not dry hard within a few hours; and

- (b) Represented that the said corporation was a manufacturer of paints, enamels, varnishes, and allied specialties and manufactured the paint sold under the brand name "Durakote";

The facts being that said corporation was not a manufacturer but, instead, was a sales organization engaged solely in the sale and distribution of paint and paint products manufactured by its two stockholders above referred to; and orders for paint received by it were transmitted to said individuals, who filled them by shipping direct to purchasers and charged the cost of paint shipped, to the account of aforesaid corporation;

With capacity and tendency to mislead a substantial portion of the purchasing public into the mistaken belief that said representations were true, and thereby induce purchase by it of said product:

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

Before *Mr. John L. Hornor*, trial examiner.

Mr. Merle P. Lyon and *Mr. Clark Nichols* for the Commission.
Kaplan & Kaplan, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Com-

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mission, having reason to believe that Durakote Paint Corporation, a corporation, and Philip H. Eisgrau, Cele Eisgrau, Nathan Pashman and Theodore Shapiro, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Durakote Paint Corporation, is a corporation, organized and doing business under the laws of the State of New York, with its principal office and place of business located at 1775 Broadway, New York, N. Y. Said corporate respondent is now, and for more than one year last past has been, engaged in the sale and distribution of paints and paint products in commerce among and between the various States of the United States, and in the District of Columbia.

Respondents, Philip H. Eisgrau, Cele Eisgrau, Nathan Pashman and Theodore Shapiro, are respectively president, vice president, secretary and treasurer of Durakote Paint Corporation. Said individual respondents own all of the issued and outstanding stock of the corporate respondent herein, and control and direct the policies, activities and business operations of said corporate respondent.

Respondent, Philip H. Eisgrau, is president of Durakote Paint Corporation, and has his office and principal place of business at 1775 Broadway, New York, N. Y.

Respondent, Cele Eisgrau, is vice president of Durakote Paint Corporation, and is the wife of respondent, Philip H. Eisgrau. She resides at 1326 Beach-25th Street, Far Rockaway, Brooklyn, N. Y.

Respondents, Nathan Pashman and Theodore Shapiro, in addition to holding the offices of secretary and treasurer, respectively, of Durakote Paint Corporation, are also engaged as copartners in the manufacture of paint and paint products under the name and style of Dutch Masters Paint & Varnish Co., and have their principal office and place of business at 35 Wythe Avenue, Brooklyn, N. Y.

Respondent, Durakote Paint Corporation, by virtue of exclusive contractual agreements with respondents, Nathan Pashman and Theodore Shapiro, as owners of Dutch Masters Paint & Varnish Co., has for upwards of one year or more last past offered for sale and sold paint called "Genuine Durakote Outside White Paint" manufactured for it by Dutch Masters Paint & Varnish Co. Said paint, when sold to members of the consuming public by said Durakote Paint Corporation, is shipped and transported from the place of business of respondents, Nathan Pashman and Theodore Shapiro in Brooklyn, N. Y., to the purchasers and users thereof located in various States of the United States other than the State of New York, and in the District of Columbia.

All of the respondents herein have maintained, and now maintain, a course of trade in said paint and paint products in commerce among and between the various States of the United States, and in the District of Columbia.

PAR. 2. In the course and conduct of their said business, and for the purpose of inducing the purchase of said products, it has been and is the practice of respondents to mail letters and advertising literature to purchasers and prospective purchasers located in various States of the United States and in the District of Columbia, and therein to make representations with respect to the price, quality and manufacture of said products and with respect to the status and character of the business conducted by

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respondent Durakote Paint Corporation. Typical of said representations so made are the following:

In our warehouse, we have 100 gallons of high grade Genuine Durakote Outside White Paint in five gallon steel buckets, guaranteed to be *clean fresh stock* in perfect condition which we will sacrifice for \$1.85 per gallon, delivered, freight prepaid; similar quality usually sold at \$3.25 per gallon.

This material is superior in quality and composition to the most expensive made well known brands of Outside White. Its unusual high quality makes it ideal for inside and outdoor painting on wood, metal, concrete, brick or over old paint. It covers *solid* in one coat, brushes easily and dries hard within a few hours to a beautiful smooth finish that is easily washable. Endures severest exposure without cracking, chipping or flaking. It may be tinted with ordinary oil colors and thinned with turpentine.

Due to the war effort and raw material shortages, further supplies may not be available for civilian use. . . .

May we have your order for all or *any part* of this lot by return mail?

Yours very truly,

Durakote Paint Corporation.

Manufacturers of Paints-Enamels-Varnishes & Allied Specialties.

Through and by means of the foregoing statements and others of similar import and meaning, respondents have represented and implied that they have a limited quantity of paint for sale worth \$3.25 a gallon but offered at a sacrifice price of \$1.85 a gallon, in order to dispose of it; that this paint is a high grade paint, superior in quality to the most expensive brands of outside white paint; that it is durable and dries to a hard finish and is capable of enduring the severest exposure without cracking, chipping or flaking; that the supply of this paint is limited to a few gallons stored in a warehouse, and that it may be impossible to obtain further quantities as soon as this supply is exhausted; and that respondent, Durakote Paint Corporation, is a manufacturer of paints, enamels, varnishes and allied specialties, and is the manufacturer of the Genuine Durakote Outside White Paint featured in its advertisements.

PAR. 3. The aforesaid statements and representations are false, misleading and deceptive. Respondent, Durakote Paint Corporation, is not a manufacturer of paints, enamels, varnishes and allied specialties, and does not own or maintain a warehouse for the storage of paint and allied products. It purchases its paint from Dutch Masters Paint & Varnish Co. of Brooklyn, N. Y., and shipments are made direct to the individual consumers from the factory of said company in Brooklyn, N. Y. Respondent, Durakote Paint Corporation, is merely a sales agent or outlet for the distribution of the paint products of Dutch Masters Paint & Varnish Co., and fills all orders through said company. Orders received are not limited to 100 gallons or any other amount, but are filled in the regular course of business in unlimited quantities, and solicitations of orders are made to many prospective customers located in various widely scattered States of the United States.

Furthermore, \$1.85 per gallon is not a sacrifice or reduced price for said Durakote Outside White Paint, but is the usual, regular and customary price of said paint. Said paint is not of a quality similar to paint regularly sold at \$3.25 per gallon, and is not superior in quality and composition to the most expensive made well known brands of Outside White Paint. It will not endure severest exposure without cracking, chipping or flaking,

and does not dry hard within a few hours. There is no immediate prospect of shortages in supply of said paint, and the war effort and raw material shortages have not diminished the available supply of said paint.

Furthermore, the steel buckets in which said paint is shipped and which are represented to contain five gallons do not in fact contain five gallons of paint, but contain substantially less than five gallons, so that the cost to the purchaser is more than the \$1.85 per gallon delivered price specified in respondent's advertisements.

PAR. 4. The use by the respondents of the foregoing false and misleading statements and representations regarding the price, quality and manufacture of their paint products and the status and character of the business conducted by respondent Durakote Paint Corporation, has had and now has, the capacity and tendency to, and does, mislead a substantial portion of the purchasing public into the mistaken and erroneous belief that said statements and representations are true, and causes a substantial portion of the purchasing public, because of such mistaken and erroneous beliefs, to purchase said paints and paint products.

PAR. 5. The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 28, 1943, issued and subsequently served its complaint in this proceeding on the respondents, Durakote Paint Corporation, a corporation, and Philip H. Eisgrau, Cele Eisgrau, Nathan Pashman, and Theodore Shapiro, individually, and as officers of Durakote Paint Corporation, charging them with the use of 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 the answers of the respondents thereto, testimony and other evidence in support of, and in opposition to, the allegations of said complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon said complaint, answers thereto, testimony and other evidence, report of the trial examiner upon the evidence, and briefs filed in support of the complaint and in opposition thereto (oral argument not having been requested); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Durakote Paint Corporation, is a corporation, organized, existing, and doing business under the laws of the State of New York, with its principal office and place of business located at 1775 Broadway, New York, N. Y. Said corporate respondent is now, and for several years last past has been, engaged in the sale and distribution of paint and paint products in commerce among and between the various States of the United States and in the District of Columbia.

Respondent, Philip H. Eisgrau, is president of respondent, Durakote Paint Corporation, and has his office and principal place of business at 1775 Broadway, New York, N. Y.

Respondent, Cele Eisgrau, is vice president of respondent, Durakote Paint Corporation, and is the wife of respondent, Philip H. Eisgrau. She resides at 1326 Beach-25th Street, Far Rockaway, Brooklyn, N. Y.

Respondents, Nathan Pashman and Theodore Shapiro, are secretary and treasurer, respectively, of respondent, Durakote Paint Corporation, and are also engaged in the manufacture of paint and paint products as copartners under the name and style of Dutch Masters Paint & Varnish Co., and have their principal office and place of business at 35 Wythe Avenue, Brooklyn, N. Y.

Said individual respondents own all of the issued and outstanding capital stock of said corporate respondent and control and direct the policies, activities, and business operations of said corporate respondent.

PAR. 2. In the course and conduct of its business the respondent, Durakote Paint Corporation, is engaged in the sale and distribution of paint under the trade or brand name of "Durakote," which paint is manufactured for it by the Dutch Masters Paint & Varnish Co. Said paint, when sold, is transported from the place of business of the Dutch Masters Paint & Varnish Co. in Brooklyn, N. Y., to purchasers thereof located in various other States of the United States.

All of said respondents have maintained, and now maintain, a course of trade in said paint and paint products in commerce among and between various States of the United States.

PAR. 3. In the course and conduct of their said business and for the purpose of inducing the purchase of said paint products, the respondents have made false, deceptive, and misleading statements and representations with respect to the status and character of the business conducted by the respondent, Durakote Paint Corporation, and with respect to the price and quality of said paint products through advertising material circulated by means of the United States mails to purchasers and prospective purchasers located in various States of the United States. Typical of such advertising material is a form letter with reference to respondents' Durakote Outside White Paint which was distributed by the United States mails to industrial users of paint and which reads as follows:

In our warehouse, we have 100 gallons of high grade Genuine Durakote Outside White Paint in five gallon steel buckets, guaranteed to be *clean fresh stock* in perfect condition which we will sacrifice for \$1.85 per gallon, delivered, freight prepaid; similar quality usually sold at \$3.25 per gallon.

This material is superior in quality and composition to the most expensive made well known brands of Outside White. Its unusual high quality makes it ideal for inside and outdoor painting on wood, metal, concrete, brick or over old paint. It covers *solid* in one coat, brushes easily and dries hard within a few hours to a beautiful smooth finish that is easily washable. Endures severest exposure without cracking, chipping or flaking. It may be tinted with ordinary oil colors and thinned with turpentine.

Due to the war effort and raw material shortages, further supplies may not be available for civilian use. . . .

May we have your order for all or *any part* of this lot by return mail?

Yours very truly,

Durakote Paint Corporation.

Manufacturers of Paints-Enamels-Varnishes & Allied Specialties.

Through and by means of the foregoing statements and others of similar import not specifically set out herein, respondents have represented that they have a limited quantity of Durakote Outside White Paint for sale worth \$3.25 a gallon which is being offered at a special or sacrifice price of \$1.85 a gallon; that this paint is a high-grade paint, superior in quality to the most expensive brands of outside white paint; that it is durable and dries to a hard finish within a few hours and is capable of enduring the severest exposure without cracking, chipping, or flaking; that the supply of this paint is limited to a few gallons stored in a warehouse; and that the respondent, Durakote Paint Corporation, is a manufacturer of paints, enamels, varnishes, and allied specialties and is the manufacturer of the paint sold under the brand name "Durakote."

PAR. 4. The aforesaid statements and representations are false, misleading and deceptive. The quantity of paint which the respondents had for sale was not limited to the specified amounts set out in respondents' advertising material, but, instead, such advertising material soliciting orders was distributed to many prospective customers and orders received were filled by the respondents in unlimited quantities. The price of \$1.85 a gallon was not a sacrifice or reduced price for said Durakote paint but was the usual, regular, and customary price charged by respondents for said paint. Said paint is not of a quality similar to paint regularly sold at \$3.25 a gallon and is not superior in quality and composition to the most expensive brands of outside paint. It will not endure severest exposure without cracking, chipping or flaking and does not dry hard within a few hours.

Respondent, Durakote Paint Corporation, is not a manufacturer of paints, enamels, varnishes, and allied specialties but, instead, is a sales organization engaged solely in the sale and distribution of paint and paint products manufactured by the respondents, Nathan Pashman and Theodore Shapiro, trading as Dutch Masters Paint & Varnish Co. When orders for paint are received by the respondent, Durakote Paint Corporation, they are transmitted to the respondents, Nathan Pashman and Theodore Shapiro, trading as Dutch Masters Paint & Varnish Co., who in turn fill said orders by shipping direct to the purchasers thereof and charge the cost of said paint, when shipped, to the account of the Durakote Paint Corporation.

PAR. 5. The use by the respondents of the foregoing false and misleading statements and representations regarding the price, quality, and manufacture of their paint products and the status and character of the business conducted by the respondent, Durakote Paint Corporation, has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the mistaken and erroneous belief that said statements and representations are true and causes a substantial portion of the purchasing public, because of such mistaken and erroneous beliefs, to purchase said paints and paint products.

CONCLUSION

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

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission on the complaint of the Commission, the answers of the respondents, testimony and other evidence in support of the allegations of said complaint and in opposition thereto taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence, and briefs filed in support of the complaint and in opposition thereto; and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, Durakote Paint Corporation, a corporation, and its officers, and Philip H. Eisgrau, Cele Eisgrau, Nathan Pashman, and Theodore Shapiro, individually, and as officers of Durakote Paint Corporation, and their respective representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale, and distribution of paints, enamels, varnishes, and allied specialties in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing as a customary or regular price or value of any of respondents' paints or paint products, any price or value which is in fact in excess of the price at which said paints or paint products are customarily offered for sale and sold in the normal and usual course of business.

2. Representing directly or by implication that respondents are making a special offer of a limited quantity of paints or paint products when such offer is made available to purchasers generally and orders received are filled without limitation.

3. Representing directly or by implication that paints or paint products which are offered for sale at the usual and customary prices therefor are being sold at special or reduced prices; or in any other manner representing that a purchaser is receiving an advantage in price or other consideration not ordinarily available.

4. Representing that respondents' outside paints are of a quality comparable with paints regularly selling at \$3.25 or more per gallon or that said paints are superior in quality or composition to the most expensive brands of outside paint.

5. Representing that respondents' paints or paint products will endure severest exposure without cracking, chipping, or flaking.

6. Representing that respondents' outside paint will dry hard within a few hours or within any period of time less than that normally required.

7. Representing directly or by implication that the respondent, Durakote Paint Corporation, is a manufacturer of paints, enamels, varnishes, or allied specialties when the activities of such corporation are confined to those of a sales organization engaged in the sale and distribution of paints and paint products manufactured by persons or concerns other than said corporation.

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

Syllabus

IN THE MATTER OF
VITAMIN PRODUCTS COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 4733. Complaint, Mar. 17, 1942—Decision, Feb. 28, 1945

Where an individual engaged in the interstate sale and distribution of various preparations designated as "Catalyn," "Vitamin A Complex," "Vitamin B Complex," "Vitamin C Complex," "Vitamin D Complex," "Vitamin E Complex," "Vitamin F Complex," "Vitamin G Complex," "V-P Organic Mineral Tablets," "Cerol," "V-P Phosphate," "Cerodyn" (also referred to as "Cerolyn" and "V. P. Fortified Wheat Germ") and "Viable Acidophilus Yeast"; through advertisements, periodicals, circulars, leaflets, pamphlets and other advertising literature, directly and by implication—

(a) Represented that the preparation "Catalyn" contained a sufficient supply of multiple vitamin concentrates to constitute a competent dietary supplement in the treatment of any vitamin deficiency disease and a competent nutritional and corrective treatment for the prevention and cure of various diseases and conditions including acidosis, anemia, angina pectoris, backwardness in children, Bright's disease, change of life, chorea, colds, constipation, cystitis, dropsy, enlarged glands, enlarged prostate gland, goiter, hardening of the arteries, headache, heart trouble, high blood pressure, infectious diseases, insomnia, low blood pressure, and various other ailments and conditions therein set forth;

The facts being that said preparation, taken as directed, did not furnish sufficient vitamins, with the exception of vitamin D and to a limited extent vitamin A, to have any therapeutic value in the treatment of vitamin deficiency or the prevention of vitamin deficiency diseases, and was not a competent dietary supplement in the building of normal vitality and resistance, nor a competent treatment for the diseases and conditions set forth by him;

(b) Falsely represented, through use of the slogans "Catalyn for Health," and "Catalyn—Nature's Source of Vitality," that said preparation would bring health to the user and could be relied upon so to do, that it could be relied upon to produce vitality, that it was a product of nature, and that the results obtained by the use thereof were miraculous, and, by designating the preparation as "This life-and-health-building product," that consumption of the product would insure life and health to the user;

(c) Falsely represented that said "Vitamin A Complex" was a competent nutritional and corrective treatment for the prevention and cure of such diseases or conditions as retarded appetite, growth and development, disturbed dental and bone development, susceptibility to infections, slow healing of reticulo-endothelium and epithelium, infections of eye, ear, genito-urinary tract, and sinus, and tonsilitis, pneumonia, tuberculosis, diarrhea, difficult delivery, interference with successful reproduction and lactation, pernicious anemia, secondary anemia, kidney and bladder disorders, degeneration of the nervous system, and atrophy of organs and glands including liver, testes, spleen, thyroid, pituitary, salivary, and others;

(d) Falsely represented that said "Vitamin B Complex" was a competent nutritional and corrective treatment for the prevention and cure of diseases or conditions such as susceptibility to infections due to lowered resistance, diabetes mellitus, functional disorders including atrophy or pathological enlargement of adrenals, brain, gonads, heart, kidneys, liver, ovaries, pancreas, pituitary gland, spleen, testes,