FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, JULY 1, 1953, TO JUNE 30, 1954

IN THE MATTER OF

KEN WHITMORE, INC. ET AL.[1]

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND THE WOOL PRODUCTS LABELING ACT

Docket 6091. Complaint Apr. 1, 1953—Decision, July 7, 1953

Where a corporation and its president, engaged in the manufacture and interstate sale and distribution of wool products as defined in the Wool Products Labeling Act—

(a) Misbranded certain ladies' coats in that they were not stamped, tagged, or labeled as required by said Act and the Rules and Regulations promulgated thereunder;

(b) Misbranded said coats in that they were labeled or tagged as containing "A Blend of Wool and IMPORTED CASHMERE—All Wool," when in fact they were made from fabrics composed entirely of wool or fleece of the sheep or lamb and contained no hair or fiber of the Cashmere goat;

(c) Misbranded certain of said ladies' coats in that the percentage or amount of the constituent fibers of their interlinings were not separately set forth on stamps, tags, labels, or other means of identification as required by Rule 24 of said Rules and Regulations; and

(d) Further misbranded said ladies' coats in that the labeling did not give the percentage of the alleged cashmere fiber present therein, if any:

Held, That such acts and practices, under the circumstances set forth, were in violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. George E. Steinmetz for the Commission.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated July 7, 1953, the initial decision in the instant matter of hearing examiner James A. Purcell,

[1] Prior to the issuance of the complaint in this matter the Commission, on January 12, 1953, Boston, obtained a temporary injunction which halted the alleged mislabeling charged and constituted the first action taken by the Commission to enjoin the misbranding of wool garments under Sec. 7 (d) of the Wool Products Labeling Act.

as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission on April 1, 1953, issued and subsequently served its complaint in this proceeding upon the respondents, Ken Whitmore, Inc., a corporation, and Sidney Sisselman, individually and as President of said corporation, charging said respondents with the use of unfair and deceptive acts and practices in violation of said Acts.

On May 19, 1953, respondents filed their answer in which answer they admitted all of the material allegations of facts set forth in said complaint; waived hearing as to the facts alleged in the complaint; agreed that findings as to the facts and conclusions based upon said answer may be made; and that an order be entered disposing of the matter without intervening procedure, but reserved the right to appeal as provided by Rule XXIII of the Rules of Practice.

Thereafter, the proceeding regularly came on for final consideration by the above-named Hearing Examiner theretofore duly designated by the Commission upon said complaint and answer thereto, and said Hearing Examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and orders:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Ken Whitmore, Inc., is a corporation duly incorporated under and by virtue of the laws of the Commonwealth of Massachusetts, and respondent, Sidney Sisselman, is President of the respondent corporation. Respondent, Sidney Sisselman, directs and controls the policies, acts and practices of the corporate respondent. The office and principal place of business of the respondents is 16 Oak Street, Pittsfield, Massachusetts.

PAR. 2. Subsequent to the effective date of the Act and more especially since 1950, respondents have manufactured for introduction, introduced, sold, distributed, delivered for shipment, and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act, wool products as "wool products" are defined therein.

PAR. 3. Certain of said wool products were misbranded in that they were not stamped, tagged or labeled as required under the provisions of section 4 (a) (2) of the Wool Products Labeling Act of 1939 and

in the manner and form as prescribed by the Rules and Regulations promulgated thereunder.

PAR. 4. Certain of said wool products were misbranded within the intent and meaning of section 4 (a) (1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein. Among such misbranded wool products were ladies' coats labeled or tagged by respondent corporation as containing "A Blend of Wool and IMPORTED CASHMERE—All Wool"; whereas, in truth and in fact said wool products did not contain any of the hair or fiber of the Cashmere goat but were made from fabrics composed entirely of the wool or fleece of the sheep or lamb.

PAR. 5. Through the use of the labels, tags and legend aforesaid respondents represent and have represented that their said wool products were and are made of fabrics composed of a blend of wool and imported cashmere fibers; which representations are false and deceptive in that they did not contain any of the hair or fiber of the Cashmere goat, but were composed entirely of fabrics manufactured from the wool or fleece of the sheep or lamb.

PAR. 6. Certain of said wool products were further misbranded in that the percentage or amount of the constituent fibers of interlinings of certain of said ladies' coats were not separately set forth on stamps, tags, labels or other means of identification in the manner, form and extent as required by Rule 24 of the Rules and Regulations promulgated by the Commission pursuant to said Wool Products Labeling Act of 1939.

PAR. 7. Certain of said wool products were further misbranded within the intent and meaninng of the Wool Products Labeling Act and Rules and Regulations thereunder, in this, that the label referred to in Paragraph Four does not give the percentage of the alleged cashmere fiber present therein, if any.

CONCLUSION

The acts and practices of respondents as hereinabove found were in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Ken Whitmore, Inc., a corporation, and its officers, and respondent, Sidney Sisselman, individually

and as an officer of said corporation, and respondents' respective representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of ladies' coats or other "wool products" as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain or in any way are represented as containing "wool," "reprocessed wool" or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included therein;

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner;

(*a*) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

(*b*) The maximum percentage of the total weight of such wool product of any nonfibrous loading, filling, or adulterating matter;

(*c*) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

3. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as containing hair or fleece of the Cashmere goat;

4. Stamping, tagging, labeling or otherwise identifying such products as containing hair or fleece of the Cashmere goat without setting out in a clear and conspicuous manner on each such stamp, tag, label or other identification the percentage of such cashmere therein;

5. Failing to separately set forth on the required stamp, tag, label, or other means of identification the character and amount of the constituent fibers contained in the interlinings of such wool products as provided in Rule 24 of the Rules and Regulations promulgated under said Wool Products Labeling Act of 1939.

1 **Order**

Provided, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (a) and (b) of section 3 of the Wool Products Labeling Act of 1939; and

Provided further, That nothing contained in this order shall be construed as limiting any applicable provisions of said Act or the Rules and Regulations promulgated thereunder.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall, within sixty (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 the order to cease and desist [as required by said declaratory decision and order of July 7, 1953].

IN THE MATTER OF

A. V. CAUGER SERVICE, INC.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5945. Complaint, Jan. 22, 1952—Decision, July 8, 1953

Complaint charging respondent with entering into restrictive and monopolistic exclusive agreements with motion picture exhibitors in connection with the sale, lease, renting, and distribution of commercial or advertising film and the exhibition thereof in the motion-picture theaters of said exhibitors.

Where one of the largest distributors of commercial or advertising films in the United States which furnished display services to advertisers through the exhibiting of such in motion-picture theaters with which it had screening agreements;

Entered into and enforced long-term screening agreements running for two years from their effective date, and for additional periods thereafter for one year, subject to sixty days' notice previous to their expiration, for the exclusive privilege of exhibiting commercial or advertising films produced or distributed by it on the screens of the theater or theaters owned or controlled by the contracting motion picture exhibitors, whereby it paid the exhibitor at a stipulated rate for said privilege and the latter agreed not to show any other paid advertising slides or films except those furnished by the distributor during the term of the agreement, except where prohibited by the Commission and subject to the provision that previous contracts with advertisers should be continued only to their earliest expiration dates:

Held, That such acts and practices unreasonably restrained commerce in commercial or advertising films, and constituted unfair methods of competition.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Floyd O. Collins for the Commission.

Mr. V. A. Julian, of Independence, Mo., for respondent.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on the 22d day of January, 1952, issued and subsequently served its complaint on the respondent named in the caption hereof charging it with the use of unfair methods of competition and unfair acts and practices in violation of the provisions of said Act.

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[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on July 8, 1953, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

The respondent, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule 5 of the Commission's Rules of Practice solely for the purpose of this proceeding, any review thereof and the enforcement of the order consented to and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth and in lieu of answer to said complaint heretofore filed and which, upon acceptance by the Commission of this settlement, is to be withdrawn from the record hereby:

1. Admits all the jurisdictional allegations set forth in the complaint except that it states that its correct address is 10922 Winner Road, Independence, Missouri, instead of 237 Huttig Avenue, Independence, Missouri, as stated in the complaint.

2. Consents that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondent, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrains from admitting or denying that it has engaged in any of the acts or practices stated therein to be in violation of law.

3. Agrees that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule 5 of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reasons to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondent consents may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Missouri with its office and principal place of business located at 10922 Winner Road, Independence, Missouri.

PAR. 2. Said respondent, for more than 5 years last past, has been and is now engaged in the business of selling, leasing, renting, and distributing commercial or advertising films to or for advertisers of various commodities and to other distributors of such films. Said respondent furnishes display services to advertisers through the exhibiting of such films upon the screens of various motion-picture theaters throughout the United States, with whom it has screening agreements.

Said respondent is one of the largest distributors of commercial or advertising films in the United States and causes said films, when sold, leased or rented, to be transported from its place of business or

the place of business of the producer to motion-picture theaters located throughout the several States of the United States, where said films are displayed on the screens of such theaters for a specified period of time, usually one week. Upon the conclusion of the display period such films are returned by the theaters or exhibitors to said respondent, or to the home office of the producer.

There has been, and is now, a constant recurring course and flow of said commercial or advertising films in interstate commerce, throughout the several States of the United States.

PAR. 3. Said respondent has been from time to time, and is now, in active and substantial competition with other film distributors in the sale, rental, and distribution in said commerce of commercial or advertising films.

PAR. 4. In or about the year 1946, and from time to time thereafter, said respondent has entered into long-term screening agreements with various motion-picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films, produced or distributed by it, on the screens of the theater or theaters owned or controlled by said exhibitors, whereby said respondent pays the exhibitor at a stipulated rate for the privilege of displaying its advertising films. Such agreements are known and designated as "Theater Screening Agreements," in which there is included the following provision:

> Exhibitor agrees not to show any other paid advertising, slides, or films except those furnished by the distributor during the term of this agreement, except where prohibited by the Federal Trade Commission; provided, any contracts with advertisers made previous to this date shall be continued only to the earliest expiration date of such contracts.
>
> This contract, when approved by an authorized officer of the company is binding upon the successors and assigns of both parties, and shall begin on the _____ day of _____ 19__, and shall continue for a period of two years from said date and for additional periods thereafter of one year unless either party not less than sixty (60) days previous to the expiration of any such period shall notify the other in writing of its selection to terminate this agreement at the end of said period.

The foregoing provision has been enforced by respondent and adhered to by a substantial number of exhibitors located throughout the United States.

PAR. 5. The capacity, tendency, and effect of the aforesaid agreements and the acts of said respondent in the performance thereof are, and have been, to unduly restrain, lessen, suppress, and injure competition in the interstate sale, lease, rental, and distribution of commercial or advertising films and to unduly hinder and prevent competing producers, sellers, and distributors of commercial or advertising films from selling, leasing, renting, and distributing such films and to

monopolize in said respondent the sale, lease, rental and distribution of commercial or advertising films in commerce as herein stated.

As a further effect of the aforesaid agreements, advertisers or prospective advertisers, who, in their respective marketing areas, have sought to obtain motion-picture film advertising through said other film distributors, have been compelled as a result of the restrictive provisions of said agreements, either to place their business with respondent or to forego this type of advertising.

PAR. 6. The acts and practices of respondent, as herein found, are all to the prejudice of competitors of respondent and of the public; have a dangerous tendency to hinder and prevent, and have actually hindered and prevented competition in the sale, lease, rental, and distribution of commercial or advertising films in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in commercial or advertising films, and have a dangerous tendency to create in respondent a monopoly in certain sections of the United States in the sale, lease, rental and distribution of such films, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

CONCLUSION

The acts and practices of respondent, as hereinabove found and set forth, are all to the prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That the respondent, A. V. Cauger Service, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale, leasing or distribution of commercial or advertising films in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

Entering into contracts with motion-picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theaters owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of one year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order.

It is further ordered, That the respondent shall, within sixty (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 compiled with this order.

A. V. CAUGER SERVICE, INC.,
By N. M. CAUGER, *President.*

Date: April 30, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 8th day of July 1953.

Syllabus

IN THE MATTER OF

RODNEY DISTRIBUTORS, INC. (D. B. A. ILLINOIS SEWING MACHINE DISTRIBUTORS) ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6082. Complaint, Feb. 19, 1953—Decision, July 8, 1953

Where a corporation and its four officers, engaged in the competitive interstate sale and distribution of sewing machines with heads imported from Japan, on the back of the vertical arms of which the words "Made in Occupied Japan" or "Japan" were covered by the motor, and on the front of some of which arms a medallion, readily removable, displayed the words in such small and indistinct fashion as not to constitute adequate notice that the heads were imported—

(*a*) Failed to disclose adequately on their said sewing machines that the heads were made in Japan;

(*b*) Falsely represented that their product was manufactured by or connected in some way with well and favorably known American firms through the featured use of such trade names or brands as "Illinois" or "Illinois De-Luxe" or other prominent domestic names;

(*c*) Represented through the use of the word "Distributors" in their corporate and trade names that they were distributors of said sewing machines, when in fact they were retailers;

(*d*) Represented that they were making a bona fide offer to sell New Home, Singer, Eldredge, and Domestic rebuilt console and portable electric sewing machines for the sums of $49.50 and $24.95, through such statements, among others, in their advertising as "HUGE SAVINGS DEMONSTRATOR SALE Choose from New Home, Singer, Eldredge, Domestic * * *", "Illinois Rebuilt Singer Head * * * Regular $99.50 NOW $49.50", and "Illinois Rebuilt White Head * * * Regular $49.50 NOW $23.95";

The facts being said offers were not genuine or bona fide; salesmen who after obtaining leads, called upon persons interested, made no offort to sell the machines advertised, but disparaged them and attempted to sell different and more expensive machines, particularly those with heads made in Japan:

Held, That such acts and practices were all to the prejudice and injury of the public and respondents' competitors, and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce.

Before *Mr. John Lewis*, hearing examiner.

Mr. William L. Taggart and *Mr. Michael J. Vitale* for the Commission.

Froelich, Grossman, Teton & Tabin, of Chicago, Ill., for respondents.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 19, 1953, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth and in lieu of answer to said complaint, filed March 10, 1953, hereby admit:

(1) All the jurisdictional allegations set forth in the complaint.

(2) Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

(3) Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which respondents consent may be entered herein in final disposition of this proceeding, are as follows:

PARAGRAPH 1. Respondent Rodney Distributors, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 5671 Milwaukee Avenue, Chicago, Illinois. Said corporation does business under the name of Illinois Sewing Machine Distributors. Respondents Seymour Ratner, Irwin Ratner, Harold Ratner and Joseph Wandel are President, Vice-Presidents, and Secretary-Treas-

[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on July 8, 1953, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

urer, respectively, of corporate respondent and acting as such officers, formulate, direct and control the policies, acts and practices of said corporation.

PAR. 2. Respondents are now, and for several years last past have been, engaged in the sale of sewing machines, the heads of which are imported from Japan, to the purchasing public. In the course and conduct of their business respondents cause and have caused their said products, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States in the United States and maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in said commerce has been and is substantial.

PAR. 3. When the sewing machines are received by respondents, the words "Made in Occupied Japan" or "Japan" appear on the back of the machine underneath the motor. The aforesaid words are, however, covered by the motor so that they are not visible. In some instances, said sewing machines, when sold by respondents, are marked with a medallion placed on the front of the sewing machine upon which the words "Japan" or "Made in Japan" appear. These words are however, so small and indistinct that they do not constitute adequate notice to the public that the heads are imported. Furthermore, said medallion can be readily removed and when the medallion is so removed no visible mark of origin appears on the machine.

Respondents place no other mark on the sewing machines showing foreign origin, or otherwise inform the public that the sewing machines are of foreign origin, before they are offered for sale to the public.

PAR. 4. When articles of merchandise, including sewing machines, are exhibited and offered for sale by retailers to the purchasing public and are not marked or not adequately marked showing that they or parts thereof are of foreign origin, or, if marked, and the markings are covered or otherwise concealed, such purchasing public understands and believes such articles to be wholly of domestic origin.

There is and has been among the members of the purchasing public a substantial number who have a decided preference for products manufactured in the United States over products manufactured in whole or in part in foreign countries including sewing machines.

PAR. 5. Respondents use the words "Illinois," "Illinois De Luxe" and other prominent domestic names as trade or brand names for their sewing machines, which words are imprinted or embossed on the front horizontal arm of the head in large, conspicuous letters, and use said trade or brand names in their advertising matter. The word "Illinois" and other prominent domestic names are the names or parts of the names of, or used as trade names, marks or brands by one or more business organizations transacting and doing business in the United

States, which are and have been well and favorably known to the purchasing public and which are and have been well and long established in various industries.

PAR. 6. By using a trade name or brand name such as "Illinois" or "Illinois De Luxe" and other prominent domestic names, respondents have represented and now represent, directly or by implication, that their product is manufactured by, or connected in some way with, the well and favorably known American firm or firms with which said names have long been associated, which is contrary to fact.

PAR. 7. There is and has been a preference among members of the purchasing public for products manufactured by well and favorably known and long established concerns whose identity is connected with the word "Illinois" and other prominent domestic names. The use of said trade or brand names by respondents on their sewing machines enhances the belief on the part of the public that the said sewing machines are of domestic origin.

PAR. 8. Respondents, by and through the use of the word "Distributors" in their corporate name and in their trade name represent and have represented directly or by implication, that they are distributors of said sewing machines. In truth and in fact, respondents are not distributors but are retailers of this product. A substantial number of the purchasing public prefer to deal with distributors of the products rather than retailers, believing that in doing so certain advantages accrue, such as cheaper price.

PAR. 9. Respondents in their advertising make the following statements:

HUGE SAVINGS
DEMONSTRATOR SALE!
Choose from
New Home Singer
Eldredge Domestic
(Hundreds of other Electrified
Rebuilt and Re-Conditioned
Sewing Machines)

Illinois Rebuilt Singer Head Electrified and installed in our NEW CONSOLE CABINETS

Regular $99.50
NOW 49.50

Picturization of console electric sewing machine

5-year Guarantee on parts
Full protection on every part for five

Now . . . Illinois makes this OUTSTANDING Offer! Sewing Machine Demonstration . . . like-new perfect sewing machines used ONLY by Illinois experts for demonstration purposes . . . Offered to you as SMASH SAVINGS! Actual "show-off" machines . . . With all the attachments . . . all the easy sew features priced at rock bottom. Don't miss this unusual opportunity to own a wonderful sewing machine for way less!

Illinois Rebuilt White Head Electrified and Installed in our NEW PORTABLE CASES. Regular $49.50 NOW $24.95.

Picturization of portable electric sewing machine

ILLINOIS SEWING MACHINE DISTRIBUTORS
(Division of Rodney Distributors, Inc.)

Northside Factory Showroom
5671 Milwaukee Avenue

Southside Showroom
11066 So. Western Avenue

By and through the use of the aforementioned statements, respondents represented, directly or by implication, that they were making a bona fide offer to sell New Home, Singer, Eldredge, and Domestic rebuilt console and portable electric sewing machines for the sums of $49.50 and $24.95, respectively.

The aforesaid representations were misleading and deceptive. In truth and in fact the offer to sell rebuilt New Home, Singer, Eldredge and Domestic Sewing Machines for $49.50 and $24.95 were not genuine or bona fide offers. After obtaining leads, respondents' salesmen call upon such persons at their homes or wait upon them at respondents' place of business. At such times and places some of respondents' salesmen have made no effort to sell the sewing machines advertised, but have disparaged the machines advertised and then attempted to sell different and more expensive sewing machines, particularly machines of which heads made in Japan are a part.

PAR 10. Respondents, in the course and conduct of their business, were and are in substantial competition in commerce with sellers of domestic sewing machines and also sellers of imported sewing machines, some of whom adequately disclose to the public that their machines or parts thereof are of foreign origin.

PAR. 11. The failure of respondents to adequately disclose on the sewing machines that they are made in Japan and also the use of the trade or brand name "Illinois," and other prominent domestic names, have the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that their said product is of domestic origin and is manufactured by the well and favorably known firm or firms with which said trade or brand names have long been associated, and to induce members of the purchasing public to purchase sewing machines because of this erroneous and mistaken belief.

Further, the use by respondents of the other foregoing false, misleading and deceptive statements and representations has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all such statements and representations were and are true and to induce the purchase of substantial quantities of said sewing machines as a result of this erroneous and mistaken belief.

As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

CONCLUSION

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

ORDER TO CEASE AND DESIST

It is ordered, That the respondent Rodney Distributors, Inc., a corporation, doing business under its own or any other name, and its officers, and respondents Seymour Ratner, Irwin Ratner, Harold Ratner and Joseph Wandel, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing foreign-made sewing machines, or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof, in such a manner that it cannot readily be hidden or obliterated.

2. Using the word "Illinois," or any simulation thereof, as a brand or trade name, or as a part thereof, to designate, describe or refer to their sewing machines, or representing through the use of any other word or words, or in any other manner, that said sewing machines are manufactured by anyone other than the actual manufacturer.

3. Using the word "Distributor," or any simulation thereof, as a part of a corporate or trade name; or representing in any other manner that said respondents are distributors of the sewing machines sold by them.

4. Representing that certain sewing machines are offered for sale when such offer is not a bona fide offer to sell the machines so offered.

It is further ordered, That the respondents Rodney Distributors, Inc., a corporation, doing business under the name of Illinois Sewing Machine Distributors; and Seymour Ratner, Irwin Ratner, Harold Ratner, and Joseph Wandel, individually and as officers of said

corporation, shall, within sixty (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.

[s] SEYMOUR RATNER, *Pres.*,
Rodney Distributors, Inc., a corporation, doing business under the name of Illinois Sewing Machine Distributors.

[s] SEYMOUR RATNER,
Seymour Ratner, individually and as officer of Rodney Distributors, Inc., a corporation.

[s] IRWIN RATNER,
Irwin Ratner, individually and as officer of Rodney Distributors, Inc., a corporation.

[s] HAROLD RATNER,
Harold Ratner, individually and as officer of Rodney Distributors, Inc., a corporation.

[s] JOSEPH WANDEL,
Joseph Wandel, individually and as officer of Rodney Distributors, Inc., a corporation.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 8th day of July, 1953.

IN THE MATTER OF

MAURICE BLATT DOING BUSINESS AS WASHINGTON WEEKLY GAZETTE, BALTIMORE WEEKLY GAZETTE, ESSEX COUNTY WEEKLY GAZETTE, ETC.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5777. Complaint, May 10, 1950—Decision, July 9, 1953

Where an individual engaged in the preparation and distribution over a period of years and in various communities of publications known in the newspaper field as "puff sheets," which were designated usually as the "Weekly Gazette" and generally preceded by the name of the particular community, displayed a local date line and the words, "5 Cents Per Copy," and, in some instances, the number of readers claimed; carried on the first page a few brief local news items and usually one or more pictures, and on the second page a box containing the local address and telephone number and the name of its editor, publisher, and manager; and, for the rest, consisted mainly of paid write-ups of local businessmen in the particular community, which publicized individuals and their businesses and described their products or services in laudatory terms, and which, not designated as advertisements, were made to simulate news stories, and constituted said individual's main source of income—

(*a*) Represented, in the course of his business, and in the solicitation of the sale of write-ups or sketches by his agents, whom he supplied with leads and a standard sales talk, that the papers were genuine weekly newspapers or gazettes;

When in fact the papers consisted essentially of said paid write-ups which were merely advertisements designed to simulate news; they had no paid circulation; and, while a limited number of copies was printed and given away or otherwise disposed of in random fashion, they had no regular readers, and could not, under any fair test, be considered bona fide newspapers;

(*b*) Represented falsely, as aforesaid, that each of said papers was a local publication with a local publisher, editor, and manager, and a bona fide local office address and telephone number where contacts could be made;

The facts being said individual neither owned nor operated any printing presses in any of the communities concerned, except Philadelphia during the earlier days of his operations; most of the printing, later, was performed for him by an Italian-language newspaper there; for long periods he maintained no bona fide offices in any of the communities and his address and telephone number were that of a telephone answering service during the relatively short periods; when he did lease office space and had his own telephone service in some communities, such offices consisted only of telephone solicitors; many of such solicitors were hired in Philadelphia and worked in a number of different communities; customers who tried to reach the local organization were unable to do so; the so-called manager's duties were concerned only with the solicitation; and all bookkeeping and accounting work was carried on from Philadelphia;

(*c*) Represented falsely, as aforesaid, that each of said publications was widely read and circulated in the community where the prospective customer resided and did business, and had a large and definite paid circulation—represented, in some communities, as being at least 17,000—through such statements as "17,000 readers" on the first page, along with "5 Cents Per Copy," and through statements by its solicitors;

The facts being the papers had no paid circulation and were not sold on newsstands; the number of those in any given community who had heard of or read his papers was negligible; said papers, after he began employing independent distributing agencies, were distributed within a radius of one or two city blocks until they gave out, usually in a different area each week, and apparently without plant; the maximum number distributed in most communities was apparently 2,000, excepting New York, Chicago, and Philadelphia in which 5,000 copies were distributed; and purchasers of write-ups found, almost without exception, not a single customer who had seen the paper or write-ups; and

(*d*) Represented, as aforesaid, that the paid write-ups or sketches about individual businessmen and business firms would be published in a "Personalities Column" in each paper;

The facts being said individual did not publish or print any such column and said write-ups were in the nature of advertisements regarding business firms or individuals which appeared throughout the paper and were set up so as to simulate ordinary news items:

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

Before *Mr. Abner E. Lipscomb* and *Mr. John Lewis*, hearing examiners.

Mr. William L. Taggart for the Commission.

Brodsky, Brodsky & Brodsky, of Philadelphia, Pa., for respondent.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated July 9, 1953, the initial decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 10, 1950, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging him 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 respondent's answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the

allegations of said complaint were introduced before the above-named hearing examiner, theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by the attorney in support of the complaint (no proposed findings or conclusions having been filed by counsel for respondent), and oral argument not having been requested; and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Maurice Blatt is an individual doing business under the name of Washington Weekly Gazette, Baltimore Weekly Gazette, Weekly Gazette, Weekly Post, Weekly Tribune, Weekly Times, Blatt Features, and under other trade or assumed names, as hereinafter set forth. At all times hereinafter mentioned his principal office and place of business was located at 179 West Berks Street, Philadelphia, Pennsylvania. During the period from 1947 until at least 1952 respondent engaged in the preparation and distribution of a number of weekly publications or papers containing paid sketches or write-ups of businessmen and business firms. In the course and conduct of his said business, during the time aforesaid, respondent caused drafts and proof sheets of such sketches and write-ups, and written notes and other intelligence in connection therewith, to be transported in commerce to, from, and between his principal office and place of business in the State of Pennsylvania and other States of the United States and the District of Columbia. After printing or causing to be printed, in Philadelphia, the said publications containing the aforesaid sketches and write-ups, respondent transported or caused the said publications to be transported in commerce, and delivered same to the individuals and businesses purchasing the sketches and write-ups therein contained, and otherwise distributed same to the public in various States of the United States, other than the State of Pennsylvania, and in the District of Columbia.

PAR. 2. The main source of respondent's income from his said business has been derived from the sale by him of sketches or write-ups in his weekly publications concerning businessmen or business firms in the communities in which he has operated. Said sketches or write-ups publicize the individuals associated with a given business, describe its

products or services in laudatory terms, and in general seek to induce the public to patronize the establishment. The write-ups are not designated as "advertisements" but are made to simulate news stories. Respondent's method of operation in the sale of such sketches or write-ups is substantially as follows:

Respondent employs a number of sales agents, called solicitors, whose primary duty is to communicate by telephone with prospective customers in an effort to induce them to purchase write-ups in one of respondent's papers or publications. Respondent supplies these agents with leads as to particular prospects to be called, with drafts of stories adapted to a number of different types of businesses, and with a standard form of sales talk for use in soliciting customers, supplemented by a list of "Comebacks" to be used if prospects ask questions not covered by the standard sales talk. The solicitor telephones a prospect and advises him that he is calling on behalf of a named newspaper (the name given depending on the name used by respondent in the particular community). The solicitor advises the prospective customer that the paper is running a story about his business in the ensuing edition and that they wish to check the story with him before publishing it to make sure it is correct. After the story is read over the telephone, the prospect is advised that it will appear in the "Personalities Column" of the paper and he is asked for additional information regarding his business "to make the story more complete." After making such additions or changes as may be suggested by the prospect, he is then advised that the full story will appear in the "Personalities Column" and that he will receive a few copies of the paper for his personal use. At this point the solicitor mentions for the first time that the people whose stories are included in the paper "are paying some amount to help defray the expense of their story." The amount is then mentioned to the prospect, it varying from $10 to $25. If the prospect agrees to pay the stipulated amount, the draft of the story, including additional notes and information obtained from interviewing him, is mailed to respondent's main office in Philadelphia. Respondent employs so-called rewrite men in Philadelphia who assemble the material in the form of a narrative and it is then printed in the publication or paper intended for distribution in the particular community where the customer resides or does business. The papers are then shipped from Philadelphia and a few copies are delivered to the prospect by an employee of respondent designated as a "collector," who thereupon collects the amount previously agreed upon.

Respondent has conducted his operations in a number of different communities, mainly in the eastern part of the United States, including, among others, Washington, D. C.; Baltimore, Maryland; Wilmington,

Delaware; New York, New York; Chicago, Illinois; Newark, Patterson, New Brunswick, and Camden, New Jersey; Philadelphia, York, Lancaster, Morristown, Allentown and Reading, Pennsylvania; and Dayton, Toledo and Cincinnati, Ohio. The period of operation in the various communities has varied from as little as a few weeks in some to as much as four years in others such as Washington, D. C., and Baltimore, Maryland. The average period of operation has been three to four months and respondent has ceased doing business in most of these communities because of lack of business, or because of the opposition of the local Better Business Bureau, or both. Most of the papers were known as the "Weekly Gazette," with the name of the particular community usually appearing immediately above this title. In Cincinnati, where respondent operated for a few months in 1952, he used the name "Weekly Tribune." In Chicago the paper was called the "Weekly Post." In York, Pennsylvania, the paper was called the "Weekly Times."

In most of the communities where he operated, with the exception of Philadelphia, the only situs which respondent had was the address and telephone number of a telephone answering service or the residence address or telephone number of one of his solicitors. However, beginning in the early part of 1950 (subsequent to the investigation of his business by the Commission and shortly prior to the issuance of the complaint herein) respondent leased office space in some of the communities where he was still operating and also secured his own telephone and telephone listing in these communities. Outside of Philadelphia, respondent at no time owned or operated any printing presses. At his principal place of business in Philadelphia respondent operated a print shop under the name of Lor-Jeff Printing Company, where the actual printing of the various publications and papers was performed during the earlier days of his operations. Later on, beginning in 1950, respondent began to have most of the printing of his papers performed for him by an Italian-language newspaper in Philadelphia.

All of the papers prepared and distributed by respondent were substantially similar in makeup and appearance. Across the top of the front page of each paper appeared the words, in heavy type: "SUPPORT YOUR COMMUNITY." Beneath this heading in still larger and bolder type appeared the name of the paper, generally, "Weekly Gazette." The name of the particular community generally appeared above the name of the paper, although in some instances, it appeared only on the dateline. Below the name of the paper there appeared on the first page of each paper a local dateline with the name of the community, the date, the words "5 Cents per Copy" and, in some instances, the number of readers claimed by the paper. On the second page of

each paper was a box setting forth the local address and telephone number of the paper and the name of its editor, publisher and manager. Outside of the heading, the balance of the first page of each paper consisted of a few brief, local news items and usually one or more pictures. The pictures were usually identical in each edition of the paper for a given date but the local news items differed in each community. The balance of each paper consisted of paid write-ups of businessmen in the particular community, supplemented by a number of substantially identical features such as cartoons, puzzles, a few syndicated columns and pictures of radio and movie stars. While the paid sketches or write-ups differed in the different editions of the paper, the other features which filled out the paper were substantially identical in all papers of a given date.

After being printed, the papers were shipped by automobile, railroad or air freight to the respective communities where distribution was to be effected. As previously mentioned, a few copies of each paper were delivered by one of respondent's collectors in the community to each of the persons who had agreed to pay for a write-up. The balance of the papers were distributed at random in various parts of the community. For several years the papers were distributed by boys hired by respondent, no records being kept to show the places of distribution and the number delivered. Beginning in 1950 the papers were distributed by independent contractors who furnished invoices showing the number of copies distributed and the places thereof. During this latter period, according to the record, the number of copies printed and distributed has varied from 2,000 to 5,000 papers, depending on the community. The papers have usually been distributed in a different area in the community each week being left in homes, stores, or office buildings.

PAR. 3. In the course and conduct of his business and in soliciting the sale of write-ups and sketches in his publications, respondent has made the following representations:

1. Respondent has represented that the papers and publications prepared and distributed by him in the various communities in which he has operated are genuine weekly newspapers or gazettes.

2. Respondent has represented that each of said papers is a local publication, having a local publisher, editor and manager, and a bona fide local office, office address and telephone number, where contacts can be made if desired.

3. Respondent has represented that each of said papers and publications is widely read and circulated in the community where the prospective customer resides or does business and has a large and definite paid circulation, which, in some communities, is represented as

being at least 17,000. While respondent denies ever having represented that any of his publications has a paid circulation of 17,000, he admits having represented that some of the papers have 17,000 "readers." This figure was arrived at by multiplying the number of papers allegedly distributed, 3,500, by the number 5. Accordingly to respondent, it is customary in the newspaper industry for a paper not having a paid circulation to claim that it has a certain number of readers, by multiplying the actual number of copies distributed by the average number of persons who it may reasonably be expected will see each copy distributed. The undersigned finds it unnecessary to determine where there is any such custom or practice in the newspaper industry. If there is such a practice there is no evidence to establish that it is well known and accepted by the reading public. Respondent's papers all contain thereon, on the top of the first page, the legend: "5 Cents Per Copy." In some communities there also appears on the dateline the statement: "17,000 Readers." In the opinion of the undersigned a substantial number of persons, upon observing the statement that the paper is for sale at 5 cent per copy, together with the further statement that the paper claims to have 17,000 readers, would reasonably understand and infer therefrom that the paper claims to have a paid circulation of 17,000. In any event, irrespective of any statement made on the papers themselves, a number of respondent's telephone solicitors have represented in conversations with prospective customers that the publications have a paid circulation of as much or more than 17,000 and have conveyed the impression to prospective customers that the papers are widely circulated and distributed in their respective communities and in various sections of said communities.

4. Respondent has represented that the paid write-ups or sketches about individual businessmen and business firms will be published in a column in each paper dominated "Personalities Column."

PAR. 4. The statements and representations, hereinabove set forth, found to have been made by respondent are false, misleading and deceptive in the following respects, among others:

1. Respondent's papers or publications are not genuine weekly newspapers or gazettes. The amount of space devoted to genuine news in said papers is negligible. Outside of a few brief local news items, and the assorted fill of cartoons, crossword puzzles, pictures and other "boiler plate" (which are substantially identical in all papers of the same date), the papers consist essentially of paid write-ups and sketches which are not news articles but are merely advertisements designed to simulate news. Not only do the papers not have any paid circulation, but they do not even have a regular group of readers as do some small local newspapers or shoppers' news which are distributed on

a non-pay basis. Most papers which carry write-ups similar to those carried in respondent's papers designate them as "Advertisements." All newspapers having a paid circulation do this as a regular practice. While some small local papers having no paid circulation may sometimes carry such articles without designating them as advertisements, they contain a reasonable amount of other information which may be properly called news and have a regular reading public. Respondent's papers and publications are what is known in the newspaper field as "puff sheets." Such papers seek to take advantage of the public's natural desire for publicity by inducing individuals and businesses to pay for laudatory articles about them, and contain little else of news value. A limited number of copies is printed up and given away or otherwise disposed of in random fashion. While it may sometimes be difficult, as one of respondent's witnesses testified, to draw the line between a genuine newspaper and a "puff sheet" (the test, according to this witness, being the proportion of genuine new articles as compared to paid publicity), respondent's papers, under any fair test, cannot be considered bona fide newspapers.

2. Respondent's papers are not local papers; they are not published in the community where the prospective customer resides or does business; they do not have a local publisher or editor; and they do not maintain a bona fide local office of the type ordinarily conducted by local papers where contacts can be made by the public. Admittedly, respondent does not own or operate any printing presses for the printing of his papers in any of the communities in which he operates, with the exception of Philadelphia. While it may be true, as contended by respondent, that a paper may be said to be published in a particular community even though it is printed elsewhere, nevertheless the record fails to disclose the presence in any of the communities where respondent has operated of any of the other indicia ordinarily associated with a local publication (which, according to one of respondent's own witnesses, include the gathering and assimilating of news, the composition of the paper, and the bookkeeping and clerical work incidental thereto). The papers have no editors and no reporters in any of these communities, other than Philadelphia. For long periods of time respondent maintained no bona fide offices in these communities, such as that usually operated by a local publication, his address and telephone number being that of a telephone answering service. Many of his solicitors were not local people but were hired in Philadelphia and worked in a number of different communities. During this period customers or prospective customers who tried to reach respondent's local organization were unable to do so. Even during the relatively short periods when respondent leased

office space and had his own telephone service in some of these communities such offices were in no sense similar to those of local publications. They consisted of a number of desks, at each of which was stationed a telephone solicitor whose only duty was to make telephone calls to prospective customers in order to induce them to purchase write-ups. These solicitors performed none of the duties ordinarily associated with newspaper reporting, newspaper work, or publishing. They were all supplied by respondent with leads of the prospects to be called, with standard forms of sketches to read to the prospects, with a stock speech to make and with a stock list of answers to give in case of "comebacks." When they obtained the necessary information they did not formulate it into a story but simply forwarded their notes to Philadelphia where the actual writing of the story was performed by so-called re-write men. Although each office had a so-called manager, his or her duties did not involve anything resembling that of a manager of a local paper or publication but consisted of part-time service as a telephone solicitor, the parceling out to the other telephone solicitors of the drafts of sketches and leads received from respondent, and arranging with the boys or distributing agency for the distribution of the paper. None of the office work ordinarily associated with a local paper or publication was performed in the respective communities. All bookkeeping and accounting work was performed in Philadelphia; payroll checks were made up and mailed from Philadelphia; all tax returns, workman compensation reports and other reports required by State and Federal Government agencies were prepared and mailed from Philadelphia. Based on the foregoing it seems clear that none of the indicia of publication of a local paper was present in the local communities where respondent operated.

3. The impression which respondent has sought to create that his papers are widely read and circulated in the communities where he has operated and that they have a large and definite paid circulation, which is as much as 17,000 in some communities, is false and without foundation in fact. Admittedly, the papers have no paid circulation, are not sold on newsstands and other places where newspapers and periodicals are ordinarily distributed, and have no regular list of subscribers or readers. The number of persons in any given community which has heard of or read any of respondent's papers is negligible. His method of distribution has been such that it would be more by accident than design that the same group of persons would see the paper more than once. For several years, while respondent was using boys to distribute the papers, there are no records to substantiate what, if any, distribution was made and the places thereof. Even after respondent began using independent distributing agencies in

1950 the deliveries were relatively small and were accomplished in a rather desultory fashion. Each week a given number of papers were turned over to the delivery agency for distribution. They were distributed within a radius of about one or two city blocks until the paper gave out, and were usually distributed in a different area each week. There appears to have been no particular plan or design in distributing the papers other than to dispose of a given number. While respondent's local manager sometimes gave the delivery agency instructions as to the place of delivery it was frequently left to the agency's discretion where it would distribute the papers and the latter would follow the course of least resistence by leaving the papers in a single downtown office building, where more rapid distribution could be accomplished, rather than in a residential area.

To the extent that the number of papers delivered can be substantiated by records, the maximum number of papers distributed in most communities appears to have been 2,000 except for New York, Chicago, and Philadelphia where 5,000 copies were distributed. It is noteworthy that in Washington, D. C., and Baltimore where respondent claimed to have made a weekly distribution of 3,500 (upon which he based his claim of 17,000 readers) the records which he produced, covering the period that he used independent distributing agencies in these communities, show a distribution of only 2,000 copies.

Although persons purchasing write-ups were frequently assured by respondent's solicitors that the paper was widely distributed in a particular part of the community (e. g., Northeast Washington or Southeast Washington) where it would be read by their customers or prospective customers, there was actually no correlation between the location of the businesses of the sketches and the places of distribution. In fact, each issue of the paper included write-ups of persons located in widely scattered parts of the community so that by delivering 2,000 copies of the paper in a radius of one or two blocks in any given part of the community it would be impossible that distribution could be made among any significant number of customers or prospective customers of the sketchees. Persons who were induced to purchase write-ups based on such representations as to distribution among their customers found upon inquiry that, almost without exception, not a single customer had seen the paper or their write-up.

4. The write-ups or sketches which respondent represented would be printed in the "Personalities Column" of the paper do not appear in any such column. In fact, respondent does not publish or print any column so designated. A "Personalities Column" would ordinarily be understood to be a separate column such as that which appears in many

newspapers under the by-line of some columnist, and containing comments of interest about particular individuals in the community. The write-ups or sketches which respondent prints are not similar to those appearing in such columns bút are in the nature of advertisements regarding business firms or individuals. They do not appear in any special designated "Personalities Column" but appear throughout the paper and are set up so as to simulate ordinary news items.

PAR. 5. The complaint also alleges that respondent has represented that his papers or publications are not run for profit and that full payment to cover the cost of the expense of publishing the sketch is not required. While there is some evidence suggesting that such representations may have been made, the record as a whole is lacking in substantial evidence to sustain this allegation of the complaint.

The complaint further charges that respondent represented that customers would receive 25 extra copies of the paper containing their sketch and that this promise was not fulfilled. The record is lacking in substantial evidence that customers were promised 25 copies of the paper or any other customary number. The collector ordinarily delivered a few copies of the paper to each customer and where the customer asked for or had been promised any additional number of copies he usually received this number from the collector.

PAR. 6. The acts, practices and methods of respondent in making and using the false and misleading statements, representations and implications, referred to in Paragraphs Three and Four above, have the capacity and tendency to mislead and deceive members of the public into the erroneous and mistaken belief that such statements, representations and implications are true, and by reason of such erroneous and mistaken belief, so engendered, to cause a substantial portion of the purchasing public to purchase articles, sketches, write-ups or advertising space in said papers or publications for a valuable consideration.

CONCLUSION

The aforesaid acts and practices of the respondent, as hereinabove found, are all to the prejudice 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

It is ordered, That the respondent Maurice Blatt, individually or trading as a Washington Weekly Gazette, Baltimore Weekly Gazette, Essex County Weekly Gazette, Passaic County Weekly Gazette, Union County Weekly Gazette, Weekly Gazette, Weekly Post, Weekly Trib-

une, Weekly Times, Blatt Features or trading under any other name, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any paper or publication of the type heretofore published by him or any other paper or publication of substantially similar makeup and composition and operated in a substantially similar manner, do forthwith cease and desist from representing:

1. That any of said papers or publications is a newspaper or gazette.

2. That any of said papers or publications is a local publication; that it is published in the community where the prospective advertiser resides or does business; or that respondent maintains a bona fide publication office at any place other than Philadelphia.

3. That any of said papers or publications is widely read and circulated, or has a paid circulation, or that it has a circulation of 17,000 or any other designated number unless said number represents the actual number of copies which are distributed.

4. That paid write-ups or sketches, which are actually advertisements of businesses and individuals, will be published in any column denominated a "Personalities Column."

It is further ordered, That the allegations of the complaint referred to in Paragraph Five above be, and the same hereby are dismissed.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent Maurice Blatt shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist [as required by said declaratory decision and order of July 9, 1953].

IN THE MATTER OF

CHAMPION SPARK PLUG CO.

FINDINGS AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2 (a) AND 2 (d) AND SEC. 3 OF THE CLAYTON ACT, AS AMENDED, AND OF THE FEDERAL TRADE COMMISSION ACT

Docket 3977. Complaint, June 27, 1947 [1]*—Decision, July 10, 1953*

Where a corporation which was one of ten concerns engaged in the manufacture of spark plugs and, with General Motors and the Electric Auto-Lite Co., made more than 80 percent of all the spark plugs produced and sold in the United States; sold its said product (1) to vehicle or engine manufacturers for use by them as original equipment and sold the same also (2) for resale for replacement to automobile manufacturers, wholesalers of automobile parts and accessories, oil companies and others, competitively engaged, along with many of their customers, in the resale of spark plugs at wholesale and retail;

In selling its spark plugs of like grade and quality for resale for replacement since June 19, 1936, at prices which varied substantially as between (1) purchasers buying directly from it, including its distributors, Atlas Supply Co., Socony-Vacuum Oil Co., and certain automobile and truck manufacturers (and prior to 1941 "direct jobbers"); (2) purchasers buying indirectly from it; and (3) purchasers buying directly and purchasers buying indirectly from it—

(*a*) Discriminated in price between distributors and certain automobile manufacturers in that in 1947, as illustrative, it sold its said products to said distributors at net prices of 26.1 cents and 24.65 cents in certain types of accounts; to four automobile manufacturers at 24 cents; and to Ford, at a cost to Ford, through latter's payment of the 5 percent excise tax, of about 22 cents;

With results, as a consequence of Ford's advertising and promotional activities, induced in part by the low price paid by Ford for such plugs, that Ford dealers preferred to purchase their requirements of such plugs direct from Ford, and certain of respondent's distributors, including those in competition with Ford for the business of the latter's dealers, lost the accounts;

Where said corporation, in selling its said spark plugs to (1) Atlas Supply Co., which was owned by a subsidiary of Standard Oil Company of New Jersey and the Standard Oil Companies of Ohio, Indiana, Kentucky, and California, purchased respondent's plugs for resale to said various Standard Oil companies, and conducted a complete merchandising program for the resale of automobile parts and accessories, including said plugs, profits of which were divided among said companies on the basis of the merchandise purchases and to (2) Socony-Vacuum Oil Co., which purchased automobile products, including spark plugs, not only for resale through its own outlets but also for its affiliates, and both of which carried on extensive advertising, training and other activities to promote the sale of respondent's spark plugs through independently operated service stations selling their respective products; and to (3) various other distributors—

[1] Amended.

(*b*) Discriminated in price in favor of said Atlas and Socony through according them a discount of 10 percent plus 10 percent from respondent's 1947 billing price of 29 cents and thus afforded them a price advantage of 1.16 to 2.61 cents per plug over the 1947 net price to its other distributors of 26.1 cents per plug (and 24.65 cents per plug in certain types of accounts);

With result that Cities Service Oil Co., one of a number of oil companies who did not receive said additional discount, was prevented thereby from fully competing with Standard Oil Companies of Ohio and Indiana and Socony, dealers of which, as a consequence of aforesaid advertising and promotional activities, preferred to purchase their requirements of respondent's plugs from or through them; and a number of distributors who paid a higher price for its plugs than did Atlas and Socony, lost the business of independently operated service stations to such favored concerns; and,

Where said corporation, in selling its said spark plugs to its distributor purchasers at 29 cents each less 10 percent plus 5 percent allowances as "Special Sales Service Compensation", for resale to its "Franchise" or "Basis" accounts, which, under franchises granted by it, bought from its said distributors at varying prices and terms fixed by respondent—and under such control by respondent that sales to such indirect accounts were in all essential respects sales by respondent; which included (1) wholesale accounts classified as "Jobber Basis" accounts and "5,000 Plugs Basis" accounts, charged, in 1947, 29 cents and 32 cents, respectively; and (2) large consumer accounts classified as " 'C' Fleet Basis" accounts and "Fleet Basis", respectively charged similar amounts—

(*c*) Discriminated in price between its distributors and its said indirect purchasers, each of whom was in competition with other purchasers of its spark plugs, and was injured to the extent that it paid a price higher than that paid by its competitors, and thus further discriminated between certain indirect purchasers;

With result that its distributors and, to a lesser extent, the more favored indirect accounts, were able to resell profitably to consumer "Fleet" accounts; and the indirect wholesale accounts paying the higher prices lost the business of all consumer accounts large enough to secure respondent's approval for a "Fleet Basis" agreement, including accounts which they had developed:

Held, That aforesaid discriminatory acts and practices were in violation of subsec. (a) of Sec. 2 of the Clayton Act: and

Where said respondent, which was one of the two largest spark plug manufacturers in the United States; along with General Motors and Electric Auto-Lite, made and sold substantially all the spark plugs purchased by equipment manufacturers, and more than 80 percent of all such products made and sold in the United States; made substantial sales to operators of large fleets of motor trucks or buses; and made about two-thirds of its total sales of spark plugs through its distributors, selling in 1946 a total of more than 58 million spark plugs through such distributors other than Atlas and Socony—

(*d*) Entered from time to time into contracts with automobile manufacturers in which there was included a provision, eliminated in 1939, whereby the manufacturers agreed to purchase from respondent their entire requirements of spark plugs for a specified term not exceeding one year and respondent agreed to supply their requirements of such products;

(*e*) Executed, prior to 1941, a so-called "Commercial Franchise" agreement with operators of bus and trucking lines and with other large consumers which set

forth the prices at which such so-called "Fleet" accounts were entitled to purchase their requirements of spark plugs, specified the sources from which they were to obtain such requirements and, through the inclusion of such language as "in consideration of your purchasing Champion Spark Plugs for your requirements, estimated to exceed 5,000 plugs per year, to service your motorized equipment and upon your placing an initial order for 200 plugs for single delivery we extend to you the following special prices, terms and conditions on all your Spark Plug purchases through this date to December 31, 1939, which, in effect, constituted agreements whereby said "Fleet" accounts were given a special low price in consideration of their purchasing such plugs for all their requirements; and

(*f*) Entered into agreements with its distributors through two forms, used prior to 1941 and subsequent to 1940, respectively, whereby the distributor, in order to obtain spark plugs at a special low price as specifically set out, undertook a variety of services with respect to said "Franchise" accounts, including the satisfactory servicing of such accounts and periodical reports with respect to their purchases, and which were of such a nature that, notwithstanding disavowals therein of any expressed or implied obligation on the part of the distributor to handle such plugs exclusively, latter, in effect, was required so to do, in order to obtain the special low price involved; interpreted said agreements as imposing such an obligation upon its distributors; refused to enter into distributor agreements with wholesale accounts which refused to agree to handle respondent's plugs exclusively; and threatened cancellation of agreements with distributors who had taken on or indicated an intention to take on competing lines of spark plugs:

Held, That such acts and practices, under the circumstances set forth, were in violation of Sec. 3 of the Clayton Act.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. L. E. Creel, Jr., *Mr. Robert R. MacIver*, and *Mr. J. Wallace Adair* for the Commission.

Marshall, Melhorn, Block & Belt, of Toledo, Ohio, for respondent.

Willkie, Owen, Farr, Gallagher & Walton, of New York City, for Kaiser-Frazer Corp., *amicus curiae.*

Mr. L. Arthur Greenstein and *Mr. Daniel S. Greenstein*, of Philadelphia, Pa., for Berlin Auto Supply Co., *amicus curiae.*

Beaumont, Smith & Harris, of Detorit, Mich., for Hudson Motor Car Co., *amicus curiae.*

Cook, Beake, Miller, Wrock & Cross, of Detroit, Mich., for Nash-Kelvinator Corp., *amicus curiae.*

Bodman, Longley, Bogle, Armstrong & Dahling, of Detroit, Mich., for Packard Motor Car Co., *amicus curiae.*

Ritter & Boesel, of Toledo, Ohio, for Willys-Overland Motors, Inc., *amicus curiae.*

Report, Findings as to the Facts, and Order

Pursuant to the provisions of the Federal Trade Commission Act and the provisions of an Act of Congress entitled "An Act to sup-

plement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on June 27, 1947, issued and subsequently served its amended complaint in this proceeding upon the respondent, Champion Spark Plug Company, a corporation (said amended complaint being issued in the place of and instead of the complaint against the same respondent issued on December 16, 1939), charging said respondent in Count I thereof with violation of subsection (a) of Section 2 of said Clayton Act, as amended; in Count II thereof with violation of subsection (d) of Section 2 of said Clayton Act, as amended; in Count III thereof with violation of Section 3 of said Clayton Act; and in Count IV thereof with violation of Section 5 of the Federal Trade Commission Act.

After the issuance of said amended complaint and the filing of respondent's answer thereto, testimony and other evidence in support of and in opposition to the allegations of said amended complaint were introduced before a hearing 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 the amended complaint, answer thereto, testimony and other evidence, recommended decision of the hearing examiner and exceptions thereto, written briefs of counsel supporting the complaint, counsel for respondent, and counsel for Kaiser-Frazer Corporation, Hudson Motor Car Company, Nash-Kelvinator Corporation, Packard Motor Car Company, and Willys-Overland Motors, Inc., as amici curiae, and oral argument of opposing counsel; and the Commission, having duly considered the matter and having entered its order disposing of the exceptions to the recommended decision of the hearing examiner, 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. The respondent, Champion Spark Plug Company (sometimes hereinafter referred to as "Champion"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located in Toledo, Ohio.

PAR. 2. Respondent is engaged in the business of manufacturing and selling spark plugs and spark plug parts. It neither makes nor sells anything else, except that it sells a small amount of spark plug

testing and cleaning apparatus purchased from others. Respondent manufactures its spark plugs in its plants in Toledo, Ohio, and Detroit, Michigan, and causes them to be transported, when sold, to its customers located in all States of the United States and in the District of Columbia. There is and has been at all times herein mentioned a current of trade and commerce in said product manufactured and sold by respondent between the States wherein respondent's plants are located and the other States of the United States. Respondent's spark plugs are sold by it for use, consumption, or resale within the various States of the United States and in the District of Columbia.

PAR. 3. Respondent sells spark plugs throughout the United States in the same territories and places as, and in substantial competition with, other persons and corporations engaged in the manufacture and sale of spark plugs. There are approximately 40 concerns engaged in the business of manufacturing or assembling spark plugs. Respondent, General Motors Corporation (AC Spark Plug Division), The Electric Auto-Lite Company, and 7 other concerns are manufacturers of complete spark plugs. The remaining approximately 30 concerns either assemble spark plug parts made by others or market under their own brand name spark plugs purchased from other manufacturers or assemblers of spark plugs. More than 80 percent of all the spark plugs produced and sold in the United States are manufactured by respondent, General Motors Corporation (AC Spark Plug Division), and The Electric Auto-Lite Company.

PAR. 4. Respondent sells its spark plugs to vehicle or engine manufacturers for use by such manufacturers as original equipment in vehicles or engines manufactured by them. Respondent also sells its plugs to such manufacturers and to others for resale for replacement of original equipment. More spark plugs are sold for replacement than for original equipment. The life of a well-made spark plug is not necessarily shorter than that of the engine in which it is used, but many are replaced during the life of the engine in an effort to secure more economical operation.

The spark plugs sold by respondent for use as original equipment become an integral part of the motor or vehicle in which they are used, and are not resold in competition with spark plugs sold for replacement purposes. The end use market for equipment spark plugs is separate and distinct from and noncompetitive with the replacement market.

Respondent sells spark plugs to be used for replacement purposes to automobile manufacturers, wholesalers of automobile parts and accessories, oil companies, and others. These customers of respondent and many of their customers are competitively engaged in the resale

of spark plugs at wholesale and retail in the various areas where said customers respectively carry on their businesses.

PAR. 5. Respondent has sold its spark plugs to automobile manufacturers for their use in motors and motor vehicles—original equipment plugs—at prices lower than those charged by respondent for its spark plugs of like grade and quality sold to said automobile manufacturers and to others for resale for replacement of original equipment. During the period from 1937 through 1947, respondent's invoice price on spark plugs sold to passenger car manufacturers for their use as original equipment ranged from 5 cents to 7 cents per plug. During the same period, respondent's prices to the said passenger car manufacturers for replacement plugs ranged from approximately 22 cents to 27 cents per plug, and its prices to other direct customers for replacement plugs ranged from approximately 25 cents to 29.7 cents per plug.

It is alleged in Count I of the amended complaint herein that the effect of the aforesaid price differentials between purchasers buying for original equipment and purchasers buying for resale for replacement is and may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged or to injure, destroy, or prevent competition with respondent in the manufacture, distribution, and sale of spark plugs.

The hearing examiner in his recommended decision found that the allegations of Count I of the amended complaint relating to the price differentials between spark plugs sold for original equipment and for replacement are sustained by the evidence, and his recommended order would prohibit all such price differentials except those which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. In arriving at his decision, the hearing examiner determined that the prices at which respondent has invoiced spark plugs to automobile manufacturers for use in original equipment and for resale for replacement do not represent the actual prices at which respondent sold such plugs to automobile manufacturers. The actual price, according to the hearing examiner, is determined by averaging the invoice or billing prices on original equipment plugs and on replacement plugs on the basis of volume of each purchased by the manufacturer. By this method of determining the "actual" price on sales to automobile manufacturers, the hearing examiner found that Champion's price on spark plugs sold to Ford Motor Company during 1946 was 16½ cents per plug or approximately 9½ cents per plug below Champion's price to its distributors. In reaching his determination as to the "actual" price

at which respondent sold spark plugs to automobile manufacturers, the hearing examiner apparently relied to a large extent upon statements made by the respondent in its answer to the amended complaint and to statements by respondent's president in the course of testimony and oral argument before the Commission.

The Commission is of the opinion that the hearing examiner's said finding that respondent sold spark plugs to automobile manufacturers at a single, average price is not supported by the evidence. The price received by a seller or paid by a buyer in any given transaction is determined by the circumstances of the transaction. What the seller, in this case the respondent, may have considered to be the price is not necessarily the determining factor. Equipment plugs and replacement plugs sold by respondent to automobile and truck manufacturers were used in entirely separate business operations. Equipment plugs were used solely in the manufacture of engines. They became an integral part of the engine in which they were used. On the other hand, replacement plugs purchased by automobile and truck manufacturers were used only for resale to dealers. Equipment plugs and replacement plugs were billed on separate invoices at two different prices. The prices set by said manufacturers on new vehicles reflected the invoice cost of equipment plugs and the prices at which they resold replacement plugs were based on the invoice cost of such plugs. None of the spark plugs purchased by automobile manufacturers for use in original equipment were resold by such manufacturers as replacement plugs. Upon consideration of all the circumstances surrounding the transactions between respondent and the automobile and truck manufacturers to whom it sold both equipment and replacement spark plugs, the Commission is of the opinion, and therefore finds, that such spark plugs were sold at two separate and distinct prices.

The hearing examiner also found that the effect of the difference between the "average price" charged automobile manufacturers and the price charged other direct customers for spark plugs for replacement has been to give the said manufacturers a price advantage over the distributors, which price advantage was utilized, in part, in advertising and sales promotional campaigns to stimulate the resale of spark plugs purchased by the manufacturers. Such price differential also, according to the hearing examiner, precludes the smaller spark plug manufacturers from successfully competing for original equipment business, and has contributed to three manufacturers of spark plugs, of which Champion is one, acquiring substantially a complete monopoly in the original equipment and replacement business of all equipment manufacturers and approximately 80-odd percent of all replacement business.

The Commission's aforesaid rejection of the hearing examiner's recommended finding as to the method of determining respondent's price on original equipment and replacement plugs sold to equipment manufacturers constitutes, in effect, a rejection of his recommended finding as to the injury to competition between respondent's customers, or customers of such customers, resulting from respondent's lower prices on original equipment plugs. Moreover, the amended complaint does not allege any injury to competition between purchasers of spark plugs for original equipment and purchasers of spark plugs for resale for replacement. The question to be resolved then, in connection with respondent's lower price on original equipment plugs than on replacement plugs, is whether the effect of such price differentials has been or may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy, or prevent competition with respondent in the manufacture, distribution, and sale of spark plugs.

Counsel supporting the complaint have sought to show that as a result of respondent's lower price on original equipment plugs, other manufacturers of spark plugs have been excluded from sharing in the original equipment business. They contend that the smaller spark plug manufacturers cannot compete for the original equipment business because they cannot stand the losses involved in respondent's low prices on original equipment business. They also contend that such smaller manufacturers are excluded from large parts of the replacement market because their spark plugs lack the prestige that is acquired by spark plugs which are used as original equipment. The evidence in the record tending to support these contentions is persuasive. However, in the opinion of the Commission, such contentions are not supported by the greater weight of all the evidence. Substantially all of the spark plugs purchased by automobile manufacturers are supplied by three companies: General Motors Corporation (AC Spark Plug Division), The Electric Auto-Lite Company, and respondent. Of the 20 most popular passenger automobiles in 1948, The Electric Auto-Lite Company supplied all equipment plugs for nine models; General Motors (AC Spark Plug Division) supplied all equipment plugs for five models; and Champion supplied all equipment plugs for five models. One model was suplied by all three of the named companies.

There is some evidence in the record tending to show that some competing spark plug manufacturers were unable to sell original equipment plugs to equipment manufacturers because they were either unable or unwilling to sell at the price at which respondent sold, or offered to sell, to equipment manufacturers. For example, an official

of the Blue Crown Spark Plug Company testified that his company's offers to sell Blue Crown's spark plugs to certain tractor works owned or controlled by Deere & Company and to Kaiser-Frazer Corporation for original equipment at a price of 12¾ cents per plug, which price was approximately Blue Crown's cost of production, were rejected because the price was too high. It appears, however, that price alone was not the determining factor in causing the said offers of the Blue Crown Spark Plug Company to be rejected. Among other things which caused such rejections was the fact that the Blue Crown spark plugs had not been tested and approved by the concerns to whom the offers were made.

There is substantial evidence in the record that manufacturers of automobiles and other vehicles, in selecting a particular spark plug, take into consideration such factors as the quality and performance of the spark plug in the engine in which it is to be used, the ability and capacity of the spark plug manufacturer to supply the requirements of the purchaser, the public acceptance of the spark plugs, and the availability of the spark plugs and service thereon throughout the United States, as well as the price.

The record does not disclose any undue mortality rate on the part of smaller spark plug manufacturers or any undue loss of business by them which can be attributed to the fact that respondent has sold its original equipment spark plugs at a lower price than it charged for replacement spark plugs.

The Commission, upon consideration of the whole record, is of the opinion, and therefore finds, that the greater weight of the evidence fails to establish that the effect of respondent's price differentials between purchasers buying for original equipment and purchasers buying for resale for replacement has been or may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy, or prevent competition with respondent in the manufacture, distribution, and sale of spark plugs. In view of this determination, it is not necessary to determine whether, as respondent claims, the lower prices on original equipment plugs were made in good faith to meet equally low or lower prices and the services and facilities offered by its competitors.

PAR. 6. In the course and conduct of its aforesaid business respondend has, since June 19, 1936, sold its spark plugs for replacement of original equipment at prices which have varied substantially as between (1) purchasers buying directly from respondent; (2) purchasers buying indirectly from respondent; and (3) purchasers buying directly and purchasers buying indirectly from respondent.

Direct purchasers of replacement spark plugs from respondent included those accounts classified by respondent as distributors, Atlas Supply Company, Socony-Vacuum Oil Company, and certain automobile and truck manufacturers. Prior to January 1, 1941, respondent also sold directly to accounts classified by it as direct jobbers. The prices charged by respondent for replacement spark plugs sold to certain direct purchasers during the years 1939 through 1947 are shown in the following tabulation:

Price Per Plug Charged Certain Direct Purchasers for Replacement Plugs

[All prices subject to a 2% cash discount]

Type or name of direct purchaser	1939	1940	1941	1942	1943	1944	1945	1946	1947
Distributor:									
Invoice price	$0.31	$0.31	$0.31	$0.33	$0.33	$0.33	[C] $0.33	$0.29	$0.29
Less 10% [A]	.279	.279	.279	.297	.297	.297	.297	.261	.261
Direct jobber [B]	.31	.31							
Atlas Supply Co.:									
Invoice price	.31	.31	.31	.33	.33	.33	[C] .33	.29	.29
Less 10%–10%	.2511	.2511	.2511	.2673	.2673	.2673	.2673	.2349	.2349
Socony-Vacuum Oil Co.:									
Invoice price	.31	.31	.31	.33	.33	.33	[C] .33	.29	.29
Less 10%	.279	.279	.279	.297	.297	[D] .297			
Less 10%–10% [D]							.2673	.2349	.2349
Kaiser-Frazer Corp								.24	
Studebaker Corp	.24	.24	.24	.27	.27	.27	[E] .24	.24	.24
Hudson Motor Car Co	.24	.24	.24	.27	.27	.27	[F] .24	.24	.24
Packard Motor Car Co	.24	.24	.24	.27	.27	.27	[G] .24	.24	.24
Ford Motor Co	.24	.24	.24	.27	.27	.27	[H] .24	[I] .22	.22

[A] All distributor accounts were paid an additional 5% rebate on spark plugs they resold to certain types of accounts.
[B] This classification was eliminated Jan. 1, 1941.
[C] Price reduced to 29¢ Sept. 1, 1945.
[D] Additional 10% allowance after Nov. 1, 1944.
[E] Price reduced from 27¢ to 26.1¢ on Sept. 1, 1945, and to 24¢ on Nov. 1, 1945.
[F] Price reduced from 27¢ to 26.1¢ on Sept. 1, 1945, and to 24¢ on Oct. 12, 1945.
[G] Price reduced from 27¢ to 26.1¢ on Sept. 1, 1945, and to 24¢ on Dec. 1, 1945.
[H] Price reduced from 27¢ to 24¢ on Sept. 1, 1945.
[I] Price reduced from 24¢ to 21¢ on May 2, 1946. However, Ford pays the Federal Excise Tax, which respondent pays for other purchasers. Such tax is 5% of 21¢, making Ford's cost approximately 22¢.

PAR. 7. Respondent has, since June 19, 1936, sold its spark plugs of like grade and quality to its distributors and to automobile manufacturers for resale for replacement at varying and different prices. For example, as indicated in the tabulation in Paragraph Six, respondent's billing or invoice price to its distributors in 1947 was 29 cents per plug. Such billing price was subject, however, to a discount of 10 percent, which was paid by respondent to the distributors quarterly. Thus, respondent's net price to its distributors in 1947 was 26.1 cents per plug. Respondent's distributors were also granted an additional 5 percent rebate on spark plugs they resold to certain types of accounts, and on such sales respondent's net price in 1947 was 24.65 cents per plug. During the same period, respondent's invoice price to Ford Motor Company for spark plugs for resale for replacement was 21 cents per plug. However, Ford paid the Federal Excise Tax on the plugs it

purchased for resale, while respondent paid such tax on the plugs sold to distributors. Such excise tax was 5 percent and thus Ford's cost on such plugs was approximately 22 cents per plug as against 26.1 cents and 24.65 cents per plug paid by respondent's distributors.

Ford Motor Company resold the spark plugs it purchased from respondent to Ford dealers. Distributors handling respondent's plugs were in competition with Ford Motor Company for the business of many of said Ford dealers. Ford Motor Company has carried on extensive advertising and sales promotional campaigns and has maintained a large force of field men for the purpose of promoting the purchase by Ford dealers of Champion spark plugs and other automobile parts from Ford Motor Company and to aid said Ford dealers in reselling such products. As a result of such advertising and promotional activities on the part of Ford Motor Company and also as a result of exhortations, by Ford's field men, to Ford dealers to purchase from Ford Motor Company, Ford dealers prefer to purchase their requirements of Champion spark plugs from Ford Motor Company. There is evidence in the record that certain of respondent's distributors have lost the business of Ford dealers because of such preference on the part of said dealers to do business with Ford Motor Company. The low prices paid by Ford Motor Company for respondent's spark plugs was one of the factors which caused Ford to engage in the various advertising and promotional campaigns to promote the purchase by Ford dealers of champion spark plugs from Ford Motor Company.

The Commission concludes, and therefore finds, that the effect of respondent's said discriminations in price between distributors and certain automobile manufacturers on spark plugs sold for resale for replacement has been and may be to injure, destroy, and prevent competition with the purchasers paying the lower prices.

PAR. 8. The prices at which respondent has sold its spark plugs to its distributors and to Atlas Supply Company (sometimes hereinafter referred to as "Atlas") and Socony-Vacuum Oil Company (sometimes hereinafter referred to as "Socony") have varied substantially. Respondent has billed or invoiced its spark plugs to its distributors and to Atlas and Socony at the same price, but such billing or invoice price does not represent the prices actually received by respondent. As shown in the tabulation in Paragraph Six hereof, respondent's net price to its distributors in 1947 was 26.1 cents per plug (on spark plugs resold to certain types of accounts the distributor's net price was 24.65 cents per plug). Respondent's billing or invoice price to Atlas and Socony of 29 cents per plug was reduced by discounts of 10 percent and 10 percent, with the result that respondent's net price to those customers in 1947 was 23.49 cents per plug. Thus, during the

year 1947, Atlas and Socony enjoyed a price advantage over respondent's other distributors of a minimum of 1.16 cents per plug and a maximum of 2.61 cents per plug.

Atlas Supply Company is a corporation the entire stock of which is owned by Stanco, Incorporated, and the Standard Oil Companies of Ohio, Indiana, Kentucky, and California. Stanco, Incorporated, is a wholly owned subsidiary of Standard Oil Company of New Jersey. Atlas purchased respondent's plugs for resale to the said various Standard Oil Companies exclusively. It conducted for the various Standard Oil Companies a complete merchandising program for the resale of automobile parts and accessories, including respondent's spark plugs. The profits earned by Atlas were divided among the various Standard Oil Companies on the basis of the total amount of merchandise purchased by each through Atlas. Socony-Vacuum Oil Company purchased automobile products, including spark plugs, not only for resale through its own outlets but also for its affiliates.

Included among respondent's distributors who did not receive the additional discount granted Atlas and Socony were a number of oil companies, of which Cities Service Oil Company was one. Cities Service Oil Company was in competition with the Standard Oil Companies of Indiana and Ohio and with Socony in the sale of respondent's spark plugs. Respondent's failure to grant Cities Service Oil Company the same discounts granted Atlas and Socony has prevented Cities Service Oil Company from fully competing with the said Standard Oil Companies of Indiana and Ohio and Socony. Atlas and Socony each carry on extensive advertising, training, and other sales promotional activities for the purpose of promoting the sale of Champion spark plugs through independently operated service stations which sell Standard Oil and Socony products, respectively. Such advertising and promotional activities have caused these service station dealers to prefer to purchase their requirements of Champion spark plugs from or through the respective Standard Oil Companies and Socony.

There is substantial evidence in the record that a number of respondent's distributors who paid a higher price for Champion spark plugs than did Atlas and Socony lost the business of independently operated service stations to the Standard Oil Companies and Socony

The Commission concludes, and therefore finds, that the effect o respondent's said discriminations in price between its distributors an Atlas and Socony on spark plugs has been and may be substantiall to injure, destroy, and prevent competition with the purchasers payin the lower prices.

As a defense to the above-described discriminations in price between distributors and Atlas and Socony, respondent claims that its lower prices to Atlas and Socony were made in good faith to meet an equally low price of a competitor. The Commission is of the opinion, and finds, that the evidence does not support this defense of the respondent. During the entire period covered by the amended complaint respondent sold spark plugs to Atlas in substantially the same manner as it did prior to the amendment of the Clayton Act on June 19, 1936. Despite testimony to the effect that during this period Atlas received some verbal offers from other spark plug manufacturers quoting lower prices than those which Atlas was paying to respondent, it does not appear that respondent varied its price in any way to meet such offers. Also, during this period Atlas purchased some of its requirements of spark plugs from AC Spark Plug Company. Atlas received no quotations from other competitors of respondent after 1941. However, on September 1, 1945 (or on October 1, 1945) respondent reduced its price to Atlas to less than the price which Atlas was then paying to the AC Spark Plug Company. There is no evidence of any quotations by competitors of respondent to Socony since August 1944. However, on September 1, 1945, respondent reduced its price to Socony by approximately 3 cents per plug and thereafter continued the discriminations in price heretofore described.

Respondent also claims as a defense to the above-described discriminations in price that the price differentials were justified by differences between its cost of selling to distributors and to Atlas and Socony. In support of this defense, respondent has presented statements with supporting testimony purporting to show a comparison of its cost of selling to Atlas and Socony with its cost of selling to all other distributors as a group for the year 1946. Respondent did not maintain its records in such a manner as would permit an accurate determination of its cost of selling to any particular customer. Consequently, for the purposes of its cost justification respondent has attempted to allocate its total selling expenses for the year 1946 as between Atlas and Socony on the one hand and its other 485 distributors on the other, and thereafter to compute an average cost of selling an individual spark plug to the customers in each group. Respondent has thus attempted to divide its 487 distributors into two groups, one group composed of Atlas and Socony and the other composed of its other 485 distributors. Such a grouping fails to take into consideration the fact that among the 485 distributors in one of the groups there are those upon whom respondent expended a comparatively small amount of sales effort. For example, there is evidence that respondent expended a comparatively small amount of sales effort

in selling to Cities Service Oil Company, probably less than was expended on sales to Atlas and Socony. However, for the purposes of its cost justification respondent included Cities Service Oil Company in the group to which respondent has allocated a major portion of its selling expenses. Respondent's cost of doing business undoubtedly varied as among its different customers. All of its selling expenses were not applicable on a proportionately equal basis to sales to all of its customers. However, in the absence of a sound basis for determining the actual cost of selling to particular customers, the sales to each customer must bear their proportionate share of the entire selling expense. A cost justification based on the difference between an estimated average cost of selling to one or two large customers and an average cost of selling to all other customers cannot be accepted as a defense to a charge of price discrimination. There are other features of respondent's cost justification which raise basic questions as to the soundness of certain of the procedures followed and allocations made in determining the cost differentials. For example, in one of the tabulations, selling expenses were allocated as between Atlas and Socony on the one hand, and all other distributors on the other, on the basis of an estimate by respondent's president that respondent expended 10 times as much sales effort on sales to regular distributors as it expended on sales to Atlas and Socony. For the purposes of the tabulation, however, a ratio of 5 to 1 was used. The fact that estimates are used in an attempted cost justification does not of itself make such cost justification wholly void of probative value. However, there should be more of a record basis for the estimates used than there was for the estimates used by the respondent in its cost justification.

Upon consideration of the aforesaid statements and supporting testimony presented by respondent in support of its cost justification and rebuttal evidence introduced by counsel supporting the complaint, the Commission finds that the evidence fails to establish that respondent's price differentials in favor of Atlas and Socony made only due allowance for differences in cost of selling to those customers.

PAR. 9. In addition to the purchasers described hereinabove to whom respondent sold spark plugs direct, respondent also negotiated and entered into contracts or agreements with numerous wholesalers, jobbers, and consumers of spark plugs, by which such purchasers were accorded the opportunity of purchasing respondent's spark plugs through Champion distributors at varying prices according to the type of contract or agreement entered into by the particular purchaser. Prior to January 1, 1941, respondent's direct accounts, other than Atlas and Socony and equipment manufacturers, were classified

by respondent as distributors and as direct jobbers. The agreements entered into between Champion and its distributors prior to 1941 provided that Champion would pay to the distributors as "special sales service compensation" 10 percent of its billing price on all spark plugs purchased by the distributors (such payments to be made quarterly), in consideration of the distributors doing certain sales promotional work; satisfactorily servicing franchise accounts; sending Champion periodic reports of purchases by franchise accounts; reporting to Champion the names of dealers not handling Champion spark plugs; making no sales directly or indirectly to any accounts, except those sold as regular dealers at dealers' prices in the territory regularly covered by their salesmen, unless and until such account was approved for a franchise by Champion or Champion had given its written approval to service them; paying their accounts promptly; conducting their business methods and distribution of Champion spark plugs in a manner completely satisfactory to Champion; and giving Champion the right to audit their sales and customers' accounts and orders at any time by any disinterested certified public accountant for the purpose of ascertaining the distribution and sale by them of Champion spark plugs. In supplemental agreements respondent agreed to increase the amount of the payment from 10 percent to 15 percent on all sales by the distributors to Wholesale Franchise and Commercial "C" Franchise accounts.

To obtain a franchise, an applicant made application to Champion on forms prepared by Champion. The application was in the form of an order from a distributor named in the order and was signed by both the applicant and the distributor. The application contained, among other things, the following: "We hereby order from the first named Supplier listed below 250 Champion Spark Plugs * * * and request you to give your approval of a franchise to us upon our agreement to carry a minimum stock of 250 Champion Spark Plugs during the year ——. We estimate our [year] requirements at 1,000 or more plugs, and understand that prices and terms of payment are subject to change without notice." The form used provided a space for Champion's approval of the franchise.

As of January 1, 1941, subsequent to the issuance of the original complaint herein, respondent discontinued its sales to so-called direct jobbers. The agreements entered into between respondent and its distributors subsequent to 1940 were slightly different from those described above. Under the revised agreements distributors were authorized to sell Champion spark plugs in the territory regularly covered by their salesmen upon the terms and conditions set forth in the agreements. Among other things, the agreements specified the prices

which the distributors would pay Champion, as well as the "Resale Prices Established in 'Fair Trade' States—Suggested Resale Prices in Other States and D. C." The distributors agreed to secure the written approval of Champion before selling or servicing Franchise accounts. After January 1, 1945, such Franchise accounts were referred to as "Basis Accounts." Distributors also agreed to report to Champion all sales to such Franchise or Basis Accounts. The agreement provided for the payment by Champion of the 10 percent special sales service compensation; also, the separate arrangement whereby Champion paid the distributor an additional 5 percent on all sales made by the distributor to Wholesale Franchise and Commercial "C" Franchise accounts was continued. The methods and forms used in obtaining Champion's approval before selling to Franchise accounts were substantially the same as those used prior to 1941. Negotiations with applicants for a franchise were carried on by respondent's representatives. The terms and conditions of sales to such Franchise accounts were fixed by Champion. The degree of control exercised by respondent over sales to such Franchise accounts was such that such sales were in all essential respects sales by respondent. These indirect accounts are considered by the Commission to be "purchasers" within the meaning of the Clayton Act, as amended.

The Franchise and Basis accounts which purchased Champion spark plugs through Champion's distributors included wholesale accounts and large consumer accounts. The wholesale accounts were classified by respondent as follows, and in 1947 paid the prices shown:

Jobber Basis Account (29 cents). (From 1942 to 1946, this classification was entitled Jobber Franchise. Prior to 1942, it was entitled Wholesale Franchise.)

5000 Plugs Basis (32 cents). (Classification eliminated January 1, 1948. Prior to 1946 this classification was entitled Merchandise Franchise account.)

Service Franchise. (Classification eliminated January 1, 1946.)

The large consumer accounts were classified by respondent as follows, and in 1947 paid the prices shown:

"C" Fleet Basis (29 cents). (Prior to 1946 this classification was entitled "C" Fleet Franchise.)

Fleet Basis (32 cents). (Classification eliminated January 1, 1948. Prior to 1946 this classification was entitled "B" Fleet Franchise.)

"A" Fleet Franchise. (Classification eliminated January 1, 1946.)

Respondent sold its spark plugs of like grade and quality directly to its distributors and until January 1, 1941, to direct jobbers and indirectly to its Franchise and Basis accounts, all as classified by respondent, at the prices shown in the following tabulation.

Prices Per Plug Charged Certain Direct and Indirect Purchasers

[All prices subject to a 2% cash discount]

Type of Account	1939	1940	1941	1942	1943	1944	1945	1946	1947
Distributor	$0.31	$0.31	$0.31	$0.33	$0.33	$0.33	[D] $0.33	$0.29	$0.29
Less 10%	.279	.279	.279	.297	.297	.297	.297	.261	.261
Distributor	.31	.31	.31	.33	.33	.33	[D] .33	.29	.29
Less 10-5%	.2635	.2635	.2635	.2805	.2805	.2805	.2805	.2465	.2465
Direct Jobber [A]	.31	.31							
Wholesale and Commercial "C" Franchise Accounts:									
Wholesale Franchise [B]									
C Fleet Franchise [B]	.325	.325	.325	.34	.34	.34	.34	.29	.29
Jobber Basis [C]									
C Fleet Basis [C]									
Other Franchise Accounts:									
Merchandise Franchise [B]									
5,000 Plug Basis [C]	.34	.34	.365	.365	.365	.365	.365	.32	.32
B Fleet Franchise [B]									
Fleet Basis [C]									
Service Franchise [B]	.37	.37	.40	.40	.40	.40	.40		
A Fleet Franchise [B]									

[A] From 1939 through 1940 inclusive. Classification eliminated Jan. 1, 1941.
[B] From 1939 through 1945 inclusive. Classification eliminated Jan. 1, 1946.
[C] From 1946 through 1947 inclusive.
[D] Price reduced to 29¢ Sept. 1, 1945.

Each of the aforesaid indirect purchasers of respondent's spark plugs were in competition with other purchasers of respondent's spark plugs in the areas in which they sold. In such competition each indirect account was injured to the extent that the price it paid was higher than the price paid by its competitors. For example, respondent has granted certain consumer accounts which it classified as "Fleet" accounts the privilege of purchasing its spark plugs at prices which were as low or lower than the prices at which many other indirect accounts, who were attempting to sell to the Fleet accounts, purchased. By reason of the lower prices accorded them respondent's distributors, and to a lesser extent the more favored indirect accounts, were able to resell profitably to such Fleet accounts at the prices established by respondent, and as a result, the indirect wholesale accounts paying the higher prices lost the business of all consumer accounts which were large enough to secure respondent's approval for a Fleet Basis agreement. This was true even of accounts which had been developed by the indirect wholesale accounts purchasing at one of the less favored prices.

The Commission concludes, and therefore finds, that the effect of respondent's said discriminations in price between its distributors and

its indirect purchasers and between certain indirect purchasers has been and may be to substantially injure, destroy, and prevent competition with said distributors and with said indirect purchasers who paid lower prices for respondent's spark plugs than their competitors.

PAR. 10. It is alleged in Paragraph Seven of Count I of the amended complaint herein that respondent has sold its various special brands of spark plugs to certain of its purchasers at prices widely varying from the prices paid by other purchasers for its regular Champion brand of spark plugs. It appears that the allegation to the effect that such special brand spark plugs were of the same grade and quality as respondent's regular Champion brand of spark plugs is not sustained by the evidence. The allegations in Paragraph Seven of Count I of the amended complaint should, therefore, be dismissed.

PAR. 11. Prior to 1940 respondent from time to time entered into contracts with some automobile manufacturers under which the automobile manufacturers agreed to purchase from respondent their entire requirements of spark plugs for a specified term not exceeding one year and respondent agreed to supply their requirements of spark plugs. This provision was eliminated from respondent's agreements with automobile manufacturers in 1939.

Prior to 1941 respondent and the operators of bus and trucking lines and other large consumers of spark plugs—so-called "Fleet accounts"—executed a "Commercial Franchise" which set forth the prices at which the Fleet accounts were entitled to purchase their requirements of spark plugs. These documents specified the sources from which the Fleet accounts were to obtain their requirements of spark plugs and provided that in case none of the specified sources were handling Champion spark plugs, such requirements would be supplied by Champion. In separate agreements between respondent and its distributors, the distributors agreed to service franchise accounts in a manner satisfactory to respondent. One of the forms of commercial franchise used during the year 1939 contained the following provision:

> In consideration of your purchasing Champion Spark Plugs for your requirements, estimated to exceed 5,000 plugs per year, to service your motorized equipment and upon your placing an initial order for 200 plugs for single delivery, we extend to you the following special prices, terms and conditions on all your Spark Plug purchases from this date to December 31, 1939. (Comm. Ex. 67-A.)

The Commercial Franchises executed by respondent and said Fleet accounts were, in practical effect, agreements between them whereby the Fleet accounts were given the right to purchase Champion spark plugs at a special low price in consideration for their purchasing Champion spark plugs for all their requirements.

In dealing with its distributors respondent has used two forms of agreements, one prior to 1941 and the other subsequent to 1940. Both of these forms contained provisions to the effect that there was no express or implied obligation on the part of the distributor to handle respondent's spark plugs exclusively. However, notwithstanding these recitals in the contracts, the services to be rendered by the distributors in order to obtain their spark plugs at a special low price, all as specifically set out in the contract, were such that it was not practical for a distributor to handle the spark plugs of a competitor of respondent. (A description of such services is contained in Paragraph Nine above.) The agreements, in effect, required the distributors to handle respondent's spark plugs exclusively in order to obtain a special low price from respondent.

That respondent interpreted its agreements with its distributors as requiring the distributors to handle respondent's plugs exclusively is shown by the fact that respondent has refused to enter into distributor agreements with wholesale accounts because such accounts refused to agree to handle respondent's plugs exclusively, and has canceled and threatened to cancel agreements with distributors who have taken on, or indicated an intention to take on, a competing line of spark plugs. For example, the Scheufler Supply Company, Inc., a wholesale automotive distributor in Great Bend, Kansas, had been trying for 20 years to get a Champion distributorship. Scheufler was told by respondent's vice president that respondent "had only one distributing contract and that was an exclusive contract," and that "they were not giving that kind of a contract unless it was exclusively handled by the distributor and no other plugs handled whatsoever." Scheufler purchased its requirements of Champion spark plugs through a distributor and Scheufler's purchases of Champion spark plugs were greater than all of the other purchases by the distributor through which Scheufler purchased. A salesman of the respondent told a jobber in Newcastle, Pennsylvania, in 1937 that he [the jobber] would have to get his "house in order so that he [respondent's saleman] could extend us a better price," and it was understood by said jobber that in order to get the better price the jobber would have to handle Champion spark plugs on an exclusive basis. Respondent canceled its distributor's contract with Paul Automotive, Inc., Lansing, Michigan, in 1948, after that concern started handling spark plugs manufactured by a competitor of respondent. In May 1948 C. E. Hamlin & Company, Jackson, Michigan, one of respondent's distributors, sought permission to handle Hastings spark plugs and was informed by respondent's district manager that respondent had canceled its distributor's contract with Paul Automotive,

Inc., because that concern had taken on the Hasting plugs. Hamlin was thus persuaded to continue selling Champion spark plugs on an exclusive basis.

The record thus establishes that although respondent's written agreement with its distributors stated that the distributors were not required to handle Champion spark plugs exclusively, the actions of the parties show that their arrangements were in fact exclusive dealing agreements.

Respondent is one of the two largest spark plug manufacturers in the United States in volume of plugs sold. Respondent, General Motors Corporation and The Electric Auto-Lite Company manufacture and sell substantially all of the spark plugs purchased by equipment manufacturers, and more than 80 percent of all the spark plugs manufactured and sold in the United States. Approximately one-sixth of respondent's total sales of spark plugs were to equipment manufacturers. In the year 1946, equipment manufacturers purchased approximately 34,000,000 spark plugs. Respondent's sales to such accounts were not less than one-third of that number. The accounts which were parties to the Fleet Franchise exclusive dealing agreements with respondent were operators of large fleets of motor trucks or busses. The "C" Fleet Franchise, for example, was entered into only with operators of over 500 vehicles. Respondent's sales to such Fleet accounts were substantial. Approximately two-thirds of respondent's total sales of spark plugs were made through its distributors. In 1946 respondent sold a total of more than 58,000,000 spark plugs through its distributors other than Atlas Supply Company and Socony Oil Company. The accounts to which respondent sold spark plugs under exclusive dealing agreements, which sales represented a substantial portion of the total sales of spark plugs in the United States, were closed to competitors of respondent.

Upon the whole record, the Commission concludes, and therefore finds, that the effect of the aforesaid exclusive dealing agreements may be to substantially lessen competition and tend to create a monopoly in the line of commerce in which respondent is engaged.

PAR. 12. Count II of the amended complaint herein charges respondent with violation of subsection (d) of Section 2 of the Clayton Act as amended. The acts and practices of the respondent which counsel supporting the complaint rely upon to support their contention that this charge of the complaint is sustained, and which the hearing examiner found do sustain the charge, are that from June 19, 1936, to January 1, 1941, respondent sold its spark plugs to its customers classified by it as distributors and direct jobbers at the same invoice price; that during this period respondent contracted to pay and did

pay to distributors quarterly as special sales service compensation for service furnished by its distributors in connection with the resale of its spark plugs an amount equal to 10 percent of their total purchases and an additional amount of 5 percent on all purchases made by distributors for Wholesale Franchise and Commercial "C" Franchise accounts as compensation for servicing all franchise accounts; and that respondent did not make available to its direct jobbers compensation for the rendition of like service on proportionally equal terms.

Respondent discontinued selling direct to customers classified by it as direct jobbers on January 1, 1941. The payments made by respondent to its distributors as "Special Sales Service Compensation" and "Special Warehouse Compensation" were the payments or discounts off billing price described in the findings herein pursuant to the allegations in Count I of the amended complaint. The Commission is of the opinion that the said payments by respondent to its distributors were in fact reductions in the net prices paid by said distributors and that, under the circumstances, Count II of the amended complaint should be dismissed.

Count IV of the amended complaint herein charges that the acts and practices of the respondent alleged in Count I to constitute a violation of subsection (a) of Section 2 of the Clayton Act, as amended, and the acts and practices alleged in Count III to constitute a violation of Section 3 of the Clayton Act, as well as certain of respondent's acts and practices in fixing and maintaining varying and discriminatory resale prices on its spark plugs, all constitute unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Subsequent to the issuance of the amended complaint in this proceeding, the Commission issued a complaint against one of respondent's principal competitors, in which acts and practices similar to those described in Counts I and III of the amended complaint herein are alleged to constitute violations of the amended Clayton Act only. Consequently, in order to avoid unwarranted unequal treatment of competing respondents, the Commission makes no findings as to that portion of Count IV which charges that the acts and practices of the respondent alleged in Counts I and III also constitute a violation of the Federal Trade Commission Act.

Subsequent to the completion of the hearings herein, the Federal Trade Commission Act was amended with respect to certain contracts and agreements which establish minimum or stipulated resale prices (Public Law No. 542, approved July 14, 1952—the McGuire Act). This amendment had the effect of making legal certain of the acts and practices which it is contended the respondent engaged in, in con-

nection with the fixing and maintaining of resale prices. For example, it is contended that respondent's agreements with its distributors which fixed the exact prices at which the distributors were to resell spark plugs were illegal because the Miller-Tydings Act, which permits the fixing of minimum resale prices under certain circumstances, does not permit the fixing of exact resale prices. The aforesaid McGuire Act has the effect of permitting, under certain circumstances, contracts or agreements which prescribe stipulated, or exact, prices, as well as minimum prices. Certain of the respondent's acts and practices which may have been illegal at the time they were committed, may not, therefore, be illegal under the existing law. Under these circumstances, an order to cease and desist such practices would be inappropriate. Furthermore, the amended complaint herein, having been issued prior to the enactment of the aforesaid McGuire Act, may not have sufficiently informed respondent as to its acts and practices in connection with the fixing and maintaining of resale prices challenged therein.

Upon consideration of all the foregoing and the further fact that the order to cease and desist which is being entered herewith pursuant to the charge in Count I of the amended complaint will be effective in preventing respondent from fixing and maintaining discriminatory prices as between its direct and indirect customers who compete with each other in the resale of respondent's spark plugs, the Commission is of the opinion that Count IV of the amended complaint should be dismissed in its entirety.

CONCLUSION

The acts and practices of the respondent as hereinabove found in Paragraphs 6, 7, 8, and 9 are in violation of subsection (a) of Section 2 of the Clayton Act, as amended, and the acts and practices of the respondent as hereinabove found in Paragraph 11 are in violation of Section 3 of said Clayton Act.

Commissioners Howrey and Carretta not participating for the reason that oral argument on the merits was heard prior to their appointment to the Commission.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, answer of the respondent, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before a hearing examiner of the Commission theretofore duly designated by it, recommended decision of the hearing examiner with exceptions

thereto, briefs of counsel supporting the complaint, counsel for the respondent, and counsel for Kaiser-Frazer Corporation, Hudson Motor Car Company, Nash-Kelvinator Corporation, Packard Motor Car Company, and Willys-Overland Motors, Inc., as amici curiae, and oral argument of opposing counsel; and the Commission having issued its order disposing of the exceptions to the recommended decision and having made its findings as to the facts and its conclusion that respondent has violated subsection (a) of Section 2 of the Clayton Act, as amended, and Section 3 of said Clayton Act:

It is ordered, That respondent, Champion Spark Plug Company, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of spark plugs in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(a) Discriminating, directly or indirectly, in the price of said spark plugs of like grade and quality:

1. By selling to any direct purchaser at net prices higher than the net prices charged any other direct purchaser who in fact competes in the resale and distribution of said spark plugs with the purchaser paying the higher price.

2. By selling to any indirect purchaser at net prices higher than the net prices charged any other direct or indirect purchaser who in fact competes in the resale and distribution of said spark plugs with the purchaser paying the higher price.

(b) Selling or making any contract or agreement for sale of spark plugs on the condition, agreement, or understanding that the purchaser shall not use or deal in or sell the products of a competitor or competitors of the respondent.

(c) Enforcing in any manner or continuing in operation or effect any condition, agreement, or understanding, in or in connection with any existing contract or agreement for sale of spark plugs, which condition, agreement, or understanding is to the effect that the purchaser shall not use or deal in or sell the products of a competitor or competitors of the respondent.

(d) Granting any rebate or fixing any price to any purchaser of spark plugs on the condition, agreement, or understanding that such purchaser shall not use or deal in the products of a competitor or competitors of the respondent.

It is further ordered, That the allegations of Counts II, IV, and Paragraphs Five and Seven of Count I of the amended complaint herein be, and they hereby are, dismissed.

It is further ordered, That the respondent, Champion Spark Plug Company, shall, within sixty (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.

Commissioners Howrey and Carretta not participating for the reason that oral argument on the merits was heard prior to their appointment to the Commission.

IN THE MATTER OF

GENERAL MOTORS CORPORATION AND AC SPARK PLUG COMPANY

FINDINGS AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSECS. (a) AND (d) OF SECS. 2 (a) AND 2 (d) AND SEC. 3 OF THE CLAYTON ACT, AS AMENDED, AND OF THE FEDERAL TRADE COMMISSION ACT

Docket 5620. Complaint, Nov. 17, 1948—Decision, July 10, 1953

Where a corporation engaged since December 29, 1950, among other things, in the distribution and sale of automobile, truck, tractor, and engine accessories, parts, and supplies, including AC spark plugs, cables, fuel pumps, fuel pump parts, oil filters, oil filter cartridges, and oil filter elements—dealt in by its wholly owned subsidiary prior to the latter's dissolution on said date—which (1) sold said AC products throughout the United States in substantial competition with others, to customers engaged, as were many of their customers, in the resale of said products at wholesale and retail; (2) supplied annually more spark plugs, oil filters, fuel pumps and speedometer cables to the original equipment field than any other manufacturer; and (3) along with Champion Spark Plug Co. and the Electric Auto-Lite Co., made and sold about 90 percent of all spark plugs sold in the United States, and itself accounted for a substantial part of all such plugs there sold for both original equipment and replacement; and (4) sold said AC products at prices which varied as between purchasers buying for original equipment; as between purchasers buying for original equipment and purchasers for resale or replacement; and as between purchasers, both direct and indirect, buying for resale or replacement;

In selling to (1) its various direct purchasers including distributors which handled all AC products and were given a special price for handling AC spark plugs and oil filter cartridges on an exclusive basis; direct jobber accounts who stocked and sold such AC products as they found demand for; and contract accounts, in which were included automobile manufacturers, chain stores, national oil and tire companies and others, whose principal business was other than the wholesaling of automotive supplies, and who were sold on said basis because of their volume of purchases; and (2) its indirect purchasers in which were included indirect jobber accounts, fleet accounts and other dealers who were required to purchase from its distributors or wholesalers, but at prices and on terms and conditions fixed and controlled by it, so that sales thereto were essentially sales by respondent—

(*a*) Discriminated in price during 1940 in favor of direct distributor purchaser accounts and against direct jobber and indirect accounts through schedules of prices on its spark plugs, oil filters and air cleaners which, as illustrative, ranged, in the case of the plugs, from 27½ cents and 29 cents to its "D" and "DA" accounts, to 31 cents to its direct jobber accounts, and to 32½ cents to 37 cents to its indirect accounts; and from 1936 to 1941 discriminated against its direct jobber accounts through the payment to the distributors, on sales of plugs by it to a jobber at 31 cents per plug, of 10 percent or 3.1 cents per plug;

(*b*) Discriminated, from 1941 until Nov. 1, 1946, in favor of its "warehouse distributors" and against its direct jobber accounts through selling the former at 28 cents per plug while selling the latter at 30 cents per plug, and through payment to said distributors, on their sales to such jobbers, of an additional 10 percent; through payment to said distributors on their sales to certain contract dealers, of additional compensation of 10 percent and 5 percent respectively; and through payment to them also of additional compensation of 10 percent on their sales of other AC products to such dealers, with no provision for additional compensation to jobbers on sales by them to such contract dealer accounts;

(*c*) Discriminated in favor of its warehouse distributors, from 1942 to Nov. 1, 1946, and against indirect jobber purchasers who bought from said distributors at 31.5 cents per plug instead of the 30 cents paid by its direct jobber purchasers, through paying said distributors 10 percent on the selling price to them of 28 cents per plug on their sales to such indirect jobbers at 31.5 cents per plug, and thus in effect accorded said distributors a price of 24.85 cents per plug as compared with said indirect jobbers net purchasing price of 31.5 cents, with contract dealers paying higher prices for AC products than the jobbers, and noncontract dealers paying higher prices than contract dealers;

(*d*) Discriminated in price under a new distribution program inaugurated Nov. 1, 1946, in favor of its "warehouse distributors" and against its direct and indirect jobbers through a schedule of prices and arrangements under which, as illustrative, price of spark plugs to said distributors was 8 percent less than the jobber price of 27 cents, or 24.8 cents, plus an additional allowance of 12 percent on sales by said distributors to jobbers approved by respondent, or net, 21.6 cents, and under which "warehouse distributors" were also eligible for a compensation of 12 percent on their sales at jobber prices to large "jobber fleet owner" accounts, after approval of contracts therewith by respondent;

(*e*) Discriminated in favor of certain direct purchaser accounts such as oil and tire companies, distributor manufacturers, jobber chains, and large retail outlets such as Sears, Roebuck, Western Auto Supply, and Montgomery Ward, which sold on a national basis, at jobber prices less 8 percent for warehouse compensation and 5 percent as a distributional discount, through according them, in addition to the prices made available by respondent to warehouse distributors (namely, jobber price less 8 percent, and an additional 12 percent compensation on their sales to jobbers) an additional 7 percent discount, and thus made its net prices to said national distributors 5 percent less than its prices to warehouse distributors on all sales except where the national distributor or warehouse distributor resold to jobbers;

(*f*) Discriminated further, in addition to the varying prices to different customer classifications, through selling certain large purchasers of AC products for resale for replacement at prices which were substantially less than those charged other large purchasers, including, in 1940 and 1941, International Harvester, sold at 22.3 cents per plug, and Allis-Chalmers, at 27.5 cents;

(*g*) Discriminated in price between certain large retail outlets in that in January 1947 it discontinued selling direct to J. T. R. Motors and Montgomery Ward—theretofore sold plugs for resale at 27 cents less 8 percent and 5 percent, or 23.6 cents per plug—and required said concerns thereafter to purchase AC products indirect at dealer prices, while permitting Sears, Roebuck

to continue to purchase at the favored price; and discriminated further in favor of Sears in that its retail stores were allowed to purchase AC plugs from local warehouse distributors at 31.5 cents per plug in lots of not less than 10, while other dealers paid 41.1 cents per plug in lots of ten;

(*h*) Discriminated in favor of certain large rubber and oil companies and against competing distributors, jobbers, and retail outlets at various competitive levels, in that it—

(1) Sold from 1941 to 1946, AC plugs to the Goodrich Rubber Co. at a flat price of 24 cents per plug for resale through its retail outlets direct to consumers, while competing jobbers and dealers were required to pay higher prices;

(2) Discriminated from beginning 1947 to Nov. 1948, in that AC products were billed and shipped to the Pure Oil Co.'s field warehouses at national distributors' prices and to its company-owned service stations, which sold them at retail in competition with other dealers who purchased from jobbers at higher prices; and in that it granted said company a special price on oil filters 3 percent less than that paid by other national distributors; and

(3) Discriminated through its cash discount practice in favor of the Goodyear Tire & Rubber Company, which resold plugs through its own retail outlets to consumers, and also had an arrangement with four oil companies whereby it paid them a commission of 10 percent on sales by Goodyear to service stations which handled their petroleum products and a commission of 7½ percent on sales to their jobber companies, and also gave its customers a rebate based on the dollar volume of purchases during a year, including AC spark plugs, and thus passed on to certain of its customers a portion of the preferential price it received;

With result that—

(1) Its discriminations in price in favor of said warehouse distributors and national distributors and against direct and indirect jobbers, who resold their products to dealers, fleet owners, and consumers in direct competition therewith, resulted in lower profits to such jobbers, loss of customers, and a lessening of their ability to compete with said favored distributors;

(2) Its discriminations in price in favor of national distributors gave their warehouse branches and plants a substantial competitive advantage in enabling them to purchase said AC products at prices substantially lower than those paid by competing warehouse distributors, jobbers and dealers; and

(3) Its discriminations in price between its national distributor accounts gave the favored accounts a substantial competitive advantage over others;

Effect of which various price discriminations had been and might be to substantially lessen, injure, destroy, and prevent competition between and among respondent's favored customers and others:

Held, That such acts and practices, under the circumstances set forth, were in violation of subsec. (a) of Sec. 2 of the Clayton Act as amended: and

Where said corporation, engaged as aforesaid in the sale and distribution of its AC products—

(*a*) Entered into and had in effect, in and prior to 1939, more than 750 contracts with its "D" and "DA" distributor accounts which contained a provision that the distributor would handle said products on an exclusive basis and, following the elimination of the exclusive dealing clause from its 1940 distributor contracts, continued its policy, though not uniformly, of requiring its distributors to handle said products exclusively; and

(*b*) In conformity with its aforesaid policy, following the World War II period and beginning in 1946 when supply and demand for automotive parts began to equalize, gave preferential prices to some of its distributors on the condition or understanding that they would not deal in spark plugs, oil filters, oil filter elements, oil filter cartridges or fuel pumps sold by its competitors, threatened distributors with cancellation of their contracts if they failed to give up competing lines, and cancelled its contracts with a number of its warehouse distributors because they failed to comply;

Effects of which exclusive dealing contracts and policy were to unreasonably restrain and substantially lessen competition between it and its competitors in the sale and distribution of the products concerned, and to substantially lessen competition in the sale thereof by the elimination of distributors who refused to deal in its products exclusively and who were the source of its supplies to many dealers:

Held, That such acts and practices, under the circumstances set forth, were in violation of Sec. 3 of the Clayton Act.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. L. E. Creel, Jr. for the Commission.

Mr. Henry M. Hogan, of Detroit, Mich., and *Miller, Gorham, Wescott & Adams*, of Chicago, Ill., for respondents.

Willkie, Owen, Farr, Gallagher & Walton, of New York City, for Kaiser-Frazer Corp., amicus curiae.

Mr. L. Arthur Greenstein and *Mr. Daniel S. Greenstein*, of Philadelphia, Pa., for Berlin Auto Supply Co., amicus curiae.

Beaumont, Smith & Harris, of Detroit, Mich., for Hudson Motor Car Co., amicus curiae.

Cook, Beake, Miller, Wrock & Cross, of Detroit, Mich., for Nash-Kelvinator Corp., amicus curiae.

Bodman, Longley, Bogle, Armstrong & Dahling, of Detroit, Mich., for Packard Motor Car Co., amicus curiae.

Ritter & Boesel, of Toledo, Ohio, for Willys-Overland Motors, Inc., amicus curiae.

Report, Findings as to the Facts, an Order

Pursuant to the provisions of the Federal Trade Commission Act and to an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on November 17, 1948, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them in Count I thereof with violation of subsection (a) of Section 2 of the Clayton Act, as amended; in Count II thereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended; in Count III thereof with

violation of Section 3 of the Clayton Act; and in Count IV thereof with violation of Section 5 of the Federal Trade Commission Act.

After the issuance of said complaint and the filing of respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final consideration by the Commission upon the complaint, answers thereto, testimony and other evidence, recommended decision of the hearing examiner and exceptions thereto, written briefs of counsel supporting the complaint, counsel for respondents, and counsel for Kaiser-Frazer Corporation, Hudson Motor Car Company, Nash-Kelvinator Corporation, Packard Motor Car Company, and Willys-Overland Motors, Inc., as amici curiae, and oral argument of opposing counsel; and the Commission, having duly considered the matter and having entered its order disposing of the exceptions to the recommended decision of the hearing examiner, 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 General Motors Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located in Detroit, Michigan. Said respondent is now, and for many years past has been, engaged in the manufacture, distribution, and sale of, among other things, internal combustion engines; trucks; automobiles; and automobile, truck, tractor, and engine accessories, parts, and supplies, including spark plugs, cables, fuel pump parts, oil filters, oil filter cartridges, and oil filter elements.

Respondent AC Spark Plug Company was, until December 29, 1950, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located in Flint, Michigan. Said respondent was engaged in the distribution and sale of automobile, truck, tractor, and engine accessories, parts, and supplies, including spark plugs, cables, fuel pumps, fuel pump parts, oil filters, oil filter cartridges, and oil filter elements, such products being hereinafter collectively referred to as "AC products." Said respondent was a wholly owned subsidiary of respondent General Motors Corporation, and said AC products were manufactured by General Motors Corporation. Under

date of December 29, 1950, respondent AC Spark Plug Company was dissolved in accordance with the laws of the State of Michigan. Respondent General Motors Corporation, as successor to respondent AC Spark Plug Company, was responsible for the acts, practices, and policies shown by the record to have been engaged in by the now dissolved AC Spark Plug Company, and said respondent General Motors Corporation has conceded that any order which the Commission could lawfully enter against respondent AC Spark Plug Company on the record herein may be lawfully entered against respondent General Motors Corporation (AC Spark Plug Division). The complaint herein will, therefore, be dismissed as to respondent AC Spark Plug Company, and as hereinafter used the term "respondent" does not include said AC Spark Plug Company.

PAR. 2. Respondent General Motors Corporation transports said AC products, or causes same to be transported, for sale and distribution from the places where said products are manufactured or stored to its customers and purchasers thereof located in other and different States of the United States and in the District of Columbia; and there is, and has been at all times mentioned herein, a continuous current of trade and commerce in said products between the States where respondent's factories and warehouses are located and the various other States of the United States. Said AC products are sold by respondent General Motors Corporation for use, consumption, and resale within the United States and the District of Columbia.

PAR. 3. Respondent General Motors Corporation distributes and sells said AC products throughout the United States in the same territories and places as, and in substantial competition with, other persons and corporations engaged in the manufacture, distribution, and sale of similar products. Customers of respondent purchasing AC products for resale, and many of their customers, are competitively engaged in the resale of such products at wholesale and retail in the various territories and places where said customers, respectively, carry on their businesses. For the past several years, respondent General Motors Corporation has annually supplied more spark plugs, oil filters, fuel pumps, and speedometer cables to the original equipment field (that is, for use by manufacturers of engines and vehicles as original equipment) than any other manufacturer of these products. Respondent, Champion Spark Plug Company, and The Electric Auto-Lite Company are the three largest manufacturers of spark plugs in the United States, and although there are approximately 40 manufacturers or assemblers of spark plugs in the United States, these three companies manufacture and sell approximately 90 percent of all the spark plugs sold in the United States. Respondent manufactures

and sells a substantial portion of all the spark plugs sold in the United States for both original equipment and replacement. In recent years approximately 98 percent of all automobiles manufactured in the United States have been equipped with respondent's AC fuel pumps.

PAR. 4. Respondent General Motors Corporation has sold its said AC products to vehicle and engine manufacturers for use by such manufacturers as original equipment in vehicles and engines manufactured by them. Respondent has also sold said AC products to such manufacturers and others for resale for replacement of original equipment. The prices at which respondent has sold its said AC products of like grade and quality have varied as between (1) purchasers buying such products for original equipment; (2) purchasers buying such products for original equipment and purchasers buying such products for resale or replacement; and (3) purchasers, both direct and indirect, buying such products for resale or replacement.

PAR. 5. In the sale of AC products for original equipment on engines and vehicles, respondent has charged varying prices for products of like grade and quality. For example, respondent has sold spark plugs to automobile and other manufacturers for original equipment at prices ranging from 6 cents per plug to 15 cents per plug or more. As of February 1, 1949, after the issuance of the complaint herein, respondent's 6-cent price on spark plugs was increased to 10 cents, and respondent's customers who had been purchasing at the 6-cent price discontinued purchasing such plugs from respondent.

The hearing examiner in his recommended decision found that respondent's price differentials between customers purchasing for original equipment resulted in injury to those customers who paid the higher prices. The hearing examiner did not state what evidence in the record he relied upon in making this finding. However, in a footnote to said finding, he stated that "While the difference in the cost of plugs in a single engine amounted to but a few cents, the profits accruing from yearly volume purchases were substantial."

The Commission, upon consideration of the entire record, is of the opinion that the allegations in the complaint as to the results of respondent's price differentials between customers purchasing AC products for original equipment are not sustained by the evidence, and that, therefore, such allegations should be dismissed.

PAR. 6. From 1936 to 1949 respondent sold spark plugs to automobile and other manufacturers for original equipment at prices substantially less than those charged for spark plugs of like grade and quality sold said automobile and other manufacturers and others for resale for replacement of original equipment. For example, during this period respondent's prices on spark plugs sold to automobile and

other manufacturers for original equipment ranged from 6 cents per plug, which price was below respondent's cost of manufacture, to 15 cents per plug, while respondent's prices on spark plugs sold to said automobile and other manufacturers and to certain other direct purchasers for resale for replacement was 24 cents per plug or more.

It is alleged in Count I of the complaint herein that respondent's practice of selling its spark plugs for original equipment below its cost of manufacture places upon the purchasers of spark plugs for replacement the injurious, unfair, and oppressive burden of paying a higher price than the price paid by others, so as to carry the loss incurred by respondent in the sale of original equipment plugs at 6 cents per plug, and that the effect of price differentials between purchasers buying for original equipment and purchasers buying for resale is and may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged or to injure, destroy, or prevent competition with respondent in the manufacture, distribution, and sale of spark plugs.

The hearing examiner in his recommended decision found that the aforesaid allegations are sustained by the evidence, and his recommended order would prohibit all such price differences except those which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such products are to such purchasers sold or delivered.

In the opinion of the Commission, the hearing examiner's findings with respect to the competitive injury resulting from respondent's lower (and below cost) price on original equipment spark plugs than on replacement spark plugs is not supported by or in accordance with the greater weight of the reliable, probative, and substantial evidence in the record. The spark plugs purchased by vehicle and engine manufacturers for use as original equipment become an integral part of the engine in which they are used. None of such spark plugs are resold by such manufacturers for replacement purposes. The buyers paying the aforesaid different prices do not compete in the resale of the spark plugs. It is contended that as a result of the below cost price on original equipment spark plugs, it is necessary for the respondent to recoup its losses on original equipment business by charging higher prices for replacement spark plugs. It is also contended that as a result of the lower prices on original equipment spark plugs, smaller manufacturers are not only precluded from selling their spark plugs for original equipment, but are also placed at a substantial disadvantage in competing with respondent in the sale of replacement spark plugs.

The adoption and use of a particular spark plug by a well-known vehicle manufacturer increases the demand for that particular plug for replacement purposes. However, despite the fact that substantially all the spark plugs used as original equipment are supplied by respondent, Champion Spark Plug Company, and The Electric Auto-Lite Company, the record does not disclose any undue mortality rate on the part of smaller spark plug manufacturers which can be attributed to respondent's lower price on original equipment spark plugs than on replacement plugs.

There is testimony in the record to the effect that some competitors of the respondent have been unable to sell their spark plugs to vehicle manufacturers because such competitors have been either unable or unwilling to sell at the prices charged by respondent and its two principal competitors in the original equipment field. However, the record as a whole does not, in the opinion of the Commission, sustain the allegations of the complaint as to the competitive injury resulting from respondent's lower price on original equipment spark plugs than on replacement spark plugs, and such allegations should, therefore, be dismissed.

PAR. 7. In the course and conduct of its aforesaid business, respondent has, since June 19, 1936, sold AC products for replacement of original equipment at prices which varied substantially as between (1) purchasers buying directly from respondent; (2) purchasers buying indirectly from respondent; and (3) purchasers buying directly and purchasers buying indirectly from respondent.

Prior to 1941, respondent classified certain of the accounts to whom it sold AC products directly as "D," "DA," "J," "A–1," "A–2," and "A–4" accounts. D and DA accounts were distributors handling all AC products and who were given a special price in return for handling AC spark plugs and AC oil filter cartridges on an exclusive basis and performing certain other designated services. J accounts were jobbers who stocked and sold such AC products as they found demand for and in the quantity consistent with the demand. Respondent's contracts with J accounts did not contain a provision requiring that AC spark plugs and AC oil filter cartridges be handled on an exclusive basis. A–1, A–2, and A–4 accounts were those concerns who were also sold on a contract basis (except fleet owners) because of the volume of their purchases, but whose principal business was other than the wholesaling of automotive supplies. These classifications included automobile manufacturers, chain stores, national oil and tire companies, and others. Other dealers in AC products were required to purchase, and did purchase, their requirements from distributors or wholesalers who purchased directly from respondent. However, the

prices and terms and conditions applicable to such indirect purchasers were fixed and controlled by respondent. Representatives of respondent personally solicited the business of such indirect accounts and sales to such accounts were essentially sales by respondent.

The prices at which respondent sold certain of its AC products to purchasers in the different classifications described above during the year 1940 are shown below:

Item	D and A-1 accounts	DA and A-2 accounts	J and A-4 accounts	Indirect accounts
AC Spark Plugs	$0.27½	$0.29	$0.31	$0.32½ to $0.37.
AC Oil Filters (Type No. S-1)	3.60	3.78	4.00	$4.50 to $5.40.
AC Oil Filter Elements (Type No. S-11)	.65	.69	.73	$0 87 to $1.05.
AC Air Cleansers	1.80	1.80	1.94	$2.22 to $2.70.

From 1936 to 1941, respondent's distributors (D and DA accounts) guaranteed the accounts of certain of respondent's jobber customers and received from respondent an amount equal to 10 percent of the jobbers' purchasing price. For example, on sales of AC spark plugs by respondent to a jobber at 31 cents per plug, a distributor received 3.1 cents per plug. As a result of such payments, respondent's price discriminations in favor of its distributors and against its other customers were actually greater than is indicated by the prices appearing in the above tabulation.

From 1941 until November 1, 1946, respondent sold AC spark plugs to purchasers classified by it as "Warehouse Distributors" ("WD") at 28 cents per plug. During the same period, respondent sold to purchasers classified by it as "Jobbers" ("LJ") at 30 cents per plug. On sales by Warehouse Distributors to these Jobbers respondent paid the Warehouse Distributors additional compensation of 10 percent of the selling price. On sales of spark plugs by Warehouse Distributors to certain contract dealers (those classified by respondent as "SP–33" and "SP–36") respondent paid the Warehouse Distributors additional compensation of 10 percent and 5 percent, respectively. Warehouse Distributors also received additional compensation of 10 percent on sales by them of other AC products to contract dealers. Jobbers received no additional compensation on their sales to these contract dealer accounts.

From 1942 to November 1, 1946, some of respondent's jobbers purchased AC spark plugs out of Warehouse distributors' stocks at 31.5 cents per plug (5 percent increase over the 30 cents per plug paid by jobbers purchasing direct). On sales to these indirect jobbers, Warehouse Distributors received a compensation of 10 percent of the selling price, and their net purchase price was, therefore, 28 cents less 3.15

cents, or 24.85 cents per plug, as compared with the indirect jobbers' net purchasing price of 31.5 cents per plug, a difference of 6.5 cents per plug. Contract dealers purchased AC products at prices higher than those paid by jobbers, and noncontract dealers purchased AC products at prices higher than those paid by contract dealers.

As of November 1, 1946, respondent inaugurated a new distribution program under which Warehouse Distributors could purchase AC products at jobbers' prices less 8 percent. On sales to jobbers approved by respondent, Warehouse Distributors received an additional compensation of 12 percent of the jobber price. Respondent's prices to Warehouse Distributors and jobbers during a major portion of the year 1947 on a number of different AC products are shown in the tabulation following:

Item	Jobber's price	WD invoice price (jobber's price less 8 percent)	WD price on sales to jobbers (jobber's price less 8 percent and 12 percent)
AC Spark Plugs	$0.27	$0.248	$0.216
AC Oil Filters (Type No. S-1C)	4.16	3.83	3.33
AC Oil Filter Elements (Type C-10)	.68	.63	.54
AC Fuel Pumps (Type No. 403)	4.00	3.68	3.20
AC Fuel Pump Repair Kits (Type No. R-1)	.90	.83	.72
AC Speedometer Cables (Type No. 601)	.315	.29	.25
AC Air Cleansers (Type No. 907)	2.26	2.08	1.81

From 1938 until November 1, 1946, respondent had an arrangement whereby owners or operators of fleets of vehicles or engines could purchase AC spark plugs, oil filters, fuel pumps, and other AC products at varying prices depending upon the number of vehicles or engines operated. For example, operators of from 10 to 49 vehicles or engines could purchase AC spark plugs from distributors or jobbers at 41 cents per plug. Operators of from 50 to 199 vehicles or engines could purchase from distributors or jobbers at 37 cents per plug, and operators of 200 or more vehicles or engines could purchase from distributors or jobbers at 34 cents per plug. Fleet owners entitled to the 37-cent or 34-cent price were required to enter into a contract with respondent before they could purchase at those prices.

After November 1, 1946, large fleet accounts were designated by respondent as "Jobber Fleet Owner" accounts and were permitted to purchase AC products from Warehouse Distributors at jobber prices. Like jobber accounts, contracts with large fleet owners were subject to the approval of respondent before Warehouse Distributors were eligible for a compensation of 12 percent on their sales to Jobber Fleet Owner accounts.

At the same time that respondent was selling AC products to Warehouse Distributors at jobber prices less 8 percent, with an additional 12 percent compensation to the Warehouse Distributors on their sales to Jobbers, respondent sold AC products of like grade and quality direct to certain accounts, such as oil and tire companies, distributor-manufacturers, and jobber chains, which sell on a national basis, at jobber prices less 8 percent for warehouse compensation and 5 percent as a distributional discount. On sales to jobbers, these national distributors received an additional 7 percent discount. After July 16, 1947, the aforesaid discounts of 8 percent and 5 percent were deducted from the amount of each billing at the time the billing was made. Respondent's net prices to national distributors were, therefore, 5 percent less than its net prices to Warehouse Distributors on all sales except where the national distributor or Warehouse Distributor resold to jobbers.

In addition to the varying prices at which respondent has sold AC products for resale or replacement of purchasers in the different customer classifications as described hereinabove, respondent has also sold AC products for resale or replacement to certain large purchasers at prices substantially less than those charged other large purchasers. For example, respondent sold AC spark plugs to International Harvester Company and to Allis-Chalmers Company for resale for replacement. In 1940 and 1941, respondent's price to International Harvester Company was 22.3 cents per plug, while at the same time respondent's price to Allis-Chalmers Company was 27.5 cents per plug.

Certain large retail outlets, such as Sears, Roebuck & Company, Western Auto Supply Company, Marshall's U. S. Auto Supply, Montgomery Ward, J. & R. Motors, and others, were classified by respondent as Warehouse Distributors until August 25, 1946; as Direct Jobbers until November 1, 1946; and as Jobber Chains after the latter date. Respondent's price after November 1, 1946, to accounts classified by it as Jobber Chains was the jobber price less 8 percent and 5 percent. AC spark plugs, for example, were sold to such concerns for resale through their own retail outlets at 27 cents less 8 percent and 5 percent, or 23.6 cents per plug. In January 1947 respondent discontinued selling direct to J. & R. Motors and Montgomery Ward, and thereafter those concerns were required to purchase AC products indirect at dealer prices. Sears, Roebuck & Company was permitted to continue to purchase at the favored price. Also, Sears' retail stores were allowed to purchase AC spark plugs from local Warehouse Distributors at the local jobber's price of 31.5 cents per plug in lots of not less than 10 plugs. Other dealers in AC spark plugs paid 41 cents per plug in lots of ten.

The B. F. Goodrich Rubber Company purchased AC spark plugs from respondent at a flat price of 24 cents per plug from 1941 to 1946 and resold such plugs through its own retail outlets direct to consumers. At the same time, competitors of Goodrich, jobbers and dealers, were required to pay higher prices for the AC spark plugs they purchased.

The Pure Oil Company purchased AC spark plugs from respondent on a national distributor's basis from the beginning of 1947 until November 1948. AC products were billed and shipped to Pure Oil Company's field warehouses at national distributor's prices and the Pure Oil Company operated company-owned service stations which sold these AC products at retail in competition with other dealers who purchased from jobbers at higher prices. Respondent granted the Pure Oil Company a special price on oil filters, which price was 3 percent less than the price paid by other national distributors.

The Goodyear Tire & Rubber Company purchased AC spark plugs from respondent on a national distributor's basis less 2 percent cash discount at the time of billing. Competitors of Goodyear who purchased on the same basis were allowed a discount of 2 percent for cash payment within the discount period, the discount being deducted from the remittance instead of from the face of the invoice. Goodyear Tire & Rubber Company resold some of the AC spark plugs so purchased through its own retail outlets to consumers. Goodyear had an arrangement with Shell Oil Company, Sinclair Refining Company, Richfield Oil Company, and Sherwood Brothers whereby Goodyear paid these companies a commission of 10 percent on sales by Goodyear to service stations which handled the petroleum products of those oil companies, and a commission of 7½ percent on sales to jobber customers of those oil companies. Goodyear also had a bonus plan under which it gave its customers a rebate based on the dollar volume of purchases during a year. AC spark plugs were included in determining the volume of purchases. A portion of the preferential price received by Goodyear on its purchases of AC spark plugs was thus passed on to certain of its customers.

PAR. 8. Direct jobbers who purchased AC products directly from respondent, as well as jobbers who purchased such products indirectly, resold such products to dealers, fleet owners, and consumers in direct competition with Warehouse Distributors and national distributors who purchased AC products directly from respondent at prices less than those paid by said jobbers. The record clearly establishes that respondent's price differentials to competing customers were substantial.

Respondent's discrimination in price in favor of Warehouse Distributors and national distributors and against jobbers, both direct

and indirect, have resulted in lower profits to the jobbers, loss of customers, and a lessening of their ability to compete with Warehouse Distributors and national distributors in the resale of respondent's AC products.

Respondent's discriminations in price in favor of national distributors have given the national distributors a substantial competitive advantage over Warehouse Distributors, jobbers, and dealers in the resale of AC products. Warehouses, branches, and plants of national distributors have been able to purchase AC products at prices substantially less than those paid by their competitors, namely, Warehouse Distributors, jobbers, and dealers. For example, in November 1947 the national distributor's profit on sales of fuel pumps to jobbers was 19.6 percent and on sales to one of the dealer classifications the profit was 38.8 percent. At the same time, the profit to jobbers on sales of fuel pumps to the same dealer classification was 30 percent. Similarly, on AC oil filters the national distributor's profit was 19.6 percent on sales to jobbers and 43.2 percent on sales to dealers. At the same time the profit to jobbers on sales of AC oil filters to dealers was 35 percent.

Respondent's discriminations in price as between its national distributor accounts have given the accounts receiving the lower prices a substantial competitive advantage over the accounts paying the higher prices.

The effect of the price discriminations described in Paragraph 7 has been and may be to substantially lessen, injure, destroy, and prevent competition between and among respondent's customers receiving the benefits of said discriminations and respondent's customers who do not receive the benefits of such discriminations.

PAR. 9. Respondent alleges in its answer to the complaint that any differences in prices to different accounts which it may have allowed were not discriminatory but were established in good faith to meet the equally low prices of competitors and/or the services and facilities furnished by competitors, as well as to make allowances for differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which AC products were sold and delivered to such different accounts.

The Commission's determination that the allegations of the complaint with respect to the injury to competition resulting from respondent's price differences between (1) customers purchasing AC spark plugs for original equipment and (2) customers purchasing AC spark plugs for original equipment and customers purchasing such spark plugs for resale or replacement are not sustained makes it unnecessary to determine whether respondent's aforesaid defenses to these price differentials are sustained by the record.

The evidence in the record does not establish that respondent's price differentials as between customers purchasing AC products for resale for replacement as described in Paragraph 7 hereof were made in good faith to meet equally low prices of competitors or the services and facilities furnished by competitors, or that such price differentials were justified by differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which AC products were sold and delivered to such customers.

PAR. 10. In and prior to 1939 respondent entered into and had in effect more than 750 contracts with distributors who were classified by respondent as "D" and "DA" accounts, which contained a provision that the distributors would handle designated AC products on an exclusive basis. Agreements entered into by respondent with such distributors in 1939 contained the following provision:

> It is understood and agreed that this agreement is entered into by the AC Spark Plug Company in consideration of the Distributor handling AC Plugs, AC Oil Filter Renewal Cartridges, and AC Oil Filters on an exclusive basis * * *. (Comm. Ex. 169, p. 22)

The exclusive dealing clause was eliminated from respondent's 1940 distributor's contracts. However, respondent's policy of requiring its distributors to handle AC products exclusively was continued, although such policy has not been uniformly adhered to. In 1940, respondent announced in a "Statement of Policy" to all its distributors that "These distributors [D and DA accounts], therefore, do not carry competitive products either for wholesale or retail distribution * * *" and "Should an AC Distributor at any time feel it to their best interest to handle a competing product, this decision is accepted by the AC Spark Plug Company; and another concern will be sought to act as an AC Distributor * * *."

From 1941 until the end of World War II the demand for AC products greatly exceeded production and respondent was unable to meet the demands of its customers. During that period respondent made little or no attempt to enforce its policy of exclusive dealing. In 1946, when the supply and demand for automotive parts began to equalize, respondent in conformity with its aforesaid policy gave preferential prices to some of its distributors on the condition or understanding that said purchasers would not deal in spark plugs, oil filters, oil filter elements, oil filter cartridges, or fuel pumps sold by competitors of respondent. Some of respondent's distributors who desired to stock competing lines of products were threatened with cancellation of their contracts if they failed to give up competing lines or products, and some distributors ceased handling competitive lines, although they carried out all the functions of the distributors and purchased in the quantities entitling them to respondent's Ware-

house Distributor's contract. For example, one witness testified that respondent's regional manager "would call my attention to the fact that we could not carry a Champion line if we were an AC distributor." Another witness testified that he was told by respondent's assistant regional manager "that they would not tolerate me to sell another spark plug alongside of AC, that if I did, they would cancel my contract." This same witness also testified that he was told by respondent's agent that "We don't allow anyone that sells AC spark plugs on a WD to carry another line of merchandise with us, and we will give you just so long to get rid of the merchandise." A regional manager for respondent testified that he had an "understanding" with this Warehouse Distributor and that he had occasion to remind this Warehouse Distributor of the "nice gentlemen's agreement" which the Warehouse Distributor had with the respondent regarding exclusive dealing. Another witness testified that he was told by one of respondent's salesmen in 1948, in reference to the handling of a competitor's plug, "in no uncertain terms that that was very much against the regulations and that we had better dispose of them, which we did."

Respondent canceled its contracts with a number of its Warehouse Distributors because such Warehouse Distributors failed to comply with respondent's request to cease handling competing products.

The evidence in the record clearly establishes that respondent's distributors, except those who were exempted from respondent's exclusive dealing policy, generally understood that they were prohibited from dealing in or handling competing products.

The complaint herein does not allege, and the record does not show that respondent has enforced its aforesaid exclusive dealing policy against all its distributors. It appears that respondent permitted a number of its distributors to deal in competitive products because (1) the distributor's volume of business was so large that respondent could not enforce its policy, (2) the distributor was located in a strategic territory, or (3) respondent was unable to furnish a complete line. It also appears that some of respondent's distributors did not deal in competing products because of their own preference, rather than because of any understanding with, or coercion by, respondent. The fact remains, however, that respondent has made contracts for sale and has sold AC products to distributors on the condition, agreement, or understanding that said distributors shall not deal in products manufactured or sold by a competitor of respondent.

The effects of respondent's exclusive dealing contracts and policy have been to unreasonably restrain and substantially lessen competition between respondent and its competitors in the sale and distribution of spark plugs, oil filters, fuel pumps, speedometer cables, and

related items, and to substantially lessen competition in the sale of respondent's products by the elimination of some of respondent's distributors who refused to deal in respondent's products exclusively and who were the source of supply of respondent's products to many dealers.

PAR. 11. Count II of the complaint herein charges respondent with violation of subsection (d) of Section 2 of the Clayton Act, as amended. With respect to such charge the hearing examiner found in substance that from June 19, 1936, to 1941 respondent's distributors guaranteed the accounts of certain of respondent's jobber customers, and that for such service respondent paid its distributors an amount equal to 10 percent of the dollar value of the purchases of AC products by the guaranteed account. The distributors and the jobbers whose accounts were guaranteed by the distributors were in competition in the resale of AC products. This practice was discontinued at the end of 1940.

The Commission is of the opinion that the aforesaid payments by respondent to its distributors were in fact reductions in the prices paid respondent by such distributors as hereinabove found. Under the circumstances, Count II of the complaint should be dismissed.

In Count IV of the complaint herein respondent is charged with having violated Section 5 of the Federal Trade Commission Act by agreeing with and compelling distributors of and dealers in AC products to maintain the various prices fixed by respondent for the resale of AC products.

Subsequent to the completion of the hearings herein the Federal Trade Commission Act was amended with respect to certain contracts and agreements which establish minimum or stipulated resale prices (Public Law No. 542, approved July 14, 1952—the McGuire Act). This amendment had the effect of making legal certain of the acts and practices which it is contended the respondent has engaged in, in connection with the fixing and maintaining of resale prices. For example, it is contended that respondent's agreements with its distributors which fixed the exact prices at which the distributors were to resell spark plugs were illegal because the Miller-Tydings Act, which permits the fixing of minimum resale prices under certain circumstances, does not permit the fixing of exact resale prices. The aforesaid McGuire Act has the effect of permitting, under certain circumstances, contracts or agreements which prescribed stipulated, or exact, prices, as well as minimum prices. Certain of the respondent's acts and practices which may have been illegal at the time they were committed may not, therefore, be illegal under the existing law. Under these circumstances, an order to cease and desist such practices would be inappropriate. Furthermore, the complaint herein, having been issued

prior to the enactment of the aforesaid McGuire Act, may not have sufficiently informed the respondent as to its acts and practices in connection with the fixing and maintaining of resale prices challenged therein.

Upon consideration of all the foregoing and the further fact that the order to cease and desist which is being entered herewith pursuant to the charge in Count I of the complaint will be effective in preventing respondent from fixing and maintaining discriminatory prices as between its direct and indirect customers who compete with each other in the resale of respondent's AC products, the Commission is of the opinion that Count IV of the complaint should be dismissed.

CONCLUSION

The acts and practices of the respondent as herinabove found in Paragraphs 7, 8, and 9 are in violation of subsection (a) of Section 2 of the Clayton Act, as amended, and the acts and practices of the respondent as hereinabove found in Paragraph 10 are in violation of Section 3 of the Clayton Act.

Commissioners Howrey and Carretta not participating for the reason that oral argument on the merits was heard prior to their appointment to the Commission.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answers of the respondents, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before a hearing examiner of the Commission theretofore duly designated by it, recommended decision of the hearing examiner and exceptions thereto, briefs of counsel supporting the complaint, counsel for respondents, and counsel for Kaiser-Frazer Corporation, Hudson Motor Car Company, Nash-Kelvinator Corporation, Packard Motor Car Company, and Willys-Overland Motors, Inc., as amici curiae, and oral argument of opposing counsel; and the Commission having issued its order disposing of the exceptions to the recommended decision of the hearing examiner and having made its findings as to the facts and its conclusion that respondent General Motors Corporation has violated the provisions of subsection (a) of Section 2 of the Clayton Act, as amended, and Section 3 of said Clayton Act:

It is ordered, That respondent General Motors Corporation, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of spark plugs, oil filters, oil

filter cartridges, oil filter elements, fuel pumps, fuel pump part kits, speedometer cables, and related automotive parts and accessories in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(a) Discriminating, directly or indirectly, in the price of said products of like grade and quality:

1. By selling to any direct purchaser at net prices higher than the net prices charged any other direct purchaser who in fact competes in the resale and distribution of said products with the purchaser paying the higher price.

2. By selling to any indirect purchaser at net prices higher than the net prices charged any other direct or indirect purchaser who in fact competes in the resale and distribution of said products with the purchaser paying the higher price.

(b) Selling or making any contract or agreement for sale of said products on the condition, agreement, or understanding that the purchaser shall not use or deal in or sell the products of a competitor or competitors of the respondent.

(c) Enforcing in any manner or continuing in operation or effect any condition, agreement, or understanding, in or in connection with any existing contract or agreement for sale of said products, which condition, agreement, or understanding is to the effect that the purchaser shall not use or deal in or sell the products of a competitor or competitors of the respondent.

(d) Granting any rebate or fixing any price to any purchaser of said products on the condition, agreement, or understanding that such purchaser shall not use or deal in the products of a competitor or competitors of the respondent.

It is further ordered, That the allegations in Count I of the complaint relating to respondent's price differences between (1) purchasers buying for original equipment and (2) purchasers buying for original equipment and purchasers buying for resale for replacement, and the allegations in Counts II and IV of the complaint, be, and they hereby are, dismissed.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent AC Spark Plug Company.

It is further ordered, That the respondent General Motors Corporation shall, within sixty (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.

Commissioners Howrey and Carretta not participating for the reason that oral argument on the merits was heard prior to their appointment to the Commission.

Syllabus

IN THE MATTER OF

THE ELECTRIC AUTO-LITE COMPANY

FINDINGS AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF THE CLAYTON ACT, AS AMENDED, AND OF THE FEDERAL TRADE COMMISSION ACT

Docket 5624. Complaint, Nov. 29, 1948—Decision, July 10, 1953

Where a corporation which was engaged in the manufacture and competitive interstate sale of certain engine and vehicle parts and accessories, including, since 1936, spark plugs; numbered among its customers, to whom it sold spark plugs at varying prices, certain purchasers competitively engaged, as were some of their customers, in the resale of spark plugs at wholesale or retail; since 1936, together with Champion Spark Plug Co. and General Motors Corporation, AC Spark Plug Division, produced and sold about 90 percent of all spark plugs produced and sold in the United States; and, in 1947, made 17.17 percent of all spark plugs—15.77 percent of all replacement plugs, and 26.5 percent of all original equipment plugs—manufactured and used in the United States—

In selling spark plugs for replacement to various customer classifications, embracing, after August 9, 1948, (1) direct accounts including Warehouse Distributors and Direct Jobbers which competed with each other in the sale to certain indirect accounts and to dealers and consumers, competed with vehicle and engine manufacturers who were sold directly, and competed with respondent's indirect accounts in sales to dealers and consumers; and (2) indirect accounts, namely, Registered Jobbers, Contract Jobbers, and Service Jobbers, sales to which, by virtue of the control exercised by respondent, were essentially sales by respondent, and which were in competition with each other in the resale to retail dealers and consumers—

(*a*) Discriminated between direct purchasers in that as of Nov. 29, 1948, it sold spark plugs for replacement use to various vehicle and engine manufacturers at 24 cents per plug, while invoicing plugs to its Warehouse Distributors and Direct Jobbers at 29 cents, or to Warehouse Distributors at a net price of 24.94 cents, and 27.35 cents, for resale to Registered Jobbers and to Contract Jobbers, respectively;

With the result that such vehicle and engine manufacturers were enabled by their lower purchasing price to effectively promote the sale of replacement spark plugs to their own distribution outlets, and thus deprive Warehouse Distributors and Direct Jobbers of the opportunity of selling to such accounts; and

(*b*) Further discriminated in the prices at which it sold spark plugs for replacement as between (1) direct purchasers, (2) direct purchasers and indirect purchasers, and (3) indirect purchasers, through their price schedules under which, after Aug. 9, 1948, invoice price to Warehouse Distributors was 29 cents and their net prices on sales to Registered Jobbers and Contract Jobbers, as noted above, were 24.94 and 27.35 cents, respectively; price to Direct Jobbers and to Registered Jobbers was 29 cents, and to Contract Jobbers and Service Jobbers was 3 cents;

Effect of which discriminations might be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and those who did not:

Held, That such acts and practices, under the circumstances set forth, were in violation of subsec. (a) of Sec. 2 of the Clayton Act as amended.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. L. E. Creel, Jr. and *Mr. J. N. Chapman* for the Commission.

Rathbone, Perry, Kelly & Drye, of New York City, and *Mr. George H. Souther*, of Toledo, Ohio, for respondent.

Willkie, Owen, Farr, Gallagher & Walton, of New York City, for Kaiser-Frazer Corp., amicus curiae.

Mr. *L. Arthur Greenstein* and *Mr. Daniel S. Greenstein*, of Philadelphia, Pa., for Berlin Auto Supply Co., amicus curiae.

Beaumont, Smith & Harris, of Detroit, Mich., for Hudson Motor Car Co., amicus curiae.

Cook, Beake, Miller, Wrock & Cross, of Detroit, Mich., for Nash-Kelvinator Corp., amicus curiae.

Bodman, Longley, Bogle, Armstrong & Dahling, of Detroit, Mich., for Packard Motor Car Co., amicus curiae.

Ritter & Boesel, of Toledo, Ohio, for Willys-Overland Motors, Inc., amicus curiae.

Report, Findings as to the Facts, and Order

Pursuant to the provisions of the Federal Trade Commission Act and to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission, on November 29, 1948, issued and subsequently served its complaint in this proceeding upon the respondent, The Electric Auto-Lite Company (incorrectly named in the complaint as "Electric Auto-Lite Company"), charging it in Count I thereof with violation of subsection (a) of Section 2 of the Clayton Act, as amended, and in Count II thereof with violation of Section 5 of the Federal Trade Commission Act.

After the issuance of said complaint and the filing of respondent's answer thereto, counsel supporting the complaint and counsel for respondent entered into certain written stipulations in which it was stipulated and agreed, among other things, that persons are available who have knowledge of the facts and if they were called as witnesses they would testify as set forth therein, and said stipulations and other evidence were introduced before a hearing examiner of the Commission theretofore duly designated by it. Said stipulations 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 the complaint, answer thereto, stipulated testimony and other evidence, recommended decision of the hearing examiner and exceptions thereto, written briefs of counsel supporting the complaint, counsel for respondent, and counsel for Kaiser-Frazer Corporation, Hudson Motor Car Company, Nash-Kelvinator Corporation, Packard Motor Car Company, and Willys-Overland Motors, Inc., as amici curiae, and oral argument of opposing counsel; and the Commission, having duly considered the matter and having entered its order disposing of the exceptions to the recommended decision of the hearing examiner, 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, The Electric Auto-Lite Company (sometimes hereinafter referred to as "Auto-Lite") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located in Toledo, Ohio. It is now and for many years past has been engaged in manufacturing and selling certain engine and vehicle parts and accessories, including spark plugs, which it has manufactured and sold since in or about 1936.

PAR. 2. Respondent, The Electric Auto-Lite Company, transports its said spark plugs, or causes same to be transported, for sale and distribution from its factory in Fostoria, Ohio, to customers located in other States of the United States and in the District of Columbia; and there is and has been at all times since 1936 a continuous current of trade and commerce in spark plugs manufactured and sold by respondent between said State of Ohio where said spark plugs are manufactured and various other States of the United States. Respondent sells its spark plugs for use, consumption, and resale within the United States and the District of Columbia.

PAR. 3. Respondent distributes and sells spark plugs throughout the United States in the same territories and places as, and in substantial competition with, certain other persons and corporations engaged in manufacturing, distributing, and selling spark plugs. Certain of respondent's customers to whom it has sold spark plugs at varying prices as hereinafter found, and some of said customers' customers, are competitively engaged in the resale of spark plugs at wholesale or retail in the various territories and places where said customers, respectively,

carry on their businesses. Prior to 1936, approximately 90 percent of all spark plugs produced and sold in the United States were manufactured by Champion Spark Plug Company and General Motors Corporation, AC Spark Plug Division. Since 1936, approximately 90 percent of all spark plugs produced and sold in the United States have been manufactured by respondent, Champion Spark Plug Company, and General Motors Corporation, AC Spark Plug Division, although there were at all times herein mentioned 30 or more manufacturers of spark plugs in the United States. In 1947 respondent manufactured 17.17 percent of all spark plugs—15.77 percent of all replacement plugs, and 26.5 percent of all original equipment plugs—manufactured and used in the United States.

PAR. 4. In the course and conduct of its aforesaid business respondent sells and has sold spark plugs of like grade and quality to vehicle and engine manufacturers for use as original equipment at varying prices. As of November 29, 1948, respondent's prices on original equipment spark plugs ranged from 6 cents to 10 cents per plug. There was a differential of 2 cents per plug in the prices at which respondent sold regular equipment spark plugs to two competing manufacturers of trucks; of 1 cent per plug in the prices at which respondent sold equipment spark plugs to two competing manufacturers of tractors; of 1 cent and 2 cents per plug in the prices at which respondent sold equipment spark plugs to three competing manufacturers of marine engines; and of 1 cent per plug in the prices at which respondent sold equipment spark plugs to two competing manufacturers of commercial engines. Prior to October 1, 1948, there were at times differentials of up to 1 cent per plug in the prices charged certain automobile and truck manufacturers who were in competition with each other in the sale of passenger automobiles and trucks.

The hearing examiner in his recommended decision found that respondent's aforesaid price differentials of from 1 cent to 2 cents per plug in the sale of its spark plugs to manufacturers for use as original equipment resulted in competitive injury to those customers paying the higher prices, the injury being particularly reflected in the volume of spark plugs purchased and the use of the profits in promoting the sale of spark plugs for replacement.

The Commission does not believe that this finding by the hearing examiner is supported by the record. During the course of the hearings in this matter, counsel supporting the complaint and counsel for respondent entered into a stipulation in which, among other things, it was stipulated and agreed that "If the Commission shall find and hold in Docket No. 3977 (*In the Matter of Champion Spark Plug Company*) and Docket No. 5620 (*In the Matter of General Motors*,

et al.) that acts and practices of the respondents in said cases of the same kind as acts and practices of Auto-Lite, as shown by the foregoing stipulation and by other proofs in the record, and which may hereinafter be made a part of the record, in this case, may be to substantially lessen competition or injure, destroy, or prevent competition between said respondents and other manufacturers of spark plugs, or between manufacturers of motor vehicles to whom said respondents respectively sell their spark plugs for replacement or for original equipment and other distributors of said spark plugs, then Auto-Lite admits, and this may under those circumstances and conditions be taken as its admission, that the effect of said acts and practices of Auto-Lite may be to the same extent, to lessen competition between Auto-Lite and other manufacturers of spark plugs, or between manufacturers of motor vehicles to whom Auto-Lite sells spark plugs for replacement or for original equipment and other distributors of its spark plugs to whom it sells its spark plugs for resale, or to injure, destroy or prevent such competition."

The Commission has found in Docket 5620, General Motors Corporation, et al., that the evidence in that record does not establish that the price differentials between customers purchasing spark plugs for original equipment, which differentials were substantially the same as those hereinabove described, have resulted in injury to those customers paying the higher prices.

The Commission, upon consideration of the entire record in this proceeding and its findings in Docket 5620, General Motors Corporation, with respect to the same kind of acts and practices as those of respondent described herein, is of the opinion that the allegations of the complaint as to the results of respondent's price differentials between customers purchasing spark plugs for original equipment are not sustained by the evidence, and that, therefore, such allegations should be dismissed.

PAR. 5. In the course and conduct of its aforesaid business, respondent sells and has sold spark plugs for use as original equipment at prices substantially less than those at which it sells and has sold spark plugs of like grade and quality for replacement. For example, respondent has sold original equipment spark plugs to automobile and other manufacturers at prices ranging from 5 cents per plug to 15 cents per plug, the latter price being that charged for spark plugs sold to or for the use of the United States Government during World War II. According to the accounting methods in use by respondent, the cost to it of manufacturing and selling spark plugs for original equipment to certain of its customers has from time to time amounted to more than the price it has received for

such plugs. During the same periods of time respondent sold spark plugs of like grade and quality for replacement at prices ranging from about 15 cents per plug to about 30 cents per plug.

It is alleged in Count I of the complaint herein that respondent's practice of selling its spark plugs for original equipment below cost places upon its purchasers of spark plugs for replacement the injurious, unfair, and oppressive burden of paying a higher price, thus carrying the loss incurred by respondent on the said original equipment sales, and that respondent's practice of selling spark plugs direct to manufacturers for original equipment below the cost of production deprives other sellers of spark plugs of the opportunity of competing for this business.

The hearing examiner in his recommended decision found that "The effect of respondent's sale of its spark plugs for original equipment at a price below cost was to exclude practically all, if not all manufacturers and sellers of spark plugs who did not have both original equipment and replacement business from competing for original equipment business as those, like respondent, who sold for both original equipment and replacement could recoup their losses on sales below cost for original equipment from sales for replacement at the higher prices."

The above-described acts and practices of the respondent are the same kind of acts and practices which the Commission found that the respondents in Docket 3977, Champion Spark Plug Company, and Docket 5620, General Motors Corporation, et al, have engaged in. The Commission found that the records in those two cases did not sustain the allegations in the complaints with respect to the competitive injury resulting from said acts and practices. In view of the stipulation between counsel supporting the complaint and counsel for respondent, referred to and quoted, in part, in Paragraph Four above, the Commission has considered its said finding in Docket 3977 and in Docket 5620 in addition to the entire record in this proceeding, and is of the opinion that the allegations in the complaint as to the competitive injury resulting from respondent's lower, and at times below cost, prices on original equipment spark plugs than on replacement spark plugs are not sustained, and that such allegations should, therefore, be dismissed. It is, therefore, unnecessary to determine whether the defense advanced by respondent that its lower prices on original equipment spark plugs were made in good faith for the purpose of meeting the equally low or lower prices of its competitors and the services and facilities furnished by its competitors is sustained by the evidence in the record.

PAR. 6. In the course and conduct of its aforesaid business, respondent has sold spark plugs for replacement at prices which have varied substantially as between (1) purchasers buying directly from respondent, (2) purchasers buying indirectly from respondent, and (3) purchasers buying directly and purchasers buying indirectly from respondent.

Respondent has classified the customers to whom it sells spark plugs direct for replacement into three groups, namely, vehicle and engine manufacturers, Warehouse Distributors (formerly Contract Distributors), and Direct Jobbers. Indirect purchasers from respondent were classified by respondent prior to August 1945 as Contract Jobbers, Service Jobbers, Wholesale Jobbers, and Local Jobbers. After August 1, 1945, such indirect purchasers were classified by respondent as Registered Jobbers, Contract Jobbers, and Service Jobbers.

Respondent's printed form of agreements with Contract Distributors (now warehouse Distributors) from 1938 to 1944 provided for the appointment by Auto-Lite of Contract Jobbers, Service Jobbers, Wholesale Jobbers, and Local Jobbers under approved agreements on printed forms. The Contract Distributors agreed to actively promote the sale of Auto-Lite spark plugs to Contract Jobbers "approved by Auto-Lite at the current Distributor Net Price" or "at the current Contract Jobber Net Price"; to Service Jobbers "approved by Auto-Lite at the current Service Jobber Net Price"; to Wholesale Jobbers "approved by Auto-Lite at the current Wholesale Jobber Net Price"; and to Local Jobbers "aproved by Auto-Lite at the current Local Jobber Net Price." From 1940 to 1944 respondent's printed form of agreements with Direct Jobbers provided for the appointment by Auto-Lite of Wholesale Jobbers and Local Jobbers under approved agreement on printed forms. The Direct Jobbers agreed "to actively promote the sale of Auto-Lite spark plugs to Wholesale Jobbers approved by Auto-Lite at the current Wholesale Jobber net price." In 1944 respondent deleted the aforesaid provisions relating to the prices at which its Contract Distributors and Direct Jobbers would resell spark plugs from said agreements. However, after 1944 respondent issued and distributed Suggested Resale Price Schedules which contained the prices at which various classifications of purchasers were to be sold. Respondent has at all times mentioned herein followed the practice of requiring approval by it of agreements between Contract Distributors, Warehouse Distributors, and Direct Jobbers and their customers except retail dealers. Respondent has participated in negotiating agreements between Contract Distributors, Warehouse Distributors, and Direct Jobbers and other jobbers of Auto-Lite spark

plugs other than retail dealers, and any change in the classification of a distributor or jobber of Auto-Lite spark plugs to another classification was subject to the approval of respondent. Respondent exercised such a degree of control over sales by its Contract Distributors, Warehouse Distributors, and Direct Jobbers to Contract Jobbers, Service Jobbers, Wholesale Jobbers, and Local Jobbers prior to August 1, 1945, and to Registered Jobbers, Contract Jobbers, and Service Jobbers after August 1, 1945, that such sales were essentially sales by respondent. Such indirect customers are considered as "purchasers" within the meaning of the Clayton Act, as amended.

As of November 29, 1948, respondent was selling spark plugs for replacement use at 24 cents per plug to the following vehicle and engine manufacturers:

Auto Car Company.
Chrysler Motor Parts Corporation.
International Harvester Company.
Kaiser-Frazer Parts Corporation.
Massey-Harris Company, Ltd.
Nash-Kelvinator Corporation.
Packard Motor Car Company.
Willys-Overland Motors, Inc.

Prior to 1948 there were, at times, differentials of up to 5 cents per plug in the prices respondent charged certain vehicle and engine manufacturers who were in competition with each other in the sale of replacement plugs. Also, as of November 29, 1948, respondent was selling spark plugs directly to Warehouse Distributors and Direct Jobbers and indirectly to Registered Jobbers at 29 cents per plug, and indirectly to Contract Jobbers and Service Jobbers at 33 cents per plug. On sales by Warehouse Distributors to Registered Jobbers respondent paid the Warehouse Distributors a commission of 14 percent of the Suggested Resale Price, that is, 29 cents. Thus the net cost to Warehouse Distributors of spark plugs resold by them to Registered Jobbers was 29 cents less 4.06 cents, or 24.94 cents per plug. On sales by Warehouse Distributors to Contract Jobbers respondent paid the Warehouse Distributors a commission of 5 percent of the Suggested Resale Price, that is, 33 cents. Thus the net cost to Warehouse Distributors of spark plugs resold by them to Contract Jobbers was 29 cents less 1.65 cents, or 27.35 cents per plug.

The prices at which respondent has sold spark plugs for replacement use directly to Contract Distributors, Warehouse Distributors, and Direct Jobbers and indirectly to Registered Jobbers, Contract Jobbers, Service Jobbers, Wholesale Jobbers, and Local Jobbers during specified periods are shown in the tabulation following.

Customer classification	Price per plug			
	1942-43-44 to Aug. 1 1945	Aug. 1, 1945, to Feb. 28, 1947	Mar. 1, 1947, to Aug. 9 1948	After Aug. 9, 1948
Direct Accounts				
Contract Distributors:				
Invoice Price	$0.275			
Less 0.035 on C. J. sales	.24			
Less 0.03 on S. J. sales	.245			
Less 0.025 on W. J. sales	.25			
Less 0.02 on L. J. sales	.255			
Warehouse Distributors:				
Invoice Price		$0.245	$0.245	$0.29
Less 0.035 on R. J. sales		.21		
Less 0.025 on C. J. sales		.22		
Less 12½ percent on R. J. sales			.214	
Less 7½ percent on C. J. sales			.225	
Less 14 percent on R. J. sales				.2594
Less 5 percent on C. J. sales				.2735
Direct Jobbers:				
Invoice Price	.275	.245	.245	.29
Less 0.025 on W. J. and L. J. sales	.25			
Indirect Accounts				
Registered Jobbers		.245	.245	.29
Contract Jobbers	.275	.27	.27	.33
Service Jobbers	.29	.29	.29	.33
Wholesale Jobbers	.315			
Local Jobbers	.33			

Spark plugs purchased by vehicle and engine manufacturers for replacement use were resold by them to their respective distribution outlets for further resale for replacement use. Respondent's Warehouse Distributors and Direct Jobbers were in competition with said vehicle and engine manufacturers in the sale of replacement spark plugs. The lower purchasing price on replacement spark plugs enjoyed by vehicle and engine manufacturers enabled them to effectively promote the sale of such spark plugs to their own distribution outlets and thus deprived respondent's Warehouse Distributors and Direct Jobbers of the opportunity of selling to such accounts.

Respondent's Warehouse Distributors and Direct Jobbers were in competition with each other in their respective trading areas in the sale of spark plugs to certain indirect accounts and to dealers and consumers. Warehouse Distributors and Direct Jobbers were also in competition with respondent's indirect accounts in the sale of spark plugs to dealers and consumers. The indirect accounts to whom respondent sold spark plugs at varying prices as hereinabove shown were also in competition with each other in their respective trading areas in the sale of spark plugs to retail dealers and consumers.

The Commission is of the opinion, and therefore finds, that respondent has discriminated in the prices at which it has sold spark plugs for replacement as between (1) direct purchasers, (2) direct purchasers and indirect purchasers, and (3) indirect purchasers; and that the effect of such discriminations may be to substantially lessen, injure,

destroy, or prevent competition between the customers receiving the benefit of said discriminations and the customers who do not receive the benefit of said discriminations.

PAR. 7. Count II of the complaint herein charges that the acts and practices of the respondent alleged in Count I to constitute a violation of subsection (a) of Section 2 of the Clayton Act, as amended, as well as certain acts and practices of the respondent in fixing and maintaining resale prices on its spark plugs, all constitute a violation of Section 5 of the Federal Trade Commission Act.

At about the same time the Commission issued its complaint in this proceeding the Commission also issued a complaint against one of respondent's principal competitors, in which acts and practices similar to those described in Count I of the complaint herein are alleged to constitute a violation of the amended Clayton Act only. Consequently, in order to avoid unwarranted unequal treatment of competing respondents, the Commission makes no findings as to that portion of Count II of the complaint in this proceeding which charges that the acts and practices of the respondent alleged in Count I also constitute a violation of the Federal Trade Commission Act.

Subsequent to the completion of the hearings herein, the Federal Trade Commission Act was amended with respect to certain contracts and agreements which establish minimum or stipulated prices (Public Law No. 542, approved July 14, 1952—the McGuire Act). This amendment had the effect of making legal certain acts and practices of the respondent which may have been illegal at the time they were committed. For example, respondent's agreements with its Contract Distributors and Direct Jobbers until 1944, in effect, established the exact prices at which spark plugs were to be resold to certain classes of customers. The Miller-Tydings Act permitted the fixing of minimum resale prices under certain circumstances, but did not specifically permit the fixing of exact resale prices. The aforesaid McGuire Act has the effect of permitting, under certain circumstances, contracts or agreements which prescribe stipulated, or exact, prices, as well as minimum prices. Under these circumstances, an order to cease and desist the acts and practices which were formerly, but not now, illegal would be inappropriate. Furthermore, the complaint herein, having been issued prior to the enactment of the aforesaid McGuire Act, may not have sufficiently informed the respondent as to its acts and practices in connection with the fixing and maintaining of resale prices challenged therein.

Upon consideration of all the foregoing and the further fact that the order to cease and desist which is being entered herewith pursuant to the charge in Count I of the complaint will be effective in pre-

venting respondent from fixing and maintaining discriminatory prices as between its direct and indirect customers who compete with each other in the resale of respondent's spark plugs, the Commission is of the opinion that Count II of the complaint in this proceeding should be dismissed in its entirety.

CONCLUSION

The acts and practices of the respondent as hereinabove found in Paragraph 6 are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Commissioners Howrey and Carretta not participating for the reason that oral argument on the merits was heard prior to their appointment to the Commission.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of the respondent, stipulated testimony, and other evidence in support of and in opposition to the allegations of said complaint taken before a hearing examiner of the Commission theretofore duly designated by it, recommended decision of the hearing examiner and exceptions thereto, briefs of counsel supporting the complaint, counsel for respondent, and counsel for Kaiser-Frazer Corporation, Hudson Motor Car Company, Nash-Kelvinator Corporation, Packard Motor Car Company, and Willys-Overland Motors, Inc., as amici curiae, and oral argument of opposing counsel; and the Commission having issued its order disposing of the exceptions to the recommended decision of the hearing examiner and having made its findings as to the facts and its conclusion that respondent has violated subsection (a) of Section 2 of the Clayton Act, as amended:

It is ordered, That respondent, The Electric Auto-Lite Company, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of spark plugs in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating in the price of said spark plugs of like grade and quality:

1. By selling to any direct purchaser at net prices higher than the net prices charged any other direct purchaser who in fact competes in the resale and distribution of said spark plugs with the purchaser paying the higher price.

2. By selling to any indirect purchaser at net prices higher than the net prices charged any other direct or indirect purchaser who in

fact competes in the resale and distribution of said spark plugs with the purchaser paying the higher price.

It is further ordered, That the allegations in Count I of the complaint relating to respondent's price differences between (1) purchasers buying for original equipment and (2) purchasers buying for original equipment and purchasers buying for resale for replacement, and the allegations in Count II of the complaint, be, and they hereby are, dismissed.

It is further ordered, That the respondent, The Electric Auto-Lite Company, shall, within sixty (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.

Commissioners Howrey and Carretta not participating for the reason that oral argument on the merits was heard prior to their appointment to the Commission.

IN THE MATTER OF

GENERAL SHOE CORPORATION

DECISION AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6001. Complaint, June 17, 1952—Decision, July 13, 1953

Where a corporate manufacturer of shoes, by means of labels on shoes, advertisements in newspapers and magazines of general circulation, folders, pamphlets, and circulars, and through radio broadcasts—

(1) Represented falsely that the wearing of its "Storybook Shoes" would hold the foot in its natural position, keep it properly aligned, hold it accurately in the shoe, insure its correct growth, provide strong support for the arch, guard against foot ills and provide better balance;

(2) Represented falsely that the resilient pads at the heel and arch in children's shoes prevented forward skid, gave arch support, cushioned jolts and protected nerve terminals and the delicate nerve-ends in the heel;

(3) Represented falsely that the wearing of its "Acrobat Shoes" gave growing feet the proper foundation and combination of features for good health; would keep young feet healthy, eliminate pronation of ankles and keep young ankles straight and strong;

(4) Represented falsely that the wearing of its "Acrobat Safety Shoes" would start children in good walking habits, set the foot in a straight line, give extra ankle support and set the ankle straight; and that the flexible sole of the shoes permitted the building of muscles and strong sound feet; and

(5) Represented falsely, directly and by implication, through use of the word "health" in connection with its said shoes, that they were so constructed as to possess aforesaid features or qualities;

When in fact all of said shoes were merely stock shoes made by quantity production methods, and while they contained some features not found in some other stock shoes, the effect of such features in the prevention or correction of foot ailments or in aiding the natural development of the feet was insignificant:

Held: That such acts and practices were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Frank Hier*, hearing examiner.

Mr. B. G. Wilson and *Mr. John M. Doukas* for the Commission.

Bass, Berry & Sims, of Nashville, Tenn., for respondent.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 17, 1952, issued and subsequently served its complaint in this proceeding upon respondent General Shoe Corporation, a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the service of said complaint and the filing of respondent's answer thereto, hearings were held at which

testimony and other evidence in support of the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it and named in the "Notice" appended to the complaint at the time of its issuance, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Respondent elected to offer no evidence on its own behalf, except the cross-examination of witnesses produced against it. Thereafter the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, and testimony and other evidence, and said hearing examiner on October 13, 1952, filed his initial decision.

The Commission, having reason to believe that the order contained in said initial decision did not constitute an appropriate disposition of the proceeding, on November 12, 1952, issued and thereafter served upon the parties its order placing the case upon the Commission's own docket for review. Thereafter the Commission, having considered the entire record and having prepared a tentative order, caused copies of the said tentative order to be served upon respondent together with its order issued on March 31, 1953, granting leave to respondent to file, within twenty days after service thereof, objections to the changes in the order continued in the hearing examiner's initial decision as shown in the tentative order of the Commission.

No objections having been filed, the proceeding came on for final consideration by the Commission upon the record herein for review 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 the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent General Shoe Corporation is a corporation organized and existing under and by virtue of the laws of the State of Tennessee with its office and principal place of business located at Nashville 3, Tennessee.

PAR. 2. Respondent is now, and for several years past has been, engaged in the manufacture, sale and distribution of shoes designated as "Storybook Shoes," "Acrobat Shoes" and "Acrobat Safety Shoes."

PAR. 3. The respondent causes and has caused said shoes, when sold, to be transported from its place of business in the State of Tennessee to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a course of trade in its said shoes

in commerce between and among the various States of the United States and in the District of Columbia. Respondent's volume of business in the sale of said shoes in commerce is and has been substantial.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the purchase of its said shoes, respondent has made certain statements and representations concerning the nature and usefulness of said shoes by means of labels on its shoes, advertisements inserted in newspapers and magazines of general circulation, and folders, pamphlets and circulars; also by radio continuities broadcast from radio stations. Among and typical of such statements and representations are the following:

With respect to Storybook Shoes:

. . . the foot is ALWAYS held in its natural, correct position . . .

. . . help insure the correct growth of their tender, little feet . . .

Safeguard NOW against foot ills later! . . .

Good care now means good feet later . . . give your child this expensive-type care! Shock Absorber Heel protects delicate nerve ends, Arch Lift Cushion keeps the foot aligned . . .

SHOCK ABSORBER HEEL . . . protects nerve terminals.

EACH CUSHION RESPONDS individually to foot action.

STORYBOOK CUSHION FOUNDATION prevents forward skid, holds foot accurately.

CHILDREN'S SUPER ACTIVE FEET . . . need the added protection of these soft, resilient pads . . . give developing arches just the amount of gentle support . . .

JOLTS can be dangerous to little feet. Shock Absorber Heel Cushion absorbs shock to delicate nerve-ends; Lift Cushion Arch keeps foot properly aligned.

. . . "Shock-Absorber" in Heel takes the jolts . . . cushions delicate nerve ends. "Lift Cushion" gives yielding support to the important arch structure.

Cushion Foundation adjusts individually to foot action . . . given better balance . . . sets foot accurately in shoe . . .

. . . You see, the two most sensitive parts of a child's foot . . . are located at the heel and in the arch. Storybook . . . SHOCK ABSORBER HEEL . . . protects the networks of nerves at the heel . . . each cushion responds individually to foot action. At the same time, the foot is held firmly in its natural position always, for Storybook Cushion Foundation shoes prevent a forward skid inside the shoe! . . . healthful shoes for boys and girls . . .

With respect to Acrobat Shoes:

They have the right combination for foot health

* * * Keep those young feet healthy and comfortable.

Acrobats * * * retard pronation or turning-in ankles.

Acrobat Shoes give growing feet the best possible foundation for future foot health * * *

Extended insoles eliminate ankle turn-in. Posture cut patterns insure ankle fit * * *

ACROBAT'S extended "cookie" insoles ELIMINATE ANKLE TURN-IN, keep young ankles straight and strong! Statistics show that 85% of our children have "turned-in" ankles * * *

With respect to Acrobat Safety Shoes:

They start Baby walking RIGHT FROM THE START with this NEW 3-way safety design . . . ACROBAT SAFETY SHOES start good walking habits with those important first steps. They set the foot in a straight line, give extra ankle support; broad, squared heels for safer footing; . . . Reinforced BACK-STAY supports and guides ankles straight . . . FLEXIBLE SOLE permits free-action that builds muscles . . .

. . . help mothers with the important job of building strong, sound feet with Acrobats.

PAR. 5. Through the use of the statements and representations above set forth and others of similar import not specifically set out, respondent represented, directly and by implication:

That the wearing of its "Storybook Shoes" will hold the foot in its natural position, keep the foot properly aligned, hold the foot accurately in the shoe, insure correct growth of the foot, provide strong support for the arch of the foot, guard against foot ills and provide better balance; that the resilient pads at the heel and arch in children's shoes prevent forward skid, give arch support, cushion jolts and protect nerve terminals and the delicate nerve-ends in the heel.

That the wearing of its "Acrobat Shoes" gives growing feet the proper foundation and combination of features for foot health; will keep young feet healthy, eliminate pronation of ankles and keep young ankles straight and strong.

That the wearing of its "Acrobat Safety Shoes" will start children in good walking habits; will set the foot in a straight line, give extra ankle support and guide the ankle straight; that the flexible sole of said shoes permits the building of muscles and strong sound feet.

PAR. 6. The aforesaid statements and representations are false, misleading or deceptive. In truth and in fact, all of respondent's shoes are merely stock shoes made by quantity production methods and while they contain some features not found in some other stock shoes, the effect of these features upon the feet in the prevention or correction of foot ailments or in aiding the natural development of the feet is insignificant.

The wearing of "Storybook Shoes" will not hold the foot in its natural position, keep the foot properly aligned, hold the foot accurately in the shoe, insure correct growth of the foot, provide any significant support for the arch of the foot, guard against foot ills nor provide better balance. The pads at the heel and arch of said shoes will not prevent forward skid. There are no particularly delicate or sensitive nerve-ends in the heel and any cushioning or protective effect provided by the pads in said shoes to the nerves that are located in the heel is insignificant.

There is nothing in the construction of respondent's "Acrobat Shoes" which is conducive to foot health in the case of children. The wearing of said shoes will not keep young feet healthy, will not eliminate pronation nor keep young ankles straight and strong.

The wearing of respondent's "Acrobat Safety Shoes" cannot be relied upon to start children in good walking habits, will not set the foot in a straight line, give extra ankle support nor guide the ankle straight. The use of said shoes will be of no value in the building of muscles or strong sound feet.

PAR. 7. Through the use of the word "health" as aforesaid in connection with its shoes, respondent has represented, directly and by implication, that the said shoes are constructed in such a manner that their use will prevent and cure diseases and abnormalities of the feet, will keep the feet healthy, prevent the development of abnormalities of the feet and correct all disorders of the feet which may be present.

PAR. 8. Such representation is misleading and, in its implications, untrue. All stock shoes, including respondent's, provide covering for all or part of the foot, and protect the feet from the elements and from external trauma. In addition, if the feet are normal and healthy, and the shoes properly fitted, and other factors affecting the health of the feet normal, such shoes, including respondent's, will tend to preserve that health. To represent, as respondent has, that its stock shoes, performing this ordinary function, are health shoes, misleads the potential purchaser into believing that such shoes will restore lost foot health, correct abnormalities, congenital or traumatic, and prevent and insure against the occurrence or reoccurrence of any of these things. This expansion of a commonplace role into a field of cure, prevention, and insurance against serious troubles, is deceptive particularly to the more than usually susceptible mind of a parent. Any variance from normal in the feet, any disturbance of full and easy function whatever its cause presents an individual diagnostic and treatment problem and no shoe will even aid, and indeed may prevent, restoration to normal unless specially adapted. The use of respondent's shoes will not prevent or cure diseases or abnormalities of the feet, keep the feet healthy, prevent the development of abnormalities or deformities or correct any disorders of the feet. Respondent's shoes cannot truthfully be designated as health shoes or as possessing health features.

PAR. 9. The use by respondent of the foregoing false, deceptive and misleading statements and representations with respect to its shoes, has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and to

induce them, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's shoes.

CONCLUSION

The acts and practices of respondent 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

It is ordered, That the respondent General Shoe Corporation, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondent's shoes designated "Storybook Shoes," "Acrobat Shoes" and "Acrobat Safety Shoes," or any other shoes of similar construction, irrespective of the designation applied thereto, do forthwith cease and desist from:

(1) Representing, directly or by implication that the wearing of respondent's "Storybook Shoes" will hold the foot in its natural position, keep the foot properly aligned, hold the foot accurately in the shoe, insure correct growth of the foot, provide strong support for the arch of the foot, guard against foot ills, or provide better balance.

(2) Representing, directly or by implication, that the resilient pads at the heel and arch in its children's shoes prevent forward skid, give arch support, cushion jolts, or protect nerve terminals of the nerve-ends in the heel.

(3) Representing, directly or by implication, that the wearing of respondent's "Acrobat Shoes" gives growing feet the proper foundation and combination of features for foot health; will keep young feet healthy, eliminate pronation of ankles or keep young ankles straight or strong.

(4) Representing, directly or by implication, that the wearing of respondent's "Acrobat Safety Shoes" will start children in good walking habits; will set the foot in a straight line, gives extra ankle support or guides the ankle straight, or will have any value in the building of muscles or strong sound feet.

(5) Using the word "health" or any other word or term of similar meaning, alone or in combination with any other word or words, to designate, describe or refer to respondent's shoes, or representing in any manner that the wearing of respondent's shoes will prevent or cure diseases or abnormalities of the feet, keep the feet healthy, pre-

vent the development of abnormalities, or correct any disorder of the feet.

It is further ordered, That the respondent shall, within sixty (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.

Commissioner Mason dissenting and stating that he is in accord with the ruling of the hearing examiner as approved by the United States Court of Appeals for the Seventh Circuit in Docket 4795—R. J. Reynolds Tobacco Company.

IN THE MATTER OF

THE d-CON COMPANY, INC., ET AL.

DECISION AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5958. Complaint, Feb. 28, 1952—Decision, July 17, 1953

Where a corporation and its officers, engaged in the manufacture, sale and distribution under the name "d-Con" of three rodenticide preparations, including a concentrate for mixing with bait, and "d-Con Ready Mixed" and "d-Con's Mouse Prufe"; in advertisements in periodicals and radio continuities—

(1) Represented that "d-Con" was non-poisonous and completely safe and might be used without danger to human beings and domestic and farm animals; when in fact, while said products were not violent poisons and repeated doses for a period of days in large amounts would be required to endanger animals or humans, nevertheless, handled carelessly or by those who did not realize their poisonous nature, they constituted a serious danger to certain animals and humans;

(2) Represented that "d-Con" was "the ONLY rat and mouse killer in the world that contains . . . special ingredient that the UNITED STATES TESTING LABORATORIES has PROVED to be three times more effective"; when in fact, composed of Warfarin mixed in a bait of freshly ground corn, it was no more attractive to rats than other freshly ground corn and not significantly more attractive than certain other rodenticides;

(3) Represented that there were "NO TELL-TALE AFTER ODORS with d-CON"; facts being that it would not eliminate all after-odors caused by putrefaction of the carcasses of dead rats;

(4) Represented that "d-Con's Mouse-Prufe" was the "only mouse eliminator that contained Warfarin"; when in fact there were other Warfarin-containing products designed for mouse control on the market when such statement was made on radio commercials; and

(5) Represented that "d-Con" was "the new scientific discovery reported in READER'S DIGEST": when in fact the Reader's Digest article contained no reference to d-Con itself but was about Warfarin, principal ingredient in competing products as well as in d-Con;

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

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. Edward F. Downs for the Commission.

Mr. Horace A. Young, of Chicago, Ill., for United Enterprises, Inc.

Frank E. & Arthur Gettleman, of Chicago, Ill., for all other respondents.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on February 28, 1952, issued and sub-

sequently served its complaint in this proceeding upon the respondents The d-Con Company, Inc., and United Enterprises, Inc., corporations, and Leonard L. Ratner, Jerome S. Garland and Gerald H. Rissman, individually and as officers of said corporations, charging them and each of them with unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the provisions of said Act. Respondents filed their answers to said complaint, and hearings were thereafter held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly filed and recorded in the office of the Commission. Proposed findings as to the facts and conclusions were filed by counsel for respondents and counsel supporting the complaint. Thereafter on January 19, 1953, the hearing examiner filed his initial decision which was duly served on the parties.

Within the time permitted by the Commission's Rules of Practice, both counsel for respondents and counsel supporting the complaint filed an appeal from said initial decision. Thereafter, this proceeding regularly came on for hearing by the Commission upon the record herein, including briefs in support of and in opposition to both appeals and oral argument of counsel, and the Commission issued its order denying the appeal of counsel supporting the complaint and granting in part and denying in part respondents' appeal; and the Commission, being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion and order to cease and desist, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent The d-Con Company, Inc., and United Enterprises, Inc., are corporations, organized under the laws of the State of Illinois with their principal offices located at 112 East Walton Street, Chicago, Illinois. Respondent United Enterprises, Inc., is in process of liquidation, having disposed of all its assets prior to February 15, 1952, except a few bills receivable, and since said date has neither manufactured, advertised nor sold any merchandise. Respondent The d-Con Company, Inc., has been for some time past, and is now, actively engaged in business as hereinafter described.

Respondents Leonard L. Ratner, Jerome S. Garland and Gerald H. Rissman are President, Vice-President, and Treasurer, respectively, of The d-Con Company, Inc., their offices being that of The d-Con Company, Inc., and as such officers they formulate and execute the

policies and practices of that corporation. Respondent Leonard L. Ratner was for a time, but is not now, President of United Enterprises, Inc.

PAR. 2. Respondents The d-Con Company, Inc., Leonard L. Ratner, Jerome S. Garland and Gerald H. Rissman, are now, and for over two years last past have been, and respondent, United Enterprises, Inc., prior to February 15, 1952, has been, engaged in the manufacture, sale and distribution of three rodenticide preparations, namely d-Con, d-Con Ready Mixed and d-Con's Mouse-Prufe. d-Con Ready Mixed and d-Con's Mouse-Prufe contain a cereal bait and are ready for immediate use. d-Con is a concentrate which is to be mixed with bait before use. The formulae and directions for use thereof are as follows:

Designation: d-CON

Formula: ACTIVE INGREDIENTS:

WARFARIN (3-(a-acetonylbenzyl) 4-hydroxy coumarin)	.3%
INERT INGREDIENTS	99.7%

Directions: Mix thoroughly contents of this package with 5½ lbs. of suitable semi-permanent bait material such as fresh corn meal, rolled oats, nut crumbs, dog food meal, poultry mash, etc. Place 2 oz. to 1 pound of mixed bait in locations frequented by rats and mice, and protect from children, dogs, cats and livestock by means of bait boxes or cages where necessary. Baits should be replaced as consumed. Use no decomposed, moldy or sour baits. Cereal baits are more generally used. Establishment and proper servicing of permanent protected feeding stations in areas where there is danger of reinfestation by rats and mice will not only control the rodents present but will be available to destroy other rats and mice as they invade the premises. For *best results* maintain supplies of *fresh* bait at such stations at all times.

NOTICE: Baiting should continue until complete lack of feeding is noted. This should take place in from five to fourteen days.

CAUTION: d-CON contains as its active ingredient an anticoagulant chemical, which, if taken accidentally by humans, domestic animals and pets may reduce the clotting ability of the blood and a serious hemorrhage may result. In case baits are accidentally eaten—

ANTIDOTE: give tablespoonful of salt in glass of warm water and repeat until vomit fluid is clear. Call physician immediately.

Notice to Physicians: When a human has been known to have accidentally ingested d-CON, blood transfusions combined with intravenous injections and oral doses of Vitamin K are indicated as in the case of hemorrhage caused by overdoses of dicumarol.

Designation: d-CON READY MIXED

Formula: ACTIVE INGREDIENT:

WARFARIN (3-(a-acetonylbenzyl) 4-hydroxy coumarin)	0.025%
INERT INGREDIENTS	99.975%

Directions: Substantially the same as those set out above for d-CON except as to the mixing.

Designation: d-CON's MOUSE-PRUFE

Formula: ACTIVE INGREDIENTS:

WARFARIN (3-(d-acetonylbenzyl) 4-hydroxy coumarin)	.025%
INERT INGREDIENTS	99.975%

Directions: Substantially the same as those set out above for d-CON except as to the mixing.

Warfarin is an anticoagulant compound developed in 1948 by Dr. Karl Paul Link and his associates in the laboratories of the University of Wisconsin. Patent to this compound is held by the Wisconsin Alumni Research Foundation which licenses respondents, among others, to manufacture and sell said compound. The use of Warfarin represents a completely new practical approach to rodent control. Products containing this compound differ from all previously used successful rodenticides in two respects. It kills effectively only when consumed repeatedly, and it produces no acquired bait shyness in the rodents being poisoned. It causes death by producing internal bleeding.

PAR. 3. The respondents, with the exception of respondent United Enterprises, Inc., since February 15, 1952, have caused and now cause their said products, when sold, to be transported from their places of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia, and have maintained and now maintain 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. Their volume of trade has been, and, with the exception of respondent United Enterprises, Inc., is now, substantial.

PAR. 4. In the course and conduct of their said business all of the respondents, with the exception of respondent United Enterprises, Inc., are now, and respondent United Enterprises, Inc., prior to February 15, 1952, was, engaged in substantial competition in commerce with other corporations, firms, and individuals in the sale of rodenticide products.

PAR. 5. In the course and conduct of their said business and for the purpose of inducing the purchase of their products in commerce, as "commerce" is defined in the Federal Trade Commission Act, respond-

ents have disseminated and caused the dissemination of certain advertisements in periodicals and radio continuities containing the statements set out hereafter and lettered (a) through (h), respectively. For clarity of discussion each advertising claim alleged to be false and the facts of record relating thereto are discussed separately as follows:

(a) *Respondents' Statements:*

D-CON is safe, clean, easy to use

D-CON, made with WARFARIN can now eliminate all rats and mice from your property, completely and permanently without endangering the life of your family or animals. In a recent test made on a University Experimental Farm, a chicken was fed enough WARFARIN to kill 9,000 rats. After 14 months of daily feeding, the chicken was still alive and doctors examinations indicated that not one bit of damage was done to the chicken, either internally or externally—or to the eggs. Certainly this test proves the harmlessness of D-CON to farm animals.

Alleged False Meaning:

That d-CON is non-poisonous and completely safe and may be used without danger to human beings and domestic and farm animals.

Facts Relating Thereto:

Respondents' advertisements of their said products taken in their entirety show that they are intended to control rats by poisoning them. They clearly reveal the poisonous nature of these products. Therefore, the allegation that respondents' claim their product is non-poisonous is not sustained by the record.

However, the above-quoted advertising claims imply that, although poisonous, d-Con is not sufficiently poisonous to human beings and animals to endanger their lives. In fact, if humans or certain domestic animals ate a quantity of respondents' products for a period of several days, the clotting ability of their blood might be reduced to such an extent that serious internal bleeding would result.

The package in which d-Con is sold contains the following legend:

CAUTION: d-CON contains as its active ingredient an anti-coagulant chemical, which, if taken accidentally by humans, domestic animals and pets may reduce the clotting ability of the blood and a serious hemorrhage may result.

Respondents' said products are not violent poisons. Repeated doses for a period of days in relatively large amounts would be required to endanger animals or humans. Adequate instructions for handling these products with safety are set out on the packages in which they are sold. These products, if handled in accordance with directions by persons realizing they are handling a poison, would not constitute any serious danger. However, handled carelessly or by persons not realizing they are poisonous, these products would constitute a serious

langer to certain animals and humans. To this extent the allegations of the complaint as to these advertising claims are sustained by the evidence.

(b) *Respondents' Statements:*

Yes, the new WARFARIN formula, developed by the U of Wisconsin, and now being sold commercially as D-CON, is the only RAT and MOUSE killer ever discovered that will rid your property of all rodents within 15 days, and will keep it FREE of these destructive pests . . . FOREVER! * * * if you use D-CON as directed, you'll never have another RAT or MOUSE ON YOUR PROPERTY . . . FOREVER! * * * Then, use D-CON as directed.
If, at the end of 15 days you have a SINGLE RAT or MOUSE on your property, return the empty can for a full $2.98 refund.

Alleged False Meaning:

That d-CON will destroy all rats and mice on a property within 15 days and will thereafter keep such property free from rats and mice.

Facts Relating Thereto:

By the use of these statements in their advertising, respondents have represented that if you use d-Con as directed, it will rid your property of all rodents within 15 days, and will keep it free from these destructive pests forever. The record shows that rats eating 1 to 1½ mg. of the preparation over a period of five days will usually die by the seventh day. Expert testimony in the record shows that there are situations, such as where more attractive other food is readily available, where the time required to kill the rats may extend beyond 15 days and the extent of the elimination may not reach 100 percent. However, evidence in the record, including evidence of actual tests with d-Con on badly infested areas, indicates that such situations are relatively rare. The greater weight of the evidence of record will not support a finding that respondents' preparation, used as directed, will fail to rid a property of all rodents within 15 days in any substantial number of cases; nor will it support a finding that its continued use as directed will fail to keep the property free of rodents in any substantial number of cases. Respondents have attempted to provide for those cases, which the record indicates are relatively rare, where the use of their product as directed will not result in 100 percent extermination in 15 days, by offering to refund the purchase price.

Taking into consideration all of the circumstances as shown by this record, the Commission is of the opinion that the public interest does not require any corrective action as to these representations, and that the allegations as to them have not been sustained.

(c) *Respondents' Statement:*

* * * D-CON the ONLY rat and mouse killer in the world that contains both warfarin, the University of Wisconsin's NEW, ACCLAIMED discovery, and

LUREX—a special ingredient that the UNITED STATES TESTING LABORATORIES has PROVED to be three times more effective.

Alleged False Meaning:

That d-CON contains a special attractant that is three times more successful or luring than any other rodenticide bait or regular feed.

Facts Relating Thereto:

Respondents' said advertising claim has the meaning alleged. d-Con is a rodenticide composed of Warfarin mixed in a bait of freshly ground corn. The evidence establishes that it is no more attractive to rats than other freshly ground corn and that it is not significantly more attractive than certain other rodenticides. The allegation that his advertising claim is false and deceptive is sustained by the evidence.

(d) *Respondents' Statement:*

NO TELL-TALE AFTER-ODORS with d-CON

Alleged False Meaning:

That d-CON will eliminate all after-odors usually associated with the use of rodenticides.

Facts Relating Thereto:

Respondents' said advertising claim has the meaning alleged. In fact, however, d-Con will not eliminate odors caused by putrefaction of the carcasses of dead rats, which is the after odor associated by the public with the use of a rodenticide. This representation, therefore, is false and deceptive as alleged.

(e) *Respondents' Statement:*

That's why the D-CON formula is recommended by the U. S. Public Health Service and the U. S. Fish and Wildlife Service * * *.

Alleged False Meaning:

That d-CON has been recommended by the United States Public Health Service and the United States Fish and Wildlife Service.

Facts Relating Thereto:

The said statement does not have the meaning alleged. It clearly states that the d-Con formula had been so recommended—not d-Con. The record shows that this statement is true. Both the United States Public Health Service and the United States Department of Interior, Fish and Wildlife Service, in published bulletins, have recommended the use of Warfarin with a cereal type bait for rodent control. A bulletin of the latter agency recommends the use of a 0.025% concentration of Warfarin with a cereal type bait. This is the exact formula and concentration of ready mixed d-Con and d-Con's Mouse-Prufe. This allegation, therefore, is not sustained by the evidence.

(f) *Respondents' Statement:*

Middleton, Wisconsin, for years was very badly infested with rats and mice. Many women and children were afraid to go out because of this great infestation. In order to prove the effectiveness of d-CON, the Middleton civic organizations, in cooperation with and at the expense of d-CON Company, set out bait stations on November 4th throughout the entire township. By November 19th, there were no longer any signs of rats in the entire city! NO ONE HAS SEEN A SINGLE SIGN OF A RAT OR MOUSE SINCE—Thanks to d-CON Middleton is rat FREE!

Alleged False Meaning:

That all rats and mice infesting a town will be eliminated by the use of d-CON and that such town will remain free from reinfestation by rats and mice.

Facts Relating Thereto:

This statement does not represent that all towns can be made permanently rat and mouse free through the use of d-Con. This advertisement used as part of a radio continuity from January 2nd through 5th, 1951, stated that after using d-Con in a campaign against rats and mice in Middleton, Wisconsin, which campaign closed November 19, 1950, the town was still free of rats and mice. The only evidence tending to disprove this claim was a showing that one year after the campaign closed one live mouse and some rat burrows were found in an inspection of the town. Such evidence does not prove this claim to be false, especially as there was no showing of continued use of d-Con throughout the town after the close of the campaign. Respondents' actual claims for permanent control of rats and mice apply only to restricted areas where d-Con's use is continued as directed. Therefore, the allegation as to the falsity of said advertising claim has not been sustained by the evidence.

(g) *Respondents' Statement:*

Yes, d-CON's Mouse-Prufe is the only mouse eliminator that contains Warfarin * * *.

Alleged False Meaning:

That d-CON's Mouse-Prufe is the only rodenticide on the market for killing mice that contains the ingredient Warfarin.

Facts Relating Thereto:

Respondents' statement has the meaning alleged. Said statement was made by respondents in radio commercials during the period from June 12th through 19th, 1951. The record shows that there were other Warfarin containing products designed for mouse control on the market at that time. Therefore, this advertising claim was false and deceptive.

(*h*) *Respondents' Statement:*

WIN THE WAR ON RATS AND MICE with d-CON, The new scientific discovery reported in READER'S DIGEST.

Alleged False Meaning:

That d-CON was the subject of a report or article appearing in the publication "Reader's Digest."

Facts Relating Thereto:

Respondents' statement clearly implied that d-Con was the subject of an article in the Reader's Digest. In fact, the article was about Warfarin, the principal ingredient in competing products as well as in respondents' d-Con. The article contained no reference to d-Con itself. Therefore, the advertising claim was false and deceptive.

PAR. 6. The use by respondents of the false, misleading and deceptive statements set out in subparagraphs (a), (c), (d), (g), and (h) of Paragraph 5 of these findings has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements are true, and has the tendency and capacity to cause such portion of the public to purchase substantial quantities of rodenticides from respondents rather than from their competitors because of such erroneous and mistaken belief.

CONCLUSION

The acts and practices of respondents, referred to in the above and foregoing Findings as to the Facts, subparagraphs (a), (c), (d), (g), and (h) of Paragraph 5 were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

The acts and practices set forth in the foregoing Findings as to the Facts, subparagraphs (b), (e), and (f) of Paragraph 5 were not in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That The de-Con Company, Inc., a corporation, and its officers, and Leonard L. Ratner, Jerome S. Garland and Gerald H. Rissman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of the rodenticide preparations designated

"d-CON" and "d-CON's MOUSE-PRUFE," in whatsoever form sold, or any other rodenticide and substantially similar composition or possessing substantially similar properties, whether sold under either of said names or under any other name or names, do forthwith cease and desist from representing directly or by implication:

1. That any of said preparations are safe or may be used without danger to human beings or domestic or farm animals, unless qualified by the words "when used as directed" or other words of like meaning.

2. That any of said preparations contain a special attractant that is more successful or alluring than all other rodenticide baits or regular feed.

3. That any of said preparations will eliminate all after-odors usually associated with the use of rodenticides.

4. That any of said preparations is the only rodenticide on the market for killing mice that contains the active ingredient Warfarin.

5. That the preparation d-Con was the subject of a report or article appearing in the publication "Reader's Digest."

It is further ordered, That the allegations of the complaint relating to the representations set forth in subparagraphs (b), (e), and (f) of Paragraph 5 of the Findings as to the Facts be, and the same hereby are, dismissed as not having been sustained by the evidence.

It is further ordered, That the case growing out of the complaint herein be, and it hereby is, closed as to the respondent United Enterprises, Inc., a corporation, without prejudice to the right of the Commission to reopen the same and to proceed further against said corporation in the event its dissolution should not become final.

It is further ordered, That respondents The d-Con Company, Inc., Leonard L. Ratner, Jerome S. Garland, and Gerald H. Rissman shall, within sixty (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 the order to cease and desist.

IN THE MATTER OF

AMERICAN EXTENSION SCHOOL ET AL.

DECISION AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6055. Complaint, Nov. 3, 1952—Decision, July 17, 1953

Where a corporation and its president, engaged in the interstate sale and distribution through the U. S. mails of a study course to prepare students thereof for examination for U. S. civil service positions; in advertisements in newspapers in the northwestern part of the United States and advertising matter distributed to prospective students—

(1) Used the word "University" in their trade or corporate name and the word "Extension" to describe their course and thereby represented that their school was a resident institution of higher learning or an extension division of such institution, when in fact they did not maintain a resident school and had no resident faculty but operated a commercial business for profit;

(2) Represented falsely as aforesaid and through use of emblems depicting the American eagle and simulation of the U. S. official seal on advertising, stationery, and lesson material, that their school was connected with the U. S. Civil Service Commission or other Government agency, and that their sales agents were employees thereof; that they had contractual relationships with the U. S. Government for supplying applicants for civil service positions; that the U. S. Civil Service Commission recognized and recommended their school; and that they had advance information of U. S. civil service examinations;

(3) Represented falsely as aforesaid and through their sales representatives that completion of their courses of study or passing of their aptitude or other tests assured employment in the U. S. civil service; that it was necessary for persons seeking such positions to take their courses of study in order to qualify; that all persons completing their course and passing U. S. civil service examinations would be placed at the top of the list of eligibles; that civil service positions were generally available which, in fact, required veterans' status or special qualifications, and that vacancies existed contrary to fact; that starting salaries for such positions were greater than was the fact; and that the examinations they gave were for specific civil service positions; and

(4) Represented falsely that unless prospective students enrolled immediately at the time their salesman called, their opportunity to take the course would have passed for a year because the enrollment quota was limited and students could not be accepted for future enrollments:

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

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. William L. Pencke for the Commission.

Mr. John M. Brady, of Portland, Oreg., for respondents.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 3, 1952, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. On December 18, 1952, by permission of the hearing examiner theretofore duly designated by the Commission, respondents withdrew their answer filed on November 28, 1952, and filed in lieu thereof a substitute answer admitting all the material allegations of fact set forth in the said complaint and waiving all intervening procedure and further hearing as to said facts. Thereafter the proceeding regularly came on for consideration by the hearing examiner upon the said complaint and answer, and said hearing examiner, on December 24, 1952, filed his initial decision.

The Commission, having reason to believe that the initial decision did not constitute an adequate disposition of the matter, on February 12, 1953, issued and thereafter served upon the parties its order placing this case upon the Commission's docket for review. Thereafter the Commission, having considered the entire record and having prepared a tentative decision, caused copies of said decision to be served upon respondents and counsel supporting the complaint, together with its order, issued on June 4, 1953, granting them leave to file, within twenty days after service thereof, objections to the changes in the hearing examiner's initial decision as shown by the said tentative decision. No objections having been filed within the period specified in the said order, the proceeding thereafter came on for final consideration by the Commission upon the record on review 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 the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. American Extension School is a corporation, organized and existing under the laws of the State of Oregon, with its principal office and place of business at 1739 Northeast 42nd Avenue, Portland, Oregon.

Respondent Theodore E. Smith is an individual, and president and director of said corporation, and as such formulates all the policies and controls and manages all of the affairs of said corporation. His

principal office and place of business is the same as that of the corporate respondent.

PAR. 2. For more than two years last past, respondents have been and are now engaged in the sale and distribution of a course of study and instruction intended for preparing students thereof for examination for certain Civil Service positions in the United States Government, which said course of study is pursued by correspondence through the United States mails. Respondents, in the course and conduct of said business, cause said course of study to be transported from their said place of business in the State of Oregon to, into and through States of the United States other than Oregon, to purchasers thereof located in such other States. There has been at all times mentioned herein a course of trade in said course of instruction so sold and distributed by respondents in commerce between and among the various States of the United States, and said course of trade has been and is substantial.

PAR. 3. In connection with the sale of said course of study, respondents have made, and are making use of, advertisements placed in newspapers in the northwestern States of the United States and of printed advertising matter distributed to prospective students in the several States in which said course of study is sold, in and by which numerous representations have been and are made in regard to said course of study and matters and things connected therewith. Typical of such representations made on postal cards distributed to the public generally are the following:

IS YOUR JOB PERMANENT
452,000 POSITIONS
This Year, due to Deaths, Retirements and Normal
Government Expansion,
CIVIL SERVICE
Thousands Every Month Find the SECURITY of a Government Position
MEN—WOMEN
If you Meet the Requirements
You are Eligible for Examination

* * *

I am interested in securing Government Employment. Please furnish me, without cost, information covering the requirements necessary to obtain a Civil Service position with the Government. I would appreciate a personal interview at your earliest convenience, if it appears I am eligible.

* * *

A Few of Over 20,000 Different Kinds of
U. S. CIVIL SERVICE POSITIONS
Paying $2450 to $4200 to Start
No Experience Needed—Common School Education Usually Sufficient

Positions	*Start—Salary*
Postal Transportation Clerks	$3170 to $3870
Post Office Clerk or Carrier	$2870 to $3670
Rural Mail Carrier—Average	$4200
Stenographer-Typist	$2450 to $2930
Postmaster	$2500 to $9000
Storekeeper-Gauger	$3450 to $4200
Customs Positions	$3450 to $4200
Departmental Clerks	$2000 to $3600
File Clerks—Statistical	$2650 to $7400
Librarian	$3727 to $6235
General Clerkships	$2450 to $4200
Social Security Positions	$2860 to $7500
Internal Revenue	$2840 to $5100
Immigration Positions	$2850 to $4200
Border and Port Patrol	$3450 and up
Park Ranger	$2974 and up
Verifier, Opener and Packer	$2850 to $3450
Telephone Operator	$2650 to $3130
Jr. Accountant	$3100 and up
Junior Investigators	$3450 and up
Forest and Field Clerk	$2820 and up
Jr. Nurse	$3000 and up

VACANCIES EXIST NOW

In connection with the use of said postal cards distributed to prospective purchasers, respondents have used the trade name "The American Extension Plan"; and in connection with the distribution to said prospects of a booklet entitled "Civil Service Security" and purporting to describe the method of taking Civil Service tests, respondents are using the trade name "American Extension University."

On their enrollment blanks, form letters, and some lesson material, respondents use a facsimile of the American eagle in the form of a seal or shield similar to the official seal of the United States Government.

PAR. 4. By means of the foregoing statements and representations, and others to the same and similar effect not herein specifically set out, respondents represent and imply that their said business is a branch of, or connected with, the United States Government or the United States Civil Service Commission; that 452,000 positions are open in the United States Civil Service, consisting of over 20,000 different kinds including those sepcifically listed on said postal cards; that said vacancies are available to all applicants and that thousands of permanent appointments are made every month; that men and women are wanted by the United States Government to prepare for Civil Service Examinations and positions and that respondents and their agents are qualified to determine the qualifications of applicants for such positions, and that said positions may be obtained through respondents' school;

that the starting salaries for the positions listed by respondents generally are from $2,450 to $4,200 and are as high as $9,000; and that respondents' said school is an extension university or an extension division for correspondence study by an institution of higher learning.

PAR. 5. In the course and conduct of said business, as aforesaid, respondents employ sales agents or representatives who call upon prospective purchasers of said course of study. By means of oral statements made by said sales agents, respondents represent and imply to prospective students and purchasers of their said course of study:

1. That American Extension School is connected with, or is a branch of the United States Civil Service Commission or the United States Government or some agency thereof;

2. That respondents' said sales agents are representatives or employees of the United States Civil Service Commission or have some connection therewith;

3. That said American Extension School is recognized or recommended by the United States Civil Service Commission;

4. That American Extension School and the United States Government have some contractual relationship whereby said school supplies employees to the United States Government;

5. That the taking of respondents' said course of study is the only way to obtain a United States Government job;

6. That the examinations given by respondents are for specific positions in the United States Civil Service;

7. That students who pass the school's aptitude test or have a pleasing personality and experience are qualified to take United States Civil Service examinations;

8. That the American Extension School has information with respect to announcements of examinations prior to the time such announcements are made by the United States Civil Service Commission;

9. That the passing of examinations given by the school assures students of obtaining a position in the United States Civil Service;

10. That students who take respondents' course of study will be placed at the top of the list of eligibles for United States Civil Service positions;

11. That unless prospective students enroll immediately at the time said salesman calls upon such prospects, the opportunity for taking the course will have passed for a year for the reason that the enrollment quota is limited and students cannot be accepted for future enrollments.

PAR. 6. All of said representations, statements and implications are grossly exaggerated, false and misleading. In truth and in fact, the representation that over 400,000 positions will be vacant in the course

of a year, and that thousands are appointed to United States Civil Service positions every month, is grossly exaggerated. Appointments to permanent United States Civil Service positions during the last two years have not exceeded several hundred appointments each month, and it is not expected that appointments will be increased. Most of the positions specifically listed in respondents' advertising literature as being available are not open to applicants generally, but are either restricted to persons of veteran status or require special physical and educational qualifications and practical experience.

Positions in the Postal service are restricted to persons living within the area of a given post office. No examination has been announced for the position of store bookkeeper gauger for years, and none is contemplated. Positions in the Customs service are restricted to men only, and most of the positions in that service are open only to veterans. Positions in the Immigration, Border, Port and Patrol services are restricted to veterans and require special training. Examinations for the position of Verifier, Opener and Packer, and Forest and Field Clerk have not been announced in over 10 years. Generally speaking, the starting salaries in said positions are not as high as those listed by respondents. Among the positions listed by respondents are many which require experience as one of the qualifications for employment.

Neither the respondents nor any of their officers, agents or salesmen are connected in any manner whatsoever with the United States Civil Service, the United States Government or any agency thereof. The United States Civil Service Commission neither recognizes nor recommends respondents' school to anyone, and no contractual relationship exists between said Commission and respondents for the furnishing of applicants for United States Civil Service examinations or employees. Applicants for United States Civil Service examinations are not required to take respondents' course of study in order to qualify for United States Civil Service examinations. The passing of respondents' so-called aptitude test or the possession of a pleasing personality and experience does not qualify applicants for United States Civil Service examinations. Respondents have no advance information pertaining to announcements of United States Civil Service examinations, nor any other information that is not available to the public generally.

The examinations given by respondents to their students are not examinations for specific positions in the United States Civil Service; the passing of a United States Civil Service examination by respondents' students will not assure them a position in the United States Civil Service or their placement at the top of the list of eligibles.

Prospects do not lose the opportunity to enroll for said course of study by failing to do so at the time of the salesman's call, but may enroll and purchase said course at any time they desire to do so. There is no limitation on the number of students; respondents sell said course to all persons who are willing to purchase the same.

PAR. 7. Through the use of the trade names "The American Extension Plan" and "American Extension University" respondents represent and imply that their business is part of an extension division of and operated by a resident institution of higher learning, with a resident faculty and a student body and equipped to offer courses in the subjects of Liberal Arts, professions and other subjects of higher education.

In truth and in fact, respondents operate a commercial business for profit engaged in the sale of a course of study designed to prepare individuals for the taking of Civil Service examinations of the lower level of general information type. Respondents do not maintain a resident school, have no resident faculty qualified to teach subjects in the several branches of higher education and do not offer any resident courses in such subjects.

PAR. 8. The use of an emblem depicting the American eagle, or a simulation of the official seal of the United States Government on some of their advertising literature, stationery and lesson material, further represents and implies that respondents' school is connected with the United States Government or some agency thereof, and has no official approval. In truth and in fact, as hereinabove set forth, respondents have no connection whatever with the United States Government, and the use of said emblems is wholly unauthorized and misleading.

PAR. 9. The use by respondents of the statements and representations aforesaid has had and now has the tendency and capacity to and does confuse, mislead and deceive members of the public into the erroneous and mistaken belief that such statements and representations are true and to induce them to purchase respondents' course of study and instruction in said commerce on account thereof.

CONCLUSION

The aforesaid acts and practices of 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

It is ordered, That respondent, American Extension School, a corporation, and its officers, agents, representatives, and employees, and respondent, Theodore E. Smith, as an officer of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of a course of study and instruction intended for preparing students thereof for examination for Civil Service positions under the United States Government, or any similar courses of study, do forthwith cease and desist from:

1. Using the word "University" or any word of similar import as a part of respondents' corporate or trade name, or using the word "Extension" or any word of similar import to describe their course of instruction, or otherwise representing that respondents' school is a resident institution of higher learning or is an extension division of a resident institution of higher learning;

2. Representing, directly or by implication:

(a) That respondents or their school have any connection with the United States Civil Service Commission or any other agency of the United States Government;

(b) That respondents' sales agents are representatives or employees of the United States Civil Service Commission or any other government agency, or have any connection therewith;

(c) That the completion of respondents' course of study assures students of positions in the United States Civil Service or makes them eligible for appointment to such positions;

(d) That the passing of respondents' aptitude or other tests assures applicants of employment in the United States Civil Service;

(e) That it is necessary for persons seeking United States Civil Service positions to take respondents' course of study in order to qualify for or obtain such positions;

(f) That the examinations given by respondents are examinations for specific positions in the United States Civil Service;

(g) That all persons completing respondents' course of instruction and passing United States Civil Service examinations will be placed at the top of the list of eligibles;

(h) That any United States Civil Service position which requires appointees to have veteran's status, or special physical, mental, educational, or experiential qualifications is generally available;

(i) That respondents have advance information regarding announcements of United States Civil Service examinations, or any information not generally available to the public;

(j) That vacancies exist in any United States Civil Service position contrary to the fact; or that the number of positions available or vacant in the United States Civil Service or any branch thereof is greater than is actually the fact;

(k) That the starting salary for any United States Civil Service position is greater than it is in fact;

(l) That any contractual relationship exists between the United States Civil Service Commission and respondants for the furnishing by respondents of applicants for United States Civil Service positions;

(m) That the United States Civil Service Commission recognizes, recommends or endorses respondents' school;

(n) That there are any limitations with respect to the time when one may enroll as a student or to the number of students who may be enrolled.

3. Using emblems or other picturizations resembling or simulating the seal or insigne of the United States or any agency thereof, or otherwise representing that respondents are connected with the United States Government or any agency thereof.

It is further ordered, That the respondents shall, within sixty (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.

IN THE MATTER OF

THOMAS D. McBRYDE, JOE T. PILCHER AND PERRY ELLIOTT, TRADING IN THE NAME OF THE B-VIMM COMPANY

DECISION AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6005. Complaint, June 30, 1952—Decision, July 19, 1953

Where three partners, engaged in the interstate sale and distribution of their liquid drug preparation "B-Vimm," in advertisements in newspapers and magazines of general circulation, circulars and leaflets, and by radio broadcasts, directly or indirectly—

(1) Represented that their said "B-Vimm" was a vitamin, liver, iron and mineral dietary supplement, that it contained all the essential vitamins and minerals and was a competent and effective treatment and gave fast relief for all diseases or conditions caused by vitamin or mineral deficiencies;

When in fact while, taken as directed, B-Vimm supplied many times the adult minimum daily requirements of Vitamin B1 and iron, it supplied only the minimum daily requirements of B2 and niacinamide, did not supply the minimum daily requirements of calcium or phosphorus, and did not supply the required mineral iodine or such essential vitamins as A, C, D, B6 and B12, or the anti-anemia factor of liver; was, therefore, not the adequate dietary supplement claimed and was of no value in the treatment of deficiency ailments other than those resulting from B1 and iron deficiencies; and did not give fast relief but, if benefit was to be derived in the infrequent cases of Vitamin B1 and iron deficiencies, had to be administered over a considerable period;

(2) Represented falsely that daily consumption of the vitamins and minerals contained in the preparation would effectively promote the removal of poisons from the blood by the liver and kidneys; and

(3) Represented falsely that it was effective in relieving muscular pain and stiff joints, and constituted a competent and effective treatment for tired, weak and rundown conditions, loss of pep or energy, lack of vitality, irritability, nervousness, sleeplessness, lack of appetite, underweight, constipation, indigestion, heartburn, high and low blood pressure, kidney and heart trouble, arthritis, rheumatism, deficiency of red blood, nutritional iron or liver anemia, coughs, colds, and other deficiency ailments:

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

Before *Mr. John Lewis*, hearing examiner.

Mr. R. P. Bellinger for the Commission.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated July 19, 1953, the initial

decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 30, 1952, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After respondents filed their answer in this proceeding, a stipulation was entered into between them and Robert P. Bellinger, attorney in support of the complaint, wherein it was agreed that the stipulation as to the facts therein set forth should constitute the entire facts in this proceeding and serve as the basis for findings of fact and an ensuing order, subject to the limitation that said order would not exceed the scope and limitations prescribed by the United States Court of Appeals for the District of Columbia in *Alberty et al* v. *Federal Trade Commission*, 182 F. 2d 36. Thereafter this proceeding regularly came on for final consideration by the above-named hearing examiner, theretofore duly designated by the Commission, upon the complaint, the answer, and the aforesaid stipulation, said stipulation having been approved as affording the basis for an appropriate disposition of this proceeding and made a part of the record of this proceeding by the hearing examiner, who, after duly considering the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents Thomas D. McBryde, Joe T. Pilcher, and Perry Elliott are copartners trading in the name of The B-Vimm Company, having their principal place of business at 101 Broad Street in Selma, Alabama. The business address of respondents Thomas D. McBryde and Joe T. Pilcher is the same as the firm's address in Selma, Alabama. The address of respondent Perry Elliott is 1503 Twenty-third Avenue, Meridian, Mississippi.

PAR 2. Respondents are now, and for more than a year last past have been, engaged in the business of selling and distributing a drug preparation, as "drug" is defined in the Federal Trade Commission Act. The designation used by respondents for said preparation, which is a liquid, and the formula and directions for use thereof, are as follows:

111 Findings

Designation: B-Vimm.
Formula for one fluid ounce:

Ferrous Gluconate	6.7 Grs.
Calc. Hypophos	4.1 Grs.
Manganese Citrate, Sol	0.49 Gr.
Copper Proteinate	0.025 Gr.
Citric Acid	0.352 Gr.
Propylene Glycol	10.68 Minims
Thiamine Hydrochloride	7.92 Milligrams
Riboflavin	1.43 Milligrams
Niacinamide	8.60 Milligrams
Liver Fraction #1	0.109 Grain
Yeast Extract	0.109 Grain
Butyl Parasept	0.060 Grain
Methyl Parasept	0.152 Grain
Hydrochloric Acid, Con	0.0018 cc
Saccharin Soluble	0.15 Grain
Caramel	5.62 Minims
Sweet Orange	0.19 Minim
Benzaldehyde	0.09 Minim
Water q. s. ad	1 Fl. Oz.

Directions: Adults—One tablespoonful three times daily before meals.
Children—One teaspoonful three times daily or as directed by the physician.

PAR. 3. Respondents cause the said preparation, when sold, to be transported from their place of business in the State of Alabama, or from the place of business of the manufacturers of said preparation in the State of Alabama, to purchasers thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said preparation in commerce between and among the various States of the United States. Respondents' volume of business in commerce in said preparation is and has been substantial.

PAR. 4. In the course and conduct of their aforesaid business, respondents, subsequent to March 21, 1938, have disseminated and are now disseminating, and have caused and are now causing the dissemination of advertisements concerning their said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and magazines of general circulation, by means of radio continuities and in circulars and leaflets, for the purpose of inducing, and which are and were likely to induce, directly or indirectly, the purchase of said preparation; and respondents have also disseminated and are now causing the dissemination of advertisements concerning their said preparation by the aforesaid means for the purpose of inducing, and which are and were likely to induce, directly or indirectly, the purchase of their said preparation in commerce, as aforesaid.

PAR. 5. Through the use of said advertisements, respondents represented, directly and by implication, that B-Vimm is a vitamin, liver, iron and mineral dietary supplement; that it contains all the essen-

tial vitamins and minerals and is a competent and effective treatment for all diseases or conditions caused by vitamin or mineral deficiencies; that the daily consumption of the vitamins and minerals contained in B-Vimm will effectively promote the removal of poisons from the blood by the liver and kidneys; that B-Vimm gives fast relief, is effective in relieving muscular pain and stiff joints and constitutes a competent and effective treatment for tired, weak and run-down conditions, loss of pep or energy, lack of vitality, irritability, nervousness, sleeplessness, lack of appetite, underweight, constipation, indigestion, heartburn, high blood pressure, low blood pressure, kidney trouble, heart trouble, arthritis, rheumatism, deficiency of red blood, nutritional iron or liver anemia, coughs, colds and other diseases caused by deficiencies of vitamins and minerals.

PAR. 6. The aforsaid statements and representations are misleading in material respects, and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, while B-Vimm, taken as directed, supplies many times the adult minimum daily requirements of Vitamin B1 and iron, it supplies only the minimum daily requirements of B2 and niacinamide. It does not supply the minimum daily requirements of calcium or phosphorus, nor does it supply iodine, a required mineral, or such essential vitamins as A, C, D, B6 and B12, or the anti-anemia factor of liver. Said preparation cannot therefore be properly characterized as an adequate vitamin and mineral dietary supplement and is of no value in the treatment of any vitamin or mineral deficiency or of conditions resulting therefrom other than B1 and iron deficiencies.

B-Vimm will not give fast relief, and, in the infrequent cases of Vitamin B1 and iron deficiencies which occur, if any benefit is to be derived from taking said preparation, it must be administered over a considerable period of time. It has no value in causing any organ to remove, or assisting any organ in removing, poisons from the blood, nor is it of value in relieving muscular pain or stiff joints, in the treatment of high blood pressure, low blood pressure, heart trouble, kidney trouble, arthritis, rheumatism, coughs or colds. The term "liver anemia" has no meaning medically, and respondents' preparation has no value in the treatment of anemia, except iron deficiency anemia.

B-Vimm possesses no value in the treatment of tired, weak or run-down conditions, loss of pep or energy, lack of vitality, irritability, nervousness, sleeplessness, lack of appetite, underweight, constipation, indigestion, heartburn, deficiency of red blood or deficiency diseases otherwise, except in those infrequent cases where such symptoms, conditions or diseases result from Vitamin B1 or iron deficiencies.

PAR. 7. The use by respondents of the foregoing false and misleading statements and representations contained in said advertisements

has had and now has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true, and into the purchase of said preparation because of such erroneous and mistaken belief.

PAR. 8. The complaint alleges that respondents' advertising is misleading in a further material respect. However, since said allegation is not covered by the stipulation as to the facts entered into herein and no proof was offered in support thereof, said allegation will be dismissed.

CONCLUSION

The 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

It is ordered, That the respondents Thomas D. McBryde, Joe T. Pilcher and Perry Elliott, individually and as copartners trading under the name of The B-Vimm Company, or under any other name, their agents, representatives and employees, directly or through any corporate or other device, in connection with the sale or distribution of their preparation designated B-Vimm, or any other preparation containing substantially similar ingredients or possessing substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication:

(a) That B-Vimm constitutes an adequate vitamin, liver, or mineral dietary supplement;

(b) That respondents preparation contains all the essential vitamins and minerals, or that it has any value in treating any vitamin or mineral deficiency or conditions resulting therefrom, other than Vitamin B1 or iron deficiencies;

(c) That said preparation will give fast relief from any physical disorders or symptoms;

(d) That said preparation has any value in causing any organ to remove, or assisting any organ in removing, poisons from the blood;

(e) That said preparation has any value in relieving muscular pain or stiff joints, or in the treatment of high blood pressure, low blood

pressure, heart trouble, kidney trouble, arthritis, rheumatism, coughs, colds, "liver anemia" or pernicious anemia;

(f) That said preparation possesses any value in the treatment of tired, weak or rundown conditions, loss of pep or energy, lack of vitality, irritability, nervousness, sleeplessness, lack of appetite, underweight, constipation, indigestion, heartburn, deficiency of red blood, or any other symptoms or conditions resulting from vitamin or mineral deficiency, unless such representation be expressly limited to cases where such symptoms or conditions are due to Vitamin B1 or iron deficiencies;

2. Disseminating or causing to be disseminated by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1 above.

It is further ordered, That with respect to the issues raised by the complaint other than those to which this order relates, the complaint be, and the same hereby is, dismissed.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall, within sixty (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 the order to cease and desist [as required by said declaratory decision and order of July 19, 1953].