

IN THE MATTER OF
AMERICAN FLANGE AND MANUFACTURING COMPANY,
INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF
SEC. 3 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914

Docket 3391. Complaint, Apr. 28, 1938—Decision, Dec. 12, 1938

- Where a corporation engaged in (1) manufacture, offer, sale, and distribution, under trade-mark "Tri-Sure," of receptacle closure parts for metal containers, which included (a) closure-structures designed to close the holes through which such containers were filled and emptied, and consisting of a threaded metal flange or bushing affixed about hole punched in container, and threaded metal closing plug to fit into flange aforesaid, and (b) sealing caps for such closure-structures for protection of container against tampering and leakage, and in (2) licensing the use (a) by customer purchaser manufacturers, of applying dies, patents on which it held, for use by such customer purchasers in applying its aforesaid closure-structures to their metal containers, and (b) by customer purchasers of its "Tri-Sure" sealing caps, of sealing tools, patents on which it held, for applying to metal containers, after filling, said caps—
- (a) Included in the "License and Service Agreement" which it offered to, and solicited of, each of its purchasers of closure-structures engaged in manufacture of metal containers, and which, in substantially the same form, except as in paragraph (b) below noted, it made use of with purchasers of its sealing caps, provisions *inter alia* under which it obligated itself to replace without cost to purchaser-customer defective closures and, similarly, to repair or replace therefor applying dies, and to supply thereto engineering service, operating instructions and advice, and to service "Tri-Sure" sealing tools of such of customers of purchaser as used therewith its "Tri-Sure" parts and sealing tools, and to cooperate therewith and to protect and defend, as therein specified, purchaser from infringement suits, and purchaser-customer undertook to acknowledge validity of, or not contest or infringe, very large number of patents and patent applications set forth in said agreement, and including (1) patents under which it made and sold its closure structures, parts, and sealing caps, (2) patents on applying sealing devices, and (3) patents which it owned but did not use in the manufacture of any of such parts or devices, and (4) patents on combinations of closure parts which it made and sold, with metal drums which it did not;
- (b) Included in its said "License and Service Agreement," which it offered and solicited as hereinabove stated, provisions under which it allowed discount equal to 10 percent, in case of its manufacturer purchaser customers, of prices billed by it during any 6 months' period during which purchaser bought from it "Tri-Sure" closures for receptacles amounting to 80 percent or more of purchaser's total requirements for closures for receptacles of whatever kind or make for such period, in connection with agreements entered into with manufacturer-purchasers as aforesaid, and discount equal to 5 percent, in case of its sealing cap purchasers, and thereby, through

agreements and provisions aforesaid and sales thereunder, contracted for sale of its said closures and sealing caps, and made sales of its products, and fixed discount from and rebate upon prices charged therefor on condition which, in essence and to extent complied with to obtain such discounts and rebates, constituted an agreement which might tend to induce purchaser of such products not to use or deal in products of its competitors, with result that effect of such contracts, sales, discounts, and rebates had been or might be to substantially lessen competition between it and its competitors;

With result that most purchasers, including metal container manufacturers in competition generally with one another in manufacture of metal containers with closure parts attached and sale thereof to those engaged in business of filling such containers, and majority of its filler customers, entered into such license and service agreements to secure rebates on prices and engineering services and other commitments there provided for; and

- (c) Substituted for 80 percent condition in quantity discount provision in its agreement hereinabove set forth, through voluntary notification of its manufacturer customers and filler customers who had signed either of aforesaid agreements, provision that it would consider that those signers of its agreement had qualified for quantity discount aforesaid who, at the end of 6 months' periods, informed it by letter that during period in question "you have considered our flange and plug your standard, have recommended them to your customers without discrimination, and used them where you could," and incorporated in agreements thereafter made, since notification aforesaid, such condition or amendment;

With result that the capacity, tendency, and effect of its policy of using aforesaid agreements might have been to—

- (1) Induce purchasers to buy its said "Tri-Sure" closures and sealing caps from it to an extent which they might not have done in absence of such agreements, and to lessen the purchase or sale of other closures or sealing caps sold in competition therewith;
- (2) Secure (a) cooperation through such agreements of purchasers of its said products in extending its said business in manufacturing and selling closure structures and sealing caps for metal containers throughout the United States, and (b) acknowledgement from manufacturers of metal containers and fillers thereof of the validity, and agreement not to infringe or contest, certain patents or patent applications owned by it, without assurance as to such validity or certain means of obtaining such assurance;
- (3) Induce customers to accept a license under its patents for closure parts, some of which were sold outright by it with knowledge that they were to be applied and used on metal containers by the purchasers;
- (4) Secure from customers an acknowledgement and agreement not to infringe or contest validity of patents owned by it which it did not at present use or rely on in manufacture and sale of its said closure structures and parts;
- (5) Lessen competition between it and competing manufacturers in connection with manufacture and sale of closure structures or sealing caps for metal containers in the United States; and
- (6) Induce purchasers of its products to aid and assist it in making more effective its monopolies under such patents in manufacture and sale of such products and dies and tools for applying to metal containers products aforesaid:

Complaint

27 F. T. C.

Held, That policy and practice in using agreements aforesaid, insofar as they required, by reason of said provisions set out, customers to acknowledge validity of, or agree not to contest or infringe, patents covering products sold outright by it to customers, pending patent applications, and patents which it did not use in connection with manufacture and sale of such products, constituted unfair method of competition within intent and meaning of Federal Trade Commission Act; and

That its said policy and practice in using agreements aforesaid and inducing metal container manufacturers and fillers to execute same, constituted violation of the provisions of Section 3 of the Clayton Act, or Act of Congress approved October 15, 1914, and entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

Mr. Allen C. Phelps for the Commission.

Davis, Lindsey, Smith & Shonts and Wilkinson, Huxley, Byron & Knight, of Chicago, Ill., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and pursuant to the provisions of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act), as amended by "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes' approved October 15, 1914, as amended (U. S. C. title 15, sec. 13) and for other purposes" (the Robinson-Patman Act), and by virtue of the authority vested in the Federal Trade Commission by the aforesaid acts, the Federal Trade Commission having reason to believe that American Flange & Manufacturing Co., Inc., hereinafter designated as the respondent, has been and is violating the provisions of said Federal Trade Commission Act, and of said Clayton Act, as amended by the Robinson-Patman Act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in such respects as follows:

Charge 1

PARAGRAPH 1. Respondent, American Flange & Manufacturing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal office at 30 Rockefeller Plaza, New York, N. Y., and a factory at Chicago, Ill.

PAR. 2. Respondent is, and has been during the time herein mentioned, engaged in the business of manufacturing, of offering for sale, selling, and distributing receptacle-closure parts for metal con-

tainers. Among such receptacle-closure parts so manufactured and sold by respondent are closure-structures, which are designed to close the holes through which metal containers are filled and emptied. Such closure-structures consist essentially of a threaded metal flange or bushing which is affixed about a hole punched in the container, and a threaded metal plug which fits into the flange and closes the hole. Respondent also manufactures and sells a sealing cap for such closure-structures, which is designed to protect the container against tampering and leakage. Respondent markets its said closure parts under the trade-mark "Tri-Sure."

PAR. 3. Respondent's "Tri-Sure" closure-structures are applied to the metal containers by the use of certain applying dies, upon which respondent claims to hold patents. Respondent licenses the use of such applying dies to its customers who purchase from it closure-structures and who are engaged in the business of manufacturing metal containers. Respondent also sells "Tri-Sure" sealing caps to customers engaged in the filling of metal receptacles. Such sealing caps may be applied to respondent's closure-structures by means of certain sealing tools upon which respondent claims to hold patents. Respondent licenses its customers purchasing such "Tri-Sure" sealing caps to use such sealing tools in applying the caps to the metal containers after such containers have been filled.

PAR. 4. In the course and conduct of its said business, respondent licenses the use of its said allegedly patented dies and tools to purchasers of the receptacle-closure parts who are located in many of the States of the United States and in some foreign countries, and causes its said receptacle-closure parts, when sold, to be transported from the State in which the same are manufactured, being the State of Illinois, to, into and through other States of the United States. Respondent sells said receptacle-closure parts to metal-container manufacturers and metal container fillers in all parts of the United States, and sells and distributes its said products in commerce between and among the various States of the United States. There is and has been at all times herein mentioned a continuous current of trade and commerce in said products across State lines between respondent's factory in the State of Illinois and the various purchasers of such commodities located in other States of the United States. Such products are so sold and distributed for use, consumption, and resale within the various States of the United States.

PAR. 5. In the course and conduct of its business as aforesaid, respondent is now and during the times herein mentioned has been in substantial competition with other corporations, individuals, partnerships, and firms engaged in the business of manufacturing receptacle-

Complaint

27 F. T. C.

closure parts for metal containers, and offering for sale, selling, and distributing such products in commerce between and among the various States of the United States and the District of Columbia. Said competitors claim to have the right to so manufacture and sell their products, and claim to have valid patents on such receptacle-closure parts, and on certain dies and tools used in applying the same to metal containers.

PAR. 6. Respondent, in connection with the sale of its "Tri-Sure" closure structures to purchasers who are metal container manufacturers, pursues a policy of inducing and requiring such manufacturer-customers to sign a certain so-called license and service agreement. By the terms of such agreement respondent agrees to furnish to such customers certain sets of "Tri-Sure" applying dies, and licenses the use thereof solely for the purpose of applying "Tri-Sure" closures of metal containers. Respondent in said agreement warrants that it owns certain patents listed therein by number and purports to grant a nonexclusive license to the purchaser of its closures for the use of the same. The patents so enumerated in said agreements include patents under which respondent claims to manufacture its closure structures, parts, and sealing caps, as well as patents on applying and sealing devices, and includes also patents which respondent claims to own but which it does not use in the manufacture of any of such parts or devices. Said agreement contains the following provision:

The Company (purchaser) as one of the essential considerations of this agreement hereby acknowledges "American Flange's" sole right in and ownership of the trade-mark "Tri-Sure" for receptacle-closures, parts thereof and applying-dies and sealing tools therefor and hereby agrees not to infringe or contest same, directly or indirectly, nor to employ other than genuine "Tri-Sure" parts to fill any order calling for "Tri-Sure" closures and also hereby acknowledges for the entire respective term of each said patent, issued or to be issued, the validity thereof and hereby agrees not to infringe or contest same, directly or indirectly.

Said agreement provides further as follows:

Should "The Company" (purchaser) during any six (6) months period purchase from the "American Flange" "Tri-Sure" closures for receptacles amounting to eighty (80) percent or more, of the company's total requirements of closures for receptacles of whatever kind or make for such six (6) months period, and should certify the same in writing, signed by a responsible officer of The Company, "American Flange" shall then allow a quantity discount equal to ten (10) percent of the prices billed by the said "American Flange" during such six (6) months period. Should any dispute arise with respect to said certification, then "American Flange" shall have the option to employ certified public accountants during business hours to examine "The Company's" books in order to ascertain the correctness of such certification.

PAR. 7. Respondent has attempted to induce and require each and every one of its purchasers of closure-structures, engaged in the manufacture of metal containers, to sign one of the aforesaid agreements, and a majority of such purchasers have been induced to enter into the same to secure the rebates on price therein provided for. Some of said metal container manufacturers, who purchase "Tri-Sure" closures from respondent, have refused to execute such agreements on the ground that they were unlawful or upon other grounds, and some of such manufacturer customers have signed said agreement with certain modifications. Respondent refuses to give any discount in price or grant any rebate thereon to customers who have not signed said agreement. Said manufacturers of metal containers so purchasing "Tri-Sure" closures from respondent are generally in competition with one another in the manufacture of metal containers with closure parts attached, and the sale thereof to corporations, partnerships, and individuals engaged in the business of filling metal containers.

PAR. 8. Respondent, in connection with its sale of such "Tri-Sure" sealing caps to corporations, partnerships, and individuals engaged in the filling of metal containers, pursues a policy of requiring such purchasers of sealing caps to enter into a so-called license and service agreement, which is substantially in the same form as the license and service agreement set forth in paragraph 6 above. Such license and service agreement so imposed upon fillers of metal receptacles lists the same patents as those contained in the agreement set forth in said paragraph 6, although it does not warrant the ownership thereof in respondent. It also contains the same two provisions as are set out verbatim in said paragraph 6. Respondent has induced the majority of its filler customers to execute such so-called license and service agreements as a means of securing the rebates on price therein provided for.

PAR. 9. The capacity, tendency, and effect of respondent's policy of using said agreements, considered as a whole, has been or may be: To prevent purchasers buying "Tri-Sure" closures and sealing caps from respondent, from purchasing or using other closures and sealing caps sold in competition with respondent's products; to monopolize in respondent the business of manufacturing and selling closure structures and sealing caps for metal containers throughout the United States; to coerce manufacturers of metal containers and fillers of such containers into acknowledging the validity of the patents claimed to be owned by respondent and to prevent such manufacturers and fillers from recognizing the validity or existence of any other patents for the manufacture of similar devices sold in competition with respondent's products; to coerce metal container manufacturers and fillers into acknowledging respondent's asserted sole right and ownership in the

Complaint

27 F. T. C.

trade-mark "Tri-Sure" and to prevent such purchasers from recognizing the existence or validity of other trade-marks on similar competitive products; to restrain, hinder, lessen, and injure competition between respondent and competing manufacturers in connection with the manufacture and sale of closure structures and sealing caps for metal containers in the United States; to unreasonably restrain trade in such products; to require metal container manufacturers and fillers under certain conditions to submit to an examination of their books by respondent; and generally to coerce and compel such purchasers of respondent's products to aid and assist respondent in promoting and creating a monopoly under such alleged patents in the manufacture and sale of such products and dies and tools for applying the same to metal containers.

PAR. 10. The policy and practice of respondent in using the above-described agreements and requiring and inducing metal container manufacturers and fillers to execute the same is and was an unfair method of competition within the intent and meaning of the Federal Trade Commission Act prior to its amendment on March 21, 1938, and constitute an unfair method of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of said Federal Trade Commission Act as amended on March 21, 1938.

Charge 2

PARAGRAPH 1. Paragraphs 1 to 9 inclusive of charge 1 are hereby incorporated herein as though set forth verbatim.

PAR. 2. Respondent in entering into the above-described agreements and in carrying out the provisions thereof and making sales thereunder has made contracts for the sale of its closures and sealing caps, has made sales of such products, and has fixed a discount from and rebate upon the prices charged therefor, on the condition, agreement, and understanding that the purchaser of such products shall not use or deal in the products of competitors, and the effect of such contracts, sales, discounts, and rebates has been or may be to substantially lessen competition between respondent and its said competitors and to tend to create a monopoly in respondent in the manufacture and sale of receptacle-closure parts and in the leasing of applying dies and tools for such parts.

PAR. 3. The acts, practices, and policies set forth in the preceding paragraph are in violation of Section 3 of the Clayton Act.

Charge 3

PARAGRAPH 1. Paragraph 1 to paragraph 9 inclusive of charge 1 are hereby incorporated herein as though fully set forth verbatim.

PAR. 2. Respondent has been making sales of such closure-structures to metal container manufacturers who have executed the above-described so-called license and service agreements and to those who have refused to execute the same.

PAR. 3. Respondent has been making sales of sealing caps for metal containers to fillers of metal containers who have executed the license and service agreements above referred to, and to those who have refused to execute such agreements.

PAR. 4. Since prior to June 19, 1936, respondent has allowed a discount or rebate of 10 percent to those of its purchasers who have executed and abided by such so-called license and service agreements, or who have substantially complied therewith, which allowance and discount it has refused to make to other purchasers.

PAR. 5. In the course and conduct of its business as above described, since prior to June 19, 1936, respondent has been and is now discriminating in price between different purchasers of closures and selling caps for metal containers in like grades and qualities so sold by respondent in interstate commerce for use, consumption, or resale, by giving and allowing some of its purchasers lower prices than those given or allowed other of its said purchasers, many of whom are actively engaged one with the other in the resale of such products in the United States. Said discriminations are brought about by the practice and policy pursued by respondent of granting a 10 percent discount to all of its purchasers who purchase from respondent 80 percent or more of their total requirements of closure parts for a given 6 months' period, or who substantially comply with the terms of the aforesaid agreements, which said discount is not allowed to other purchasers.

PAR. 6. The general effect of such discriminations in price, as so made by respondent as above set forth, has been or may be to lessen competition and to injure, destroy, and prevent competition between respondent and its competitors in the manufacture, sale, and distribution of closures and sealing caps for metal containers, and also has been or may be to substantially lessen competition and to injure, destroy, and prevent competition in the resale of such closures between and among some of the said favored purchasers of such products so receiving such discriminatory discounts and rebates, and some of the competitive unfavored purchasers not receiving such discriminatory discounts and rebates. The effect of such discriminations in price also has been and may be to tend to create a monopoly in respondent in said line of commerce and to tend to create a monopoly in said favored purchasers receiving such discriminatory price in the resale of such closures so applied to metal containers in

Findings

27 F. T. C.

the various localities or trade territories in the United States in which such purchasers respectively are engaged in the business of manufacturing metal containers.

PAR. 7. The foregoing alleged acts and practices of said respondent are in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, and pursuant to the provisions of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act), as amended by "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes' approved October 15, 1914, as amended (U. S. C. title 15, sec. 13), and for other purposes" (the Robinson-Patman Act), and by virtue of the authority vested in the Federal Trade Commission by the aforesaid acts, the Federal Trade Commission on April 28, 1938, issued and served its complaint in this proceeding upon respondent, American Flange & Manufacturing Co., Inc., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said Federal Trade Commission Act and with violating the provisions of Section 3 of the Clayton Act and Section 2 of the Clayton Act as amended by the Robinson-Patman Act. Thereafter, a stipulation was entered into in lieu of answer to the complaint whereby it was stipulated and agreed that a statement of facts signed and executed by the respondent and its counsel, George L. Wilkinson and Harry W. Lindsey, Jr., for the purposes of this proceeding only, and W. T. Kelley, Chief Counsel of the Federal Trade Commission, subject to the approval of the Commission, may be taken as the facts in this proceeding and in lieu of testimony in support of the charges stated in the complaint, or in opposition thereto, and that the said Commission may proceed upon said statement of facts to make its report, stating its findings as to the facts and its conclusion based thereon and enter its order disposing of this proceeding without the presentation of argument or the filing of briefs.

Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and stipulation, said stipulation having been approved, accepted and filed, and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest

of the public and makes this, its findings as to the facts and its conclusions drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, American Flange & Manufacturing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal office at 30 Rockefeller Plaza, New York, N. Y., and a factory at Chicago, Ill.

PAR. 2. Respondent is, and has been during the time herein mentioned, engaged in the business of manufacturing, of offering for sale, selling, and distributing receptacle-closure parts for metal containers. Among such receptacle-closure parts, so manufactured and sold by respondent are closure-structures, which are designed to close the holes through which metal containers are filled and emptied. Such closure-structures consist essentially of a threaded metal flange or bushing which is affixed about a hole punched in the container, and a threaded metal plug which fits into the flange and closes the hole. Respondent also manufactures and sells a sealing cap for such closure-structures, which is designed to protect the container against tampering and leakage. Respondent markets its said closure parts under the trade-mark "Tri-Sure."

PAR. 3. Respondent's "Tri-Sure" closure-structures are applied to metal containers by the use of certain applying dies, upon which respondent holds patents. Respondent licenses the use of such applying dies to its customers who purchase from it closure-structures and who are engaged in the business of manufacturing metal containers. Respondent also sells "Tri-Sure" sealing caps to customers engaged in the filling of metal receptacles. Such sealing caps may be applied to respondent's closure-structures by means of certain sealing tools upon which respondent holds patents. Respondent licenses its customers purchasing such "Tri-Sure" sealing caps to use such sealing tools in applying the caps to the metal containers after such containers have been filled.

PAR. 4. In the course and conduct of its said business, respondent licenses the use of its said patented dies and tools to purchasers of the receptacle-closure parts who are located in many of the States of the United States and in some foreign countries, and causes its said receptacle-closure parts, when sold, to be transported from the State in which the same are manufactured, being the State of Illinois, to, into, and through other States of the United States. Respondent sells said receptacle-closure parts to metal container manufacturers and metal container fillers in all parts of the United States, and sells and

distributes its said products in commerce between and among the various States of the United States. There is and has been at all times herein mentioned a continuous current of trade and commerce in said products across State lines between respondent's factory in the State of Illinois and the various purchasers of such commodities located in other States of the United States and foreign countries. Such products are so sold and distributed for use, consumption, and resale within the various States of the United States.

PAR. 5. In the course and conduct of its business as aforesaid, respondent is now and during the times herein mentioned has been in substantial competition with other corporations, individuals, partnerships, and firms engaged in the business of manufacturing receptacle-closure parts for metal containers, and offering for sale, selling, and distributing such products in commerce between and among the various States of the United States and the District of Columbia.

PAR. 6. Respondent, in connection with the sale of its "Tri-Sure" closure structures to purchasers who are metal container manufacturers, and prior to the issuance of the complaint herein, but not thereafter, pursued the policy of entering into with many of such manufacturer-customers the following license and service agreement:

LICENSE AND SERVICE AGREEMENT WITH
METAL-RECEPTACLE MANUFACTURERS

(No. B----- Dated ----- 19--)

It is agreed between LICENSOR, AMERICAN FLANGE & MANUFACTURING CO., INC., an Illinois corporation, with principal office at 30 Rockefeller Plaza, New York, U. S. A., hereinafter called "AMERICAN FLANGE" and LICENSEE, a company engaged in the manufacture of metal receptacles, with principal office at-----and plant(s) at-----, hereinafter called "THE COMPANY" that

WHEREAS "AMERICAN FLANGE" has developed and markets co-acting receptacle-closure parts which are known by its trade-mark "TRI-SURE" and also applying-dies and sealing-tools therefor; and

WHEREAS both parties hereto recognize that "THE COMPANY'S" most effective and reliable employment of "TRI-SURE" closures in receptacles it makes, and as well the maintenance of best repute of "AMERICAN FLANGE" "TRI-SURE" closures among consumers, requires that such closures be applied by use of "AMERICAN FLANGE'S" special applying-dies therefor and that said dies be duly serviced and kept up for close adherence in all respect to "AMERICAN FLANGE'S" dimensional standards and for operating-efficiency, enabling proper jointure of the closures with the receptacles and also their suitability to co-act properly with "AMERICAN FLANGE'S" other "TRI-SURE" parts to be guaranteed to consumers; and

WHEREAS "THE COMPANY" desires to have the use of suitable equipment of "AMERICAN FLANGE'S" said special applying-dies, same to be used in and for, only, such employment as "THE COMPANY" makes of said "TRI-

SURE" closures and also to have full benefit of "AMERICAN FLANGE'S" within-stated service-commitments, parts-guarantees, and patent-defense obligations, and also to acquire herein-stated license under certain patents and patent-applications of "AMERICAN FLANGE."

NOW, THEREFORE, in consideration of the premises and of the mutual covenants of the parties hereto well and truly to be kept and performed by them as herein stated,

(1) "AMERICAN FLANGE" has supplied to "THE COMPANY" or promptly shall do so, certain sets of "AMERICAN FLANGE'S" "TRI-SURE" applying dies all in good order, of sizes and types listed in Schedule "J" appended hereto as a part hereof, each of which dies, together with any additional or replacement dies hereafter supplied under this agreement, which "THE COMPANY" is hereby authorized and licensed, to use solely for, and agrees not to use otherwise than for, applying to metal receptacles of "THE COMPANY'S" own make "TRI-SURE" closures purchased by "THE COMPANY" from "AMERICAN FLANGE" and applied in keeping with "AMERICAN FLANGE'S" dimensional standards and specifications for proper jointure with said receptacles and proper co-action with "AMERICAN FLANGE'S" "TRI-SURE" assembly; and

(2) "AMERICAN FLANGE" covenants and guarantees, with respect to said closures so purchased and said dies so used

(a) To replace without cost to "THE COMPANY," upon due return thereof to "AMERICAN FLANGE" for replacement, any "TRI-SURE" closures found defective in material, workmanship or dimensioning;

(b) To repair or replace without cost to "THE COMPANY," upon due return thereof to "AMERICAN FLANGE" for repair or replacement, any said "TRI-SURE" applying-dies heretofore or hereafter furnished and used under this agreement which is, or under "THE COMPANY'S" careful use becomes, defective in structure or operation;

(c) To supply at "THE COMPANY'S" request and without cost to "THE COMPANY" reasonable engineering-service, operating instructions and advice to aid "THE COMPANY" in efficiently utilizing said "TRI-SURE" closures and said applying-dies therefor; and

(d) To co-operate with and to service the "TRI-SURE" sealing-tools of such of "THE COMPANY'S" customers for its "TRI-SURE" closed receptacles as used therewith "AMERICAN FLANGE'S" "TRI-SURE" parts and sealing-tools, at such customers' request; and further

(3) "AMERICAN FLANGE" warranting that it owns the within-mentioned patents and patent applications, pertinent to the subject matter of this agreement, grants to "THE COMPANY" a non-exclusive license under United States patents Nos. (Reissue) 16,659; 1,413,989; 1,473,411; 1,467,916; 1,513,516; 1,513,637; 1,513,638; 1,529,929; 1,543,355; 1,543,451; 1,547,003; 1,554,764; 1,591,058; 1,633,555; 1,633,556; 1,640,594; 1,644,153; 1,644,154; 1,645,163; 1,656,228; 1,656,229; 1,656,241; 1,663,099; 1,690,523; 1,711,291; 1,718,610; 1,737,182; 1,737,675; 1,737,676; 1,743,475; 1,777,772; 1,789,928; 1,799,244; 1,887,435; 1,887,448; 1,887,449; 1,887,485; 1,901,196; 1,910,410; 1,910,411; 1,949,979; 1,951,491; 1,964,603; 1,966,049; 1,982,144; 1,982,145; 1,997,203; 1,999,205; 2,029,341; 2,034,776; 2,040,088; 1,617,302; 1,689,510; 1,720,807; 1,891,033; 1,905,969; 1,931,243; 1,939,934; applications for United States patents Serial Nos. 88,308; 92,058; 43,138; 66,203; 71,631; 11,428; 120,316; 124,814; 128,365; 150,785; 158,477; 173,123; 173,124; 584,316; 667,179; also United States patents Nos. (Reissue) 20,647; 1,893,980; 1,956,135; 1,992,855; 2,035,198; 2,080,881;

Findings

27 F. T. C.

2,100,168; and under any corresponding foreign patents and applications therefor, owned or controlled by "AMERICAN FLANGE" and any division, renewals or continuations of said applications and under all United States or foreign patents resulting from said applications, and under any reissue of any of the aforesaid patents heretofore or hereafter issued, for the full term of each thereof, to use as aforesaid, but not otherwise, each set of closure-applying dies heretofore or hereafter furnished to "THE COMPANY" under this agreement, in applying to "THE COMPANY'S" receptacles as aforesaid, but not otherwise, "TRI-SURE" closures purchased from "AMERICAN FLANGE." "THE COMPANY", as one of the essential considerations of this agreement hereby acknowledges "AMERICAN FLANGE'S" sole right in and ownership of the trade-mark "TRI-SURE" for receptacle-closures, parts thereof, and applying-dies and sealing tools therefor and hereby agrees not to infringe or contest same, directly or indirectly, nor to employ other than genuine "TRI-SURE" parts to fill any order calling for "TRI-SURE" closures and also hereby acknowledges for the entire respective term of each said patent, issued or to be issued, the validity thereof and hereby agrees not to infringe or contest same, directly or indirectly; and further

(4) Providing that "THE COMPANY" faithfully complies with each of the terms and conditions stated herein on its part to be performed, "AMERICAN FLANGE" covenants to protect and defend "THE COMPANY" against any charge of infringement of any United States or foreign patent based on "THE COMPANY'S" use hereunder of said "TRI-SURE" closures and said applying-dies, provided "THE COMPANY" shall immediately report to "AMERICAN FLANGE" in writing each and all such infringement claims and shall, in writing, promptly give "AMERICAN FLANGE" sole and irrevocable authority to defend or settle such claim or claims and shall at all times fully and freely give "AMERICAN FLANGE" the benefit of "THE COMPANY'S" information and co-operation in the matter.

All said applying-dies, now or hereafter being in "THE COMPANY'S" possession under this agreement shall be and forever remain "AMERICAN FLANGE'S" property, and "THE COMPANY" agrees with respect to same as follows: not to part with possession of any except by return to "AMERICAN FLANGE"; to keep and to use said dies in only its aforementioned plant or plants; to use said dies with due, reasonable care in keeping with "AMERICAN FLANGE'S" specifications and use-instructions; to permit "AMERICAN FLANGE'S" authorized representatives to inspect said dies and the closures and receptacles upon which they are being used at any reasonable time in ordinary business hours; to return any or all of said dies to "AMERICAN FLANGE" promptly upon written request, and that all dies returned for any reason will be properly packed by "THE COMPANY" and shipped to "AMERICAN FLANGE" charges prepaid. For repair or replacement of dies accidentally or negligently damaged, destroyed or lost, while in "THE COMPANY'S" possession, "THE COMPANY" shall promptly pay the reasonable charges, to be made by "AMERICAN FLANGE" and further

(5) "AMERICAN FLANGE" agrees to supply "THE COMPANY" with its requirements of "TRI-SURE" closures, for use as aforesaid, subject to "AMERICAN FLANGE'S" current prices and terms, as from time to time may be issued in "AMERICAN FLANGE'S" price list, with the express understanding that "AMERICAN FLANGE" in no way wishes to limit the use by "THE COMPANY" of closures which do not infringe on any United States or foreign patents or patents pending owned by "AMERICAN FLANGE" and of which "THE COMPANY" has had notice. Should "THE COMPANY", during any six (6) months period, pur-

1286

Findings

chase from the "AMERICAN FLANGE" "TRI-SURE" closures for receptacles amounting to eighty (80%) per cent, or more, of "THE COMPANY'S" total requirement of closures for receptacles of whatever kind or make for such six (6) months period, and should certify the same in writing, signed by a responsible officer of "THE COMPANY", "AMERICAN FLANGE" shall then allow a quantity discount equal to ten (10%) per cent of the prices billed by the said "AMERICAN FLANGE" during such six (6) months period. Should any dispute arise with respect to said certification, then "AMERICAN FLANGE" shall have the option to employ Certified Public Accountants during business hours, to examine "THE COMPANY'S" books in order to ascertain the correctness of such certification; and further

(6) It is mutually agreed that this License and Service Agreement supersedes, as of the date hereof, any and all prior agreements between these parties that in any way concern the subject matter of the instant agreement; and that this License and Service Agreement is not transferable or assignable by "THE COMPANY" or by operation of law save in connection with the transfer of its entire business as a going concern and not then save subject to the essential condition that the transferee shall, by due acceptance in writing, delivered to "AMERICAN FLANGE" within thirty (30) days after said transfer, fully assume and agree to the same in the place and stead of "THE COMPANY". In the event of the insolvency or bankruptcy of "THE COMPANY" or its assignment for the benefit of creditors, "AMERICAN FLANGE" shall have the right and power forthwith to enter the premises of "THE COMPANY" and remove and take possession of all the said closure-applying dies,

This agreement shall be interpreted and construed according to the Laws of the State of New York, U. S. A.

IN WITNESS WHEREOF, the parties hereto subscribed in duplicate by their respective duly authorized agents, this _____ day of _____ A. D. 19__.

AMERICAN FLANGE & MANUFACTURING CO., INC.

By _____

Its _____

duly authorized hereunto,

By _____

Its _____

duly authorized hereunto.

(End of Agreement)

PAR. 7. Respondent, prior to the issuance of the complaint herein, but not thereafter, and in connection with its sale of such "Tri-Sure" sealing caps to corporations, partnerships, and individuals engaged in the filling of metal containers, pursued a policy of entering into with many of such purchasers of sealing caps, a license and service agreement which was substantially in the same form as the license and service agreement set forth in paragraph 6 above, except that the so-called quantity discount provided for in paragraph 5 of said agreement was 5 percent in the case of filler-customers instead of 10 percent as in the agreement set forth in full above.

Findings

27 F. T. C.

PAR. 8. The patents so enumerated in said agreements include patents under which respondent manufactures and sells its closure structures, parts, and sealing caps, as well as patents on applying sealing devices, and include also patents which respondent owns but which at present it does not use in the manufacture of any of such parts or devices, and patents on combinations with metal drums of closure parts manufactured and sold by respondent. Respondent does not make or sell drums.

PAR. 9. Respondent, prior to the issuance of the complaint herein, but not thereafter, offered to each and every one of its purchasers of closure structures engaged in the manufacture of metal containers, one of the aforesaid agreements, and solicited such purchasers to enter into the same. Most of such purchasers entered into said agreements to secure the rebates on prices and engineering services and other commitments of respondent therein provided for. Said manufacturers of metal containers so purchasing "Tri-Sure" closures from respondent are generally in competition with one another in the manufacture of metal containers with closure parts attached and the sale thereof to corporations, partnerships, and individuals engaged in the business of filling metal containers. Respondent, prior to the issuance of the complaint herein, but not thereafter, has entered into with the majority of its filler customers, such license and service agreements as a means of securing rebates on prices, engineering services, and other commitments of respondent therein provided for.

PAR. 10. Prior to the issuance of the complaint herein, respondent voluntarily notified its manufacturer-customers and its filler customers who had signed either of the so-called license and service agreements as follows:

We will consider that you have qualified for our quantity discount when at the end of six months periods you inform us by letter that during the period you have considered our flange and plug your standard, have recommended them to your customers without discrimination and used them where you could.

And since notification to respondent's customers of the foregoing amendment of its customer agreement, all agreements between respondent and its customers have been made subject to the foregoing amendment.

PAR. 11. The capacity, tendency, and effect of respondent's policy of using said agreements may have been to induce purchasers to buy "Tri-Sure" closures and sealing caps from respondent to an extent which they might not have done in the absence of such agreements and to lessen the purchase or sale of other closures or sealing caps sold in competition with respondent's products; to secure the cooperation, by means of such agreements, of purchasers of respondent's

products in extending the business of respondent in manufacturing and selling closure structures, and sealing caps for metal containers throughout the United States; to secure from manufacturers of metal containers and fillers of such containers acknowledgment of the validity and an agreement not to infringe or contest certain patents and patent applications owned by respondent, without assurance as to such validity or certain means of obtaining such assurance; to induce customers to accept a license under its patents for closure parts, some of which are sold outright by respondent, with knowledge that they are to be applied and used on metal containers by the purchasers; to secure from customers an acknowledgment and agreement not to infringe or contest the validity of patents owned by respondent which respondent does not at present use or rely on in the manufacture and sale of its said closure structures and parts; to lessen competition between respondent and competing manufacturers in connection with the manufacture and sale of closure structures, or sealing caps, for metal containers, in the United States; and to induce purchasers of respondent's products to aid and assist respondent in making more effective its monopolies under such patents in the manufacture and sale of such products and dies and tools for applying the same to metal containers.

PAR. 12. Respondent, in entering into the above-described agreements, before their amendment prior to issuance of the complaint herein as aforesaid, and in carrying out the provisions thereof and making sales thereunder, has made contracts for the sale of its closures and sealing caps, has made sales of such products, and has fixed a discount from and rebate upon the prices charged therefor, on a condition which, in its essence and to the extent it is complied with to obtain the discounts from and rebate upon such prices, constitutes an agreement which may tend to induce the purchaser of such products not to use or deal in the products of respondent's competitors, and the effect of such contracts, sales, discounts, and rebates has been or may be to substantially lessen competition between respondent and its said competitors.

CONCLUSION

The Commission concludes from the above facts:

1. The policy and practice of respondent in using the above-described agreements, in so far as they require by reason of section (3), respondent's customers to acknowledge the validity of or to agree not to contest or infringe patents covering products sold outright by respondent to its customers pending patent applications and patents which it does not use in connection with the manufacture and sale of

Order

27 F. T. C.

such products, is and was an unfair method of competition within the intent and meaning of the Federal Trade Commission Act.

2. The policy and practice of respondent in using the above-described agreements and inducing metal container manufacturers and fillers to execute the same constitute a violation of Section 3 of the Clayton Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and a stipulation as to the facts entered into between the respondent herein and W. T. Kelley, Chief Counsel for the Commission, which provides among other things that without further evidence or other intervening procedure, the Commission may issue and serve upon the respondent herein findings as to the facts and conclusions based thereon and an order disposing of the proceedings, and the Commission having made its findings as to the facts and conclusions that said respondent has violated the provisions of the Federal Trade Commission Act and the provisions of Section 3 of an act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act).

It is ordered, That respondent, American Flange & Manufacturing Co., Inc., a corporation, its officers, directors, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of its "Tri-Sure" or other closure structures or parts for metal containers in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Soliciting, persuading, or inducing any purchaser of "Tri-Sure" or other metal receptacle closure flanges or sealing caps, in connection with the purchase of such products, to accept a license from respondent for the use of the patents under which said patented articles are manufactured and sold by it to its customers, to acknowledge the validity of or to agree not to contest or infringe such patents, or patents which respondent does not use in connection with the manufacture or sale of such articles to its customers, or pending applications for patents held or claimed by respondent or any patent in advance of its issuance.

2. Recognizing or continuing in force any of the above-described provisions in any existing contract between respondent and a purchaser which was obtained by solicitation or inducement on the part of respondent, provided however, that nothing herein shall require

respondent to cease and desist from recognizing or continuing in force or entering into any contract, agreement or license containing provisions for the recognition of the validity of patents or patent applications by a licensee, licensed by respondent to manufacture under such patents or patent applications or the validity of any patent or patents or patent applications covering dies and tools leased or loaned by respondent to its customers or covering methods or processes carried out by dies and tools in applying flanges and sealing caps manufactured and sold by respondent.

3. Offering, giving, or agreeing to give any discount from or rebate on the prices of respondent's products upon the condition or understanding that the purchaser thereof will purchase or has purchased from respondent said products to the extent of 80 percent or any other percentage or proportion of his total requirements of products designed for the same use and purpose for any designated period.

4. Offering, giving, or agreeing to give any discount from or rebate on the prices at which respondent sells its products on the condition or understanding that such purchaser has or will certify or acknowledge that he considers respondent's said products superior to all other similar products or the standard to be applied in measuring the quality, utility, or efficiency of respondent's products as compared to similar products sold by competitors of respondent.

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

IN THE MATTER OF
GOLD MEDAL BOOKS, INC.

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

Docket 2880. Complaint, July 24, 1936—Decision, Dec. 13, 1938

Where a corporation engaged in offer and sale of books of fiction, periodicals, and pamphlets, in commerce among the various States and in the District of Columbia; in soliciting, through periodicals circulated among purchasers and prospective purchasers in various States and in said District, sale, for 98 cents, of group of five books which, as originally bound, jacketed, and published in original edition, sold at prices ranging from \$2.00 to \$2.50 each—

Depicted, under heading "MOST SENSATIONAL OFFER IN PUBLISHING HISTORY," and, in large bold type statement "\$11.50 WORTH OF 'BEST SELLERS' Now Only 98¢," and statement in small, but plain, type "Here are the 5 books you've always wanted to buy * * * so sensational in theme the public made them 'best sellers' overnight at \$2 and \$2.50 each. Now you get all five for only 98¢ * * * the book opportunity of a lifetime! Don't delay!", aforesaid five books against a black background, as originally bound, jacketed, and published as aforesaid, and in the original edition and in the form in which each sold at said prices ranging from \$2.00 to \$2.50 each, together with, in corner of advertisement and in very small and relatively inconspicuous miniature type (and under enlarged words "COMPLETE * * * UNCENSORED"), notice to the effect that the books, as then being offered for 98 cents, were reprints, facts being specific edition of books then offered were not identical with or equal in value to original editions referred to in form or in quality, but were reprints in paper covers of such original editions, and were not identical in form, make-up, and quality with the original, which sold at one time for such higher prices, but were inferior thereto, and said reprints never sold at such higher prices or at price of \$11.50 for group, or at price greater than 98 cents, and boxed explanatory statements referred to were, under circumstances of such advertisements, either wholly unnoticeable or left unread by many readers, and were without force as an informative or material portion of such advertisements and did not place purchasers or prospective purchasers on notice that edition in question was reprint and not original one which at one time sold for price indicated;

With tendency and capacity to mislead and deceive members of purchasing public with respect to quality and value of books distributed and sold by it, and particularly to mislead them into false and erroneous belief that edition thereof being sold for 98 cents for entire group was same as original one which sold at prices ranging from \$2.00 to \$2.50 each, or \$11.50 for the group of five, and with result that purchasing public bought said edition of five books above referred to in reliance upon the truthfulness of said representations and trade was thereby unfairly diverted to it from its