

IN THE MATTER OF
THE HUBINGER COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SUBSEC. (a) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914,
AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket \$801. Complaint, June 1, 1939—Decision, Apr. 3, 1941

Where a corporation engaged in manufacture and competitive interstate sale and distribution of glucose or corn syrup unmixed, and gluten feed, by-product thereof—

In selling its said syrup, of like grade and quality, to, mostly, candy manufacturers competitively engaged in sale to various customers, including chain stores, wholesalers, and retailers of candy, in most kinds of which such syrup is used, with cost thereof to candy manufacturer purchasers constituting (1) a substantial part of cost of raw materials used in particular candies having high syrup content and of the total cost of manufacturing an extensive line of candies having a wide range of syrup content, and (2) a significant and possibly determinative factor in competitive sales to customers, especially chain store and other large quantity purchasers, of many candies containing substantial quantity of such syrup ingredient, priced a few cents a pound only, and bearing no differentiating name or brand, and in sale of which candy sellers attract customers by selling at only fraction of a cent per pound lower than competitor, so that unfavored purchaser's higher raw material costs are difficult, if not impossible, to recover by increasing selling price of candy manufactured if such purchaser hopes to maintain his sales volume—

- (a) Sold and delivered its said syrup in several types and sizes of containers, including barrels, half-barrels and 10- and 5-gallon kegs, at prices per hundredweight which increased over tank car prices per hundredweight according to size and type of container, with differentials ranging from 13 cents for such drums, where there was no return freight thereon, to \$1.08 for said 5-gallon kegs;
- (b) Sold its said product, between June 19, 1936, and July 25, 1937, at higher delivered prices per hundredweight to purchasers located in certain cities other than Chicago and Zion, Ill., than those at which it sold said syrup in containers of like size and type to purchasers located in such cities, and thereafter sold its said product to purchasers in certain cities other than Chicago at higher prices per hundredweight than those at which it sold its said syrup in containers of like size and type to purchasers located in city aforesaid, and at prices which were not uniformly higher, but varied with geographic location;
- (c) Sold its said syrup to a certain Chicago concern at delivered prices which were 10 cents per hundredweight less than those which it charged other purchasers in said city, through granting and allowing it, for portion of period involved, such discount from its regular list prices for delivery in city in question, and thereafter through contract entered into by it with concern in question, under which discount was granted and allowed in consideration

of latter's undertaking to purchase minimum of 125 tank cars of product in question yearly, for delivery at rate of not less than 5 and not more than 35 cars a month;

- (d) Sold its said syrup to a certain grocery company in Muskogee, Okla., at delivered prices which were 10 cents per hundredweight less than those at which it sold said product to other purchasers located in said city, through accepting arbitrary deduction of said amount in full payment for product sold to said concern, and invoiced to it at full current market price; and
- (e) Continued to sell its said syrup to certain purchasers, most of whom were large quantity buyers and located in Chicago, at its old and lower price, while concurrently selling syrup of like grade and quality to other purchasers at its new and higher price;

With result that—

(1) It discriminated, through sale of its syrup at said varying prices, differences between which were not shown by it as making only due allowance for differences, if any, in the cost of manufacture, sale or delivery resulting from the differing methods or quantities, if any, in which said commodities were sold and delivered to such buyers, between purchasers who paid various different prices for commodities in question; and unfavored candy manufacturer purchasers, whose costs increased over those of favored purchasers directly as the amount of the discrimination between them and the syrup content of their candy increased, were placed under a competitive disadvantage;

(2) Effect on those unfavored manufacturer purchasers whose products were sold on very close and competitive margin, as hereinbefore set forth, and for whom it was difficult, if not impossible, to recover higher raw material costs by increasing price of product if purchaser hoped to maintain his sales volume, was to decrease his profit to extent necessary to absorb higher direct per unit cost imposed by higher syrup cost as long as he attempted to sell his candy at competitive price, and in event, through such absorption, of impairment of profit to any material degree, of bringing about only selective sales by such purchaser at non-competitive prices to customers on basis of service or on some other non-price basis, with consequently reduced volume of sales, unused capacity and increased overhead unit cost on particular, and also on all, products, with further impairment of profits thus entailed;

(3) Such impairment of profits tended to weaken, financially, existing unfavored candy manufacturers, with possibility of bringing about their elimination from the industry, and proved an effective deterrent to establishment of new candy manufacturing enterprises in those areas in which it discriminated as above set forth;

(4) There was conferred upon favored purchasers monetary benefits which gave them substantial competitive advantage, enabling them to reduce selling price of their candy, lower costs, and increase volume and profits, with result that such benefits could well lead to domination by said favored purchasers of industry in question; and

(5) Effect of lower prices granted to said Chicago and Muskogee concerns was sufficient to attract substantial business to instant corporation from its competitors; and

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Where said corporation engaged, as aforesaid, in manufacture of such glucose or corn syrup unmixed and gluten feed, byproduct thereof, and in competitive interstate sale and distribution of such products;

In selling its said gluten feed, purchasers of which were all feed dealers competitively engaged in the resale thereof—

- (f) Sold its said product to 9 particular purchasers at prices which were 50 cents per ton less than those at which it concurrently sold such feed of like grade and quality to all other purchasers, in accordance with the terms of a written contract entered into by it with them, providing for such an allowance in consideration of their undertaking purchase of 100 tons per month for 12 months;

with result that—

(1) It discriminated in price, through selling its said feed at such different prices, differences between which were not shown by it as making only due allowance for differences, if any, in the cost of manufacture, sale or delivery resulting from the differing methods or quantities, if any, in which such commodity was sold or delivered to such customers, between purchasers who paid the different prices therefor;

(2) Allowances granted and paid by it to such favored feed dealers were sufficient, if and when reflected in whole or substantial part in reduced resale prices, to attract business away from non-contract competing feed dealer customers of instant corporation paying higher prices, or to force such unfavored dealers to resell said feed at substantially reduced profit or refrain from reselling; and

(3) Such allowances were likewise sufficient, if not reflected in reduced resale prices, substantially to increase margins of profit of said contract feed dealers over and above margins of profit otherwise obtainable in resale of such commodity by such noncontract feed dealer customers paying higher prices to said corporation;

With effect that discriminations aforesaid in sale of such glucose or corn syrup unmixed and gluten feed as above set forth, might substantially lessen competition between favored and unfavored purchasers, tend to create monopoly in former and injure, destroy or prevent competition therewith, and that discriminations in favor of aforesaid Chicago and Muskogee concerns might be substantially to lessen competition or tend to create monopoly in line of commerce in which said corporation was engaged, and to injure, destroy or prevent competition with it:

Held, That in discriminating in price between different purchasers of glucose and of gluten feed, as above set forth, said corporation violated the provisions of Sec. 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.

Before *Mr. John P. Bramhall* and *Mr. John L. Horner*, trial examiners..

Mr. Frank Hier and *Mr. P. R. Layton* for the Commission.

Mr. J. O. Boyd, of Keokuk, Ia., for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent named in the caption hereof, and hereinafter more par-

ticularly designated and described, since June 19, 1936, has violated and is now violating the provisions of section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, The Hubinger Co., is a corporation organized and existing under the laws of Iowa with its principal office and place of business at 1003 South Fifth Street in the city of Keokuk and State of Iowa.

PAR. 2. Respondent owns and operates a plant at Keokuk, Iowa. This plant has a corn grinding capacity in excess of 12,000 bushels per day, with complete facilities for the finished fabrication of all known corn products, both for household and industrial use.

PAR. 3. For many years respondent has been and is now engaged in the business of manufacturing, selling, and distributing in interstate commerce products derived from corn. The principal products derived from corn are (1) starch, both for food and other purposes; (2) glucose or corn syrup; and (3) corn sugar. Starch is first manufactured from the corn, and glucose and grape sugar are made by treating the starch with certain acids, the resulting solid product being sugar and the resulting syrup being glucose. Glucose is largely used in the manufacture of candy, jellies, jams, preserves, and the like as well as in the mixing of syrups.

The principal byproducts of corn resulting in the corn products business are gluten feed, corn oil, corn-oil cake, and corn-oil meal.

Respondent, in addition to bulk products, produces branded products.

PAR. 4. For many years in the course and conduct of its business, the respondent has been and is now manufacturing the aforesaid commodities at said plant and has sold and shipped and does now sell and ship such commodities in commerce between and among the various States of the United States from the State in which its factory is located across State lines to purchasers thereof located in States other than the State in which respondent's said plant is located in competition with other persons, firms, and corporations engaged in similar lines of commerce.

PAR. 5. Since June 19, 1936, and while engaged as aforesaid in commerce among the several States of the United States and the District of Columbia, the respondent has been and is now, in the course of such commerce, discriminating in price between purchasers of said commodities of like grade and quality, which commodities are sold for use, consumption, or resale within the several States of the United

States and the District of Columbia in that the respondent has been and is now selling such commodities to some purchasers at a higher price than the price at which commodities of like grade and quality are sold by respondent to other purchasers generally competitively engaged with the first mentioned purchasers.

PAR. 6. The effect of said discriminations in price made by the respondent, as set forth in paragraph 5 herein, may be substantially to lessen competition in the sale and distribution of corn products between the respondent and its competitors; tend to create a monopoly in the line of commerce in which the respondent is engaged; and to injure, destroy, and prevent competition in the sale and distribution of corn products between the respondent and its competitors.

PAR. 7. The effect of said discriminations in price made by the respondent, as set forth in paragraph 5 herein, may be substantially to lessen competition between the buyers of said corn products from respondent receiving said lower discriminatory prices and other buyers from respondent competitively engaged with such favored buyers who do not receive such favorable prices; tend to create a monopoly in the lines of commerce in which buyers from the respondent are engaged; and to injure, destroy, and prevent competition in the lines of commerce in which those who purchase from the respondent are engaged between the said beneficiaries of said discriminatory prices and said buyers who do not and have not received such beneficial prices.

PAR. 8. The aforesaid acts of respondent constitute a violation of the provisions of subsection (a) of section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec. 13).

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant 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 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936, (U. S. C., title 15, section 13) the Federal Trade Commission on June 1, 1939, issued and served its complaint in this proceeding upon the respondent, The Hubinger Co., a corporation, charging it with discriminating in price between different purchasers of respondent's various products in violation of subsection (a) of section 2 of said act as amended.

After the issuance and service of said complaint, a motion to dismiss the complaint or to make it more definite and certain was filed by re-

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spondent. That part of said motion asking that the complaint be dismissed was denied by an order of the Commission on July 15, 1939, which said order granted 20 days' time within which to file written brief and argument in support of that part of said motion to make the complaint more definite and certain. Subsequently, on January 26, 1940, respondent having filed said brief in support of its motion to make complaint more definite and certain, the Commission entered its order denying the motion to make complaint more definite and certain. Thereafter, on February 16, 1940, and pursuant to an extension of time granted by the Commission, an answer was filed by the respondent. Pursuant to written notice to respondent of the time, date and place, hearings were commenced on June 20, 1940, before John P. Bramhall, an examiner designated by the Commission, at which hearings evidence in support of the charges made in the complaint was introduced by Frank Hier and P. R. Layton, attorneys for the Commission. Such hearings were continued on October 14, 1940, before John L. Hornor, an examiner designated by the Commission to take testimony and receive evidence in this proceeding in the place and stead of John P. Bramhall, the examiner theretofore appointed, and other evidence was introduced into the record by stipulation between counsel for the Commission and counsel for the respondent. Respondent presented no testimony in opposition to the charge contained in the complaint and waived all intervening procedure, oral argument, the filing of briefs, and further hearings, all of which appears of record herein.

Thereafter, this proceeding came on for final disposition by the Commission on said complaint, answer and the record herein, and the Commission having duly considered the same and now being fully advised in the premises, makes this its findings as to the facts and its conclusion therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, The Hubinger Co., is a corporation organized and existing under the laws of Iowa, with its principal office and place of business at 1003 South Fifth Street, Keokuk, Iowa.

PAR. 2. For many years respondent has been, and is now, engaged in the business of manufacturing, distributing, and selling corn syrup unmixed, or glucose, which is one of the principal products derived from the refining of corn, and in the manufacture, distribution and sale of gluten feed, a byproduct in the manufacture of such syrup. For the manufacture of such products respondent owns and operates a

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corn-refining plant at Keokuk, Iowa, which has a corn grinding capacity in excess of 12,000 bushels per day.

PAR. 3. For many years, in the course and conduct of its business, respondent has sold and shipped, and does now sell and ship, such syrup and such gluten feed in commerce between and among the several States of the United States, causing such syrup and such gluten feed to be sold and shipped from its said plant in Keokuk, Iowa, across State lines to purchasers thereof located in other States of the United States and in competition with other corporations engaged in similar lines of commerce.

PAR. 4. Such syrup has been sold and delivered by respondent in several types and sizes of containers, at prices per hundredweight which increase over the tank car price per hundredweight according to the size and type of container, as follows:

Container	Price per cwt. over tank-car price per cwt.
Tank wagons.....	\$0.10
Returnable drums.....	1.13
Barrels.....	.33
Half barrels.....	.58
10-gal. kegs.....	.98
5-gal. kegs.....	1.08

1 Where there is no return freight on empty drums.

Where there is some return freight on returnable drums, which freight is paid by respondent, the basic differential for corn syrup shipped in returnable steel drums of \$0.13 per hundredweight over the tank car price per hundredweight, as shown above is increased but only sufficiently per hundredweight to approximately equal the amount of the return freight paid by respondent on the empty drum, so that the basic differential of \$0.13 per hundredweight is not in any instance accounted for by any return freight on the empty drum paid by respondent.

PAR. 5. Between June 19, 1936, and July 25, 1937, respondent sold such syrup at higher delivered prices per hundredweight to purchasers located in certain cities other than Chicago and Zion, Ill., than it sold such syrup in containers of like size and type to purchasers located in said cities of Chicago and Zion, Ill.; and between July 25, 1937, and the present time, respondent sold such syrup to purchasers located in certain cities other than Chicago, Ill., at higher delivered prices per hundredweight than it sold such syrup in containers of like size and type to purchasers located in Chicago, Ill., and such higher prices were not uniformly higher but varied with

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the geographical location of the cities in which the purchasers paying the higher prices were located.

Thus, on the following dates respondent sold such syrup to such purchasers located respectively in each of the following cities at the delivered prices per 100 pounds which are shown opposite said cities for such syrup, (43° Baumé) in tank cars, or in other containers, in which latter case, for the purposes of comparison, no differential has been added for the containers:

TABLE I

Location of purchaser	Aug. 1, 1936	Aug. 1, 1937	Aug. 1, 1938	Aug. 1, 1939
Chicago, Ill.	\$2.94	\$3.04	\$2.29	\$2.09
Zion, Ill.	2.94	3.17	2.39	2.17
Keokuk, Iowa.	3.11	3.20	2.47	2.27
St. Louis, Mo.	3.10	3.20	2.47	2.27
Kansas City, Mo.	3.32	3.40	2.69	2.49
St. Joseph, Mo.	3.32	3.40	2.69	2.49
Muskogee, Okla.	3.58	3.64	2.94	2.74
Oklahoma City, Okla.	3.62	3.68	2.99	2.79
Fort Worth, Tex.	3.72	3.77	3.09	2.89

Table II, which follows, shows the differentials which exist between the delivered prices set forth in table I, the differentials in each case being the amount per hundredweight, which purchasers in the several cities were charged over the price charged in Chicago, Ill.:

TABLE II

Location of purchaser	Aug. 1, 1936	Aug. 1, 1937	Aug. 1, 1938	Aug. 1, 1939
Chicago, Ill.	\$0.00	\$0.00	\$0.00	\$0.00
Zion, Ill.	.00	.13	.10	.08
Keokuk, Iowa.	.17	.16	.18	.18
St. Louis, Mo.	.16	.16	.18	.18
Kansas City, Mo.	.38	.36	.40	.40
St. Joseph, Mo.	.38	.36	.40	.40
Muskogee, Okla.	.64	.60	.65	.65
Oklahoma City, Okla.	.68	.64	.70	.70
Fort Worth, Tex.	.78	.73	.80	.80

The following table III shows the railroad freight rates per hundredweight on corn syrup from respondent's plant at Keokuk, Iowa, to each of the cities enumerated in table I which were in effect on the dates for which the prices and differentials have been shown:

TABLE III

Location of purchaser	Aug. 1, 1936	Aug. 1, 1937	Aug. 1, 1938	Aug. 1, 1939
Chicago, Ill.	\$0.171	\$0.16	\$0.175	\$0.175
Zion, Ill.		.205	.225	.225
Keokuk, Iowa.	.000	.000	.000	.000
St. Louis, Mo.	.139	.13	.145	.145
Kansas City, Mo.	.209	.28	.31	.31
St. Joseph, Mo.	.209	.28	.31	.31
Muskogee, Okla.	.535	.50	.55	.55
Oklahoma City, Okla.	.588	.55	.61	.61
Fort Worth, Tex.	.684	.64	.71	.71

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Table IV, which follows, shows the differentials which exist between the railroad freight rates per hundredweight set forth in table III, the differential in each case being the amount per hundredweight by which the freight rate from Keokuk, Iowa, to Chicago, Ill., is exceeded by the freight rate from Keokuk, Iowa, to the other cities enumerated except where the figure is preceded by a minus sign, in which case the reverse is true:

TABLE IV

Location of purchaser	Aug. 1, 1936	Aug. 1, 1937	Aug. 1, 1938	Aug. 1, 1939
Chicago, Ill.	\$0.00	\$0.00	\$0.00	\$0.00
Zion, Ill.		.045	.05	.05
Keokuk, Iowa.	-.171	-.16	-.175	-.175
St. Louis, Mo.	-.032	-.03	-.03	-.03
Kansas City, Mo.	.128	.12	.135	.135
St. Joseph, Mo.	.128	.12	.135	.135
Muskogee, Okla.	.364	.34	.375	.375
Oklahoma City, Okla.	.417	.39	.435	.435
Fort Worth, Tex.	.513	.48	.535	.535

The extent to which the price differentials (shown in table II) make more than due allowance for differences in the cost of delivery (shown in table IV) is set forth below in table V, the figure in each case being the amount per hundredweight by which the price difference in table II exceeds the difference in freight rates in table IV:

TABLE V

Location of purchaser	Aug. 1, 1936	Aug. 1, 1937	Aug. 1, 1938	Aug. 1, 1939
Chicago, Ill.	\$0.00	\$0.00	\$0.00	\$0.00
Zion, Ill.		.085	.05	.03
Keokuk, Iowa.	.341	.32	.355	.355
St. Louis, Mo.	.192	.19	.21	.21
Kansas City, Mo.	.252	.24	.265	.265
St. Joseph, Mo.	.252	.24	.265	.265
Muskogee, Okla.	.276	.26	.275	.275
Oklahoma City, Okla.	.263	.25	.265	.265
Fort Worth, Tex.	.267	.25	.265	.265

PAR. 6. From April 6, 1938, until the present time respondent sold such syrup to E. J. Brach & Sons, Chicago, Ill., at delivered prices which were 10 cents per hundredweight less than the prices respondent charged other of such purchasers located in Chicago, Ill. Said lower prices were effected by respondent's granting and allowing to E. J. Brach & Sons a discount of 10 cents per hundredweight from respondent's regular list prices for delivery in Chicago such as are set forth in paragraph 5 above.

On and after May 1, 1939, at which time a written contract for the ensuing 12 months was entered into between respondent and E. J. Brach & Sons, which contract was renewed on May 1, 1940, said dis-

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count was granted and allowed by respondent in consideration of an agreement by E. J. Brach & Sons, to purchase a minimum of 125 tank cars of such syrup per year to be delivered at the rate of not less than 5 and not more than 35 cars per month.

PAR. 7. Since June 19, 1936, respondent has sold such syrup to the Griffin Grocery Co. at Muskogee, Okla., at delivered prices which were 10 cents per hundredweight less than the prices at which respondent sold such syrup to other of such purchasers located in Muskogee, Okla. Such sales were invoiced by respondent at the full current market price, but the Griffin Grocery Company arbitrarily deducted 10 cents per hundredweight from the amount of each such invoice and remitted the balance to the respondent, which balance the respondent accepted in full payment for such syrup.

PAR. 8. Respondent, since June 19, 1936, after increasing the price of such syrup to the trade generally, has sold the same to some purchasers thereof, most of whom buy in large quantities and are located in Chicago, Ill., at the former and lower price while concurrently selling such syrup of like grade and quality to other purchasers at the new and higher price.

PAR. 9. Since January 1, 1939, and continuing up to the present time, respondent has sold its gluten feed to nine particular purchasers at prices which were 50 cents per ton less than the prices at which it concurrently sold such feed of like grade and quality to all other purchasers.

Such sales were made to said nine purchasers pursuant to the terms of a written contract entered into by respondent with each of them. Each contract provided that in consideration of the purchase of 100 tons per month for 12 months, respondent would pay and grant to the purchaser at the end of the contract period an allowance of 50 cents per ton.

PAR. 10. By selling such syrup at said different prices as found in paragraphs 4, 5, 6, 7, and 8, and by selling such gluten feed at said different prices as found in paragraph 9, the differences between any of which prices respondent has not shown to make only due allowance for differences, if any, in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities, if any, in which said commodities were sold or delivered to such purchasers, respondent has discriminated in price between such purchasers who have paid the various different prices for said commodities.

PAR. 11. All of such purchasers of gluten feed are feed dealers, competitively engaged in the resale of such feed to various customers; and the allowances granted and paid by respondent to said nine con-

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tract feed dealers are sufficient if and when reflected in whole or in substantial part in reduced resale prices to attract business away from respondent's noncontract competing feed dealer customers paying higher prices, or to force the latter to resell such feed at a substantially reduced profit or to refrain from reselling. Such allowances are likewise sufficient, if not reflected in reduced resale prices, to substantially increase the margins of profit of the said contract feed dealers over and above the margins of profit otherwise obtainable in the resale of such feed by such noncontract feed dealer customers paying the higher prices to respondent.

PAR. 12. Most of such syrup, all of which is of like grade and quality, is purchased for use in the manufacture of candy; and most of such purchasers are competitively engaged in the sale of candy in which said syrup is used as an ingredient to various customers, including chain stores, wholesalers and retailers.

Such syrup is used as an ingredient to some extent in the manufacture of most kinds of candy, and is one of the major raw materials used in the production of many varieties of candy. Not only is the quantity of such syrup used significant, but the price paid therefor by such purchasers is a substantial part of the cost of the raw materials used in particular candies having a high syrup content, as well as of the total cost of manufacturing an extensive line of candies having a wide range of syrup contents. Said costs of the unfavored of such purchasers increase over said costs of such favored purchasers directly as the amount of the discrimination between them and as the syrup content of the candy increases.

Under such circumstances, one result of said discriminations has been to place the unfavored purchaser paying the greater prices for such syrup under a competitive disadvantage.

Many candies containing a substantial quantity of such syrup are priced at but a few cents per pound. As to products so priced and bearing no differentiating name or brand, sellers have attracted customers by selling at only a small fraction of a cent per pound lower than a competitor. This has been especially true in selling such candies to chain stores and to other purchasers of large quantities to whom such a small difference in price is determinative in placing their business.

Such being the fact, an unfavored purchaser's higher raw material costs are difficult, if not impossible, to recover by increasing the price of the candy manufactured, if such unfavored purchaser hopes to maintain his sales volume. The effect on such unfavored purchaser of the higher cost of such syrup is to decrease profit to the

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extent necessary to absorb the higher direct per unit cost imposed by the higher syrup cost as long as such unfavored purchaser attempts to sell his candy at a competitive price.

Where such an absorption causes an impairment of profit to any material degree, it results in such unfavored purchaser making only selective sales at noncompetitive prices to customers on the basis of service or on some other nonprice basis, and directly causes reduced volume of sales, resulting in unused capacity and increased overhead unit cost on particular as well as on all products; the consequence again being impairment of profit.

Such impairment of profits tends to weaken financially existing unfavored candy manufacturers; may bring about the elimination of such unfavored candy manufacturers from the industry, and does prove an effective deterrent to the establishment of new candy manufacturing enterprises in those areas in which respondent discriminates as found above.

A further result of said discriminations has been to confer upon the favored purchasers monetary benefits which have given them a substantial competitive advantage, enabling them to reduce the selling prices of their candy, lower costs, increase volume and increase profits. Such benefits can well lead to a domination by them of the candy industry.

The effect of the lower prices granted to E. J. Brach & Sons and to the Griffin Grocery Company and found in paragraph 10 to be a discrimination in favor of said purchasers was and is sufficient to attract substantial business to respondent from said E. J. Brach & Sons and from the Griffin Grocery Company and away from respondent's competitors.

PAR. 13. Therefore, the Commission finds that the discriminations found in paragraphs 4, 5, 6, 7, 8, 9, and 10 may substantially lessen competition between the favored and unfavored purchasers, tend to create a monopoly in such favored purchasers, and injure, destroy or prevent competition with such favored purchasers, and that the further effect of the discriminations in favor of E. J. Brach & Sons and the Griffin Grocery Co. may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, and to injure, destroy or prevent competition with respondent.

CONCLUSION

The Commission concludes that in discriminating in price between different purchasers of glucose and of gluten feed, as set forth in the

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above findings of fact, the respondent, The Hubinger Co., has violated the provisions of section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, the testimony taken and stipulated, and other evidence introduced before John P. Bramhall, and John L. Hornor, trial examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint, no evidence having been presented in opposition thereto by respondent and further hearings, oral argument and the filing of briefs having been waived by the respondent; the Commission having made its findings as to the facts and its conclusion, which findings and conclusion are hereby made a part hereof, that respondent has violated 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, as amended by the Robinson-Patman Act, approved June 19, 1936, (title 15, section 13, U. S. C. A.).

It is ordered, That respondent, The Hubinger Co., its officers, representatives, agents, and employees, directly or indirectly, in connection with the offering for sale, sale and distribution of glucose or corn syrup unmixed and gluten feed in interstate commerce and in the District of Columbia, do forthwith cease and desist:

1. From discriminating in price between different purchasers of glucose or corn syrup unmixed of like grade and quality, and between different purchasers of gluten feed of like grade and quality, either directly or indirectly, in the manner and degree as found by the Commission in paragraphs 4, 5, 6, 7, 8, 9, and 10 of the Commission's findings as to the facts and conclusion.

2. From continuing or resuming the discriminations in price found by the Commission in paragraphs 4, 5, 6, 7, 8, 9, and 10 of the aforesaid findings as to the facts and conclusion.

3. From otherwise discriminating in price in a manner and degree substantially similar to the discriminations found in paragraphs 4, 5, 6, 7, 8, 9, and 10 of the Commission's findings as to the facts and conclusion.

4. From otherwise selling said glucose or corn syrup unmixed and gluten feed to some purchasers thereof at a different price than to other purchasers, the effect whereof may be substantially to lessen

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competition or tend to create a monopoly in the line of commerce in which customers of the respondent are engaged, or to injure, destroy or prevent competition with any person who either grants or receives the benefit of such discrimination, provided that nothing shall prevent price differences which make only due allowance for the differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered, and provided further that nothing shall prevent respondent from showing that its lower price to any purchaser or purchasers was made in good faith to meet any equally low price of any competitor.

It is further ordered, That the said respondent, The Hubinger Co., 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
VITAPHORE APPLIANCES, INC.

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

Docket 3884. Complaint, Aug. 31, 1939—Decision, Apr. 3, 1941

Where a corporation engaged in interstate sale and distribution to members of the public and physicians, of its Vibratherm heat and massage electric device for the alleged treatment, through internal and external use, of disorders of the pelvic region, both male and female, and particularly disorders of the prostate gland; by advertisements disseminated by mail and in newspapers and periodicals of general circulation, and in circulars and other written and printed matter—

Represented, directly and by implication, that the use of said device constituted a cure or remedy or was an effective and competent treatment for prostatitis, constipation, hemorrhoids, sexual decline, backache, headache, arm, leg and foot pains, bodily weakness, tired feeling, night rising, bladder weakness, nervousness, vaginitis, leucorrhea, cervicitis, inflammation of the ovaries and tubes, pelvic congestion, painful menstruation, congested ovaries, uterus and tubes;

Facts being it had no therapeutic value in the treatment of prostatitis in excess of furnishing temporary relief from pain by local application of heat, and not only was without therapeutic value in treatment of various conditions and disorders above set forth but use thereof might be harmful in the case of female disorders of the pelvic region where inflammatory conditions existed;

With effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were true and, because of such belief, of inducing it to purchase said devices in substantial number:

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

Before *Mr. Edward E. Reardon*, trial examiner.

Mr. Wilbur N. Baughman, *Mr. Donovan Divet* and *Mr. John M. Russell* for the Commission.

Yeagley & Yeagley, of South Bend, Ind., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Vitaphore Appliances, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of the said act, and it appearing to the Com-