

IN THE MATTER OF

ACME ASBESTOS COVERING AND FLOORING COMPANY,
ET AL.

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

Docket 4613. Complaint, Dec. 27, 1941¹—Decision, Apr. 27, 1944

Where a number of corporations, engaged as manufacturers or as winders or converters of insulating materials and in interstate sale and distribution thereof, in competition with one another to the extent that competition had not been restrained as below set forth, and including the volume producers and more important members of the industry, which—characterized before the National Recovery Administration by a few practices in general use, such as zoning, customer classification, freight equalization, and the use of a standard price list—operated, during said period, under a code which provided for the filing of prices and adherence thereto until the filing of others, and under a code merchandising plan, which—continued after the Act's invalidation and until the adoption of the program below described—regulated in great detail for virtually the entire country, numerous trade practices such as classification of buyers and discounts, units of sale, use of standard list prices, standardization of contracts, freight allowances and zones, etc., and fitted into a detailed written document the prior practices before referred to, supplemented by numerous other provisions;

Acting in cooperation with an individual who had been secretary of a trade association of the industry prior to being made manager for the division concerned in the industry's code;

Combined and conspired to control and stabilize prices, terms and conditions of sale, and trade practices and conditions pertaining thereto, and to carry on and perfect the control over such matters accomplished under said N.R.A. code, through the establishment of a patent licensing and merchandising plan which was in general a reestablishment, with additions, of that created under N.R.A., substituting direct price fixing for price reporting, stopping some loopholes for competition which existed in the other, and providing more direct and effective means of enforcement, and under which the aforesaid individual (1) was given exclusive license under a patent of one of the members, for use in the manufacture of asbestos paper and insulating fabrics, along with the exclusive right to grant non-exclusive sub-licenses to others, and (2) proceeded to sub-license the various concerns herein involved, under uniform terms and conditions, as considered, evolved, changed and agreed upon by them from time to time, and under provisions which, among other things, provided for inspection of sub-licensee's books, prohibited the sub-licensees from selling at lower prices or upon more favorable terms or conditions of sale than specified by the licensor, and provided that liquidated damages of 50 per cent of the proper net selling price be paid to the licensor on any sales of licensed materials in violation of the licensor's schedule; and thereby—

- (1) Established and maintained uniform prices, discounts and terms and conditions in the sale of the insulating materials herein involved—including asbestos paper and rule board, wool felt and sponge felt paper, corrugated asbestos paper, pipe coverings, boiler jackets and sheets and blocks, and accessories usually sold therewith—

¹ Amended.

- including such matters as manner of handling price advances or decline, fixing of standard list prices, differentials for different weights of products, etc.;
- (2) Established and maintained uniform differentials in price applicable to designated differences in specifications of said materials or to differences in type or quantity of accessories sold therewith; customer classifications for use in determining prices, discounts, terms and conditions of sale; and specified prices to the various classes of producers in car lot and L.C.L. quantities; and fixed units of sale and standard sizes, etc.;
 - (3) Maintained a delivered price zone system through which, despite different costs of delivery, identical delivered prices were achieved on products concerned, designating particular locations for use as freight equalization points for pricing purposes; and established and maintained exclusive methods for quoting and pricing a particular material or groups of materials; outlining factory zones, dividing the country into geographical zones for pricing purposes, defining carload quantity, outlining the manner in which freight might be equalized, and providing the formula, etc.; and
 - (4) Established and maintained formulae for calculating unit prices, or total prices therefrom, supplying tables for calculating areas of certain products, and specifying method of figuring the prices thereon, etc.;

Capacity, tendency and effect of which combination and conspiracy, including inauguration and employment of said patent licensing and merchandising plan established as a part thereof and as a means of effectuating the same, and of said acts and practices performed in connection therewith was—

(1) To restrain and suppress competition in the sale and distribution of pipe covering and insulating materials, both patented and unpatented or licensed and unlicensed, among the several states, and to fix and maintain prices, terms and conditions of sale for such materials, and deprive purchasers thereof of benefits of competition in pricing;

(2) To collectively determine and establish classifications of customers for pricing purposes and fix and determine price differentials among such classifications, and create substantial uniformity in contracts of sale and the terms and conditions specified therein;

(3) To determine and maintain uniform delivered prices on certain insulating material, and uniform delivered costs to purchasers through said freight equalization plan and geographical zones employed for pricing purposes;

(4) To establish standard construction, size, and thickness specifications of products to facilitate price fixing thereon; and

(5) To promote and maintain otherwise their price fixing combination and conspiracy and obstruct, lessen and defeat any form of competition which threatened the maintenance and purposes thereof:

Held, That such combination and conspiracy, and said acts and practices performed pursuant thereto and under said conditions and circumstances, constituted unfair methods of competition in commerce.

Contentions—made in connection with the inauguration and putting into effect of a patent licensing and sub-licensing merchandising plan through licensing a certain individual under a patent owned by one of the concerns involved, with exclusive authority to sub-license concerns thereunder, as a means of fixing and stabilizing prices and terms and conditions of sale by members of the industry concerned—that various negotiations which preceded the granting of the exclusive license to said individual, represented no more than his efforts to ascertain whether it would be a profitable business venture for him to assume the obligations imposed by the license, and that negotiations concerning changes in the additions to the mer-

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chandising plans represented no more than the efforts of an intelligent business man, not himself engaged in the manufacture and sale of any of the licensed products, to inform himself of the conditions which existed in the manufacture and sale of such products, to the end that he might properly administer the licenses: *held*, in view of the facts and circumstances shown in the record, as above indicated, without merit.

Before *Mr. Randolph Preston*, trial examiner.

Mr. Floyd O. Collins for the Commission.

Cadwalader, Wickersham & Taft, of New York City, for Acme Asbestos Covering and Flooring Co., Asbestos, Asphalt and Insulation Manufacturing Co., Atlantic Asbestos Corp., A. H. Bennett Co., The Philip Carey Manufacturing Co., The Clark Asbestos Co., Empire Asbestos Products, Inc., Johns-Manville Corp., L. A. Rubber & Asbestos Works, Inc., G. A. MacArthur Co., Pacific Asbestos & Supply Co., The Ruberoid Co., and Donald Tulloch, Jr., and along with—

Mr. John Loeffler, of Minneapolis, Minn., for W. S. Nott Co.

Pepper, Bodine, Stokes & Schoch, of Philadelphia, Pa., for Keasbey & Mattison Co.

Gabrielson & Wolfe, of New York City, for Norristown Magnesia and Asbestos Co. and Sall Mountain Co.

Mr. Richard D. Daniels, of Washington, D. C., and *Brobeck, Phleger & Harrison*, of San Francisco, Calif., for Plant Rubber & Asbestos Works.

Mr. David H. Caplow, of Chicago, Ill., for Standard Asbestos Manufacturing Co.

AMENDED 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 the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The words and terms set out in this paragraph shall have the following meanings, wherever used in this amended complaint:

"Licensed materials" means the following materials which the respondents classified in the sub-license agreements which the respondent Donald Tulloch, Jr., had with the other respondents, as forming part of United States Patent No. 1,972,500:

1. Low pressure (coarse corrugated) Aircell type asbestos pipe covering, sheets and/or blocks.
2. Low pressure (fine corrugated) Aircell type asbestos pipe covering, sheets and/or blocks.
3. Low pressure Laminated type asbestos pipe covering, sheets and/or blocks.
4. Woolfelt types pipe covering.
5. Anti-sweat type pipe covering.
6. Frost proof type pipe coverings.
7. High pressure Laminated type asbestos pipe covering, sheets, and/or blocks.
8. Corrugated asbestos paper.

9. Asbestos paper and rollboard. (Materials so designated include all paper whose chief constituent is asbestos fiber.)

10. Wool felt paper. (Materials so designated include all paper whose chief constituent is wool or rag fiber.)

11. Sponge felt paper. (Materials so designated include all paper whose chief constituent is asbestos and sponge fibers.)

"Non-licensed materials" includes such items as: solid brass, zinc, and lacquered bands, flexible range boiler jackets, and canvas covering.

"Toohey Patent" means United States Patent No. 1,972,500, issued on September 4, 1934, to respondent, Johns-Manville Corporation, as assignee of Edward A. Toohey and Earl K. Williams.

"Respondent corporations" means all of the respondents named in the caption hereof, except respondent, Donald Tulloch, Jr. The Philip Carey Company, the wholly owned subsidiary of respondent, The Philip Carey Manufacturing Company, is likewise referred to in this complaint as a "Respondent corporation," for the reason that the respondent, The Philip Carey Manufacturing Company, is legally responsible and liable for the acts and practices performed by the said The Philip Carey Company prior to its dissolution as hereinafter set forth.

PAR. 2. Respondent, Acme Asbestos Covering and Flooring Company, is a corporation, organized and existing under the laws of the State of Illinois, with its office and principal place of business being located at Fulton and Elizabeth Streets, Chicago, Ill.

Respondent, Asbestos Asphalt and Insulation Manufacturing Company, is a corporation, organized and existing under the laws of the State of Illinois, with its office and principal place of business being located at 2100 West Fullerton Avenue, Chicago, Ill. (It is the successor to the Illinois Philip Carey Company.)

Respondent, Atlantic Asbestos Corporation, is a corporation, organized and existing under the laws of the State of New York, with its office and principal place of business being located at 2128 Westchester Avenue, Bronx, N. Y. It was organized on January 1, 1939, when it succeeded to the business, assets, good will, etc. of J. Ozurovitch, Inc. On such succession it adopted, accepted, approved, and became a party to any and all of the agreements hereinafter set out which may have been entered into by its predecessor, J. Ozurovitch, Inc.

Respondent, A. H. Bennett Company, is a corporation, organized and existing under the laws of the State of Minnesota, with its office and principal place of business being located at 113 First Street, North, Minneapolis, Minn.

Respondent, The Philip Carey Manufacturing Company, is a corporation, organized on or about February 14, 1888, under the laws of the State of Ohio, and which has existed under the laws of said State since that date, with its office and principal place of business being located at Lockland, Ohio. One of its wholly owned subsidiaries was The Philip Carey Company, a corporation, organized on or about June 10, 1907, under the laws of the State of New Jersey, and existing under said laws until about June, 1941, when it was dissolved for tax purposes. G. D. Crabbs, R. S. King, C. A. Blinn, W. L. Steffens, and W. C. Ignatius, were chairman of the Board, president, vice president, vice president, and secretary-treasurer, respectively of both the respondent, The Philip Carey Manufacturing Company and The Philip Carey Company, at the time of the latter's dissolution. Also the office and principal place of business of both

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corporations always was during the existence of The Philip Carey Company, at the same location, Lockland, Ohio. When The Philip Carey Company was dissolved in about June, 1941, all of its assets were transferred to respondent, The Philip Carey Manufacturing Company, which respondent likewise assumed all of what it considered to be the lawful and valid contracts of its wholly owned subsidiary, The Philip Carey Company, including the sub-licensing agreement, hereinafter described, which then existed between the said The Philip Carey Company and respondent, Donald Tulloch, Jr., and said respondent, The Philip Carey Manufacturing Company, has continued, and is still continuing the operation under said sub-licensing agreement and the merchandising plan, hereinafter described, which is a part thereof or an adjunct thereto.

Respondent, The Clark Asbestos Company, is a corporation, organized and existing under the laws of the State of Ohio, with its office and principal place of business being located at 1893 East 55th Street, Cleveland, Ohio.

Respondent, Empire Asbestos Products, Inc., is a corporation, organized and existing under the laws of the State of New York, with its office and principal place of business being located at the Atlas Terminal, Glendale, Long Island, N. Y.

Respondent, Gillen-Cole Company, is a corporation, organized and existing under the laws of the State of Oregon, with its office and principal place of business being located at 714 S. W. Front Avenue, Portland, Oreg.

Respondent, Johns-Manville Corporation, is a corporation, organized and existing under the laws of the State of New York, with its office and principal place of business being located at 22 East 40th Street, New York, N. Y.

Respondent, Keasby & Mattison Company, is a corporation, organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business being located at Ambler, Pa.

Respondent, L. A. Rubber & Asbestos Works, Incorporated, is a corporation, organized and existing under the laws of the State of California, with its office and principal place of business being located at 124 East Third Street, Los Angeles, Calif.

Respondent, G. A. MacArthur Company, is a corporation, organized and existing under the laws of the State of Minnesota, with its office and principal place of business being located at 2387 Hampden Avenue, St. Paul, Minn. This corporation was organized in February, 1913, under the name of Twin City Pipe Covering Company, which corporation was changed to its present form in May, 1931.

Respondent, Norristown Magnesia and Asbestos Company, is a corporation, organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business being located at Norristown, Pa.

Respondent, W. S. Nott Company, is a corporation, organized and existing under the laws of the State of Minnesota, with its office and principal place of business being located at Second Avenue, North, and Third Street, Minneapolis, Minn.

Respondent, Pacific Asbestos & Supply Company, is a corporation, organized and existing under the laws of the State of Oregon, with its office and principal place of business being located at S. W. Front and Clay Streets, Portland, Oreg.

Respondent, Plant Rubber & Asbestos Works, is a corporation, organized and existing under the laws of the State of California, with its office and principal place of business being located at 537 Brannan Street, San Francisco, Calif.

Respondent, The Ruberoid Co., is a corporation, organized and existing under the laws of the State of New Jersey, with its office and principal place of business being located at 500 Fifth Avenue, New York, N. Y.

Respondent, Sall Mountain Company, is a corporation, organized and existing under the laws of the State of Delaware, with its office and principal place of business being located at 70 Pine Street, New York, N. Y.

Respondent, Standard Asbestos Manufacturing Company, is a corporation, organized and existing under the laws of the State of Illinois, with its office and principal place of business being located at 820-22 West Lake Street, Chicago, Ill.

Respondent, Donald Tulloch, Jr., is an individual, having his principal office and place of business on the 16th Floor of the Inquirer Building, Philadelphia, Pa.

PAR. 3. Respondent corporations manufacture and sell approximately from 80 percent to 90 percent of the low pressure asbestos pipe covering manufactured and sold in the United States, with respondents, Johns-Manville Corporation and The Philip Carey Manufacturing Company, and its wholly owned subsidiary, The Philip Carey Company, up to the time of the dissolution of the said The Philip Carey Company, about June, 1941, manufacturing and selling approximately 50 percent of same. Both licensed and non-licensed materials are embodied, involved, and employed in the manufacture, use, and sale of such covering.

Some of respondent corporations manufacture some or all of their licensed and non-licensed materials and convert same into low-pressure asbestos pipe covering, while the other respondent corporations, which are known in the trade as "winders," purchase some or all of said materials from those respondent corporations which manufacture same, and then convert them into such covering.

To the extent that the respondent corporations act collusively and collectively in the pricing and sale of such covering and materials, they are in a position to dominate and control the prices at which same must be purchased by the purchasers and users thereof throughout the United States.

PAR. 4. In the course and conduct of their respective businesses, each of respondent corporations sells and distributes licensed and non-licensed materials and the asbestos covering, which are manufactured or converted by it, to the purchasers thereof located in the various States of the United States and in the District of Columbia, and in connection with such sales, transports or causes to be transported said products to such purchasers located in the various States of the United States other than the State of origin of said shipments and in the District of Columbia. The said respondent corporations have maintained, and still do maintain, a regular current of trade in such products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. Respondent, Donald Tulloch, Jr., (referred to herein as "respondent Tulloch") aided, abetted, furthered, cooperated with, and was an instrumentality of, and a party to, the understanding, agreement, combination, and conspiracy hereinafter set out, and actively partici-

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pated in the performance of some, if not all, of the acts and things herein-after set out, which were done for the purpose of making said agreement, understanding, combination, and conspiracy, effective, and of requiring compliance therewith by respondent corporations.

PAR. 6. Each of respondent corporations has been, during the various times herein set forth, and some of them still are, in competition with one or more of the other respondent corporations in making and seeking to make sales in commerce between and among the various States of the United States and in the District of Columbia, of some or all of the licensed and non-licensed materials, and also of the low-pressure pipe covering embodying some or all of such materials except in so far as such competition has been hindered, lessened, restricted, or forestalled by the understanding, agreement, combination, and conspiracy and the methods, policies, and practices done in pursuance thereto and in furtherance thereof, as hereinafter set forth.

PAR. 7. During the year 1931, application was made for respondent, Johns-Manville Corporation, for the Toohey patent which contained claims embodying the licensed materials and for an air-cell asbestos which, by the insertion of a wax "sizer," would make the asbestos covering both water repellent and moisture-proof. Such asbestos is used primarily for low pressure pipe covering. This patent was granted on September 4, 1934, and as part of, and an incident to, the agreement, understanding, combination, and conspiracy hereinafter set forth, respondent, Johns-Manville Corporation, did, on September 11, 1935, grant to respondent Tulloch an exclusive license to make, use, and sell, and exclusive right to issue non-exclusive licenses to others to use and sell the materials and products covered by the Toohey patent.

PAR. 8. Prior to and during the year 1934, respondents, Tulloch, Johns-Manville Corporation, The Philip Carey Company, a wholly owned subsidiary of the respondent, The Philip Carey Manufacturing Company, Norristown Magnesia and Asbestos Company, together with some of the other respondent corporations, entered into an unlawful agreement, understanding, combination, and conspiracy for the purpose, intent, and with the effect of substantially restricting, suppressing and eliminating actual and potential competition in price and otherwise in the sale and distribution in commerce between and among the various States of the United States and in the District of Columbia, of both licensed and non-licensed materials and also of the low-pressure asbestos covering embodying some or all of such materials. Thereafter, during the years 1935 and 1936, those respondent corporations which originally did not enter into said agreement, understanding, combination, and conspiracy, did, from time to time, adopt, join in, and become parties to same, and all of the respondents named in the caption hereof did, after they entered into, joined in or became parties to said agreement, understanding, combination, and conspiracy, by concerted action and in cooperation with one another, carry out, enforce, and maintain same and did perform some, or all of the acts and practices done in furtherance of said agreement, understanding, combination, and conspiracy, and in pursuance thereto, as herein alleged; although respondent, The Philip Carey Manufacturing Company, for the reasons hereinbefore set forth, is legally liable and responsible for the acts and practices of its wholly owned subsidiary, The Philip Carey Company, for the acts and practices of said subsidiary which were performed as a part of and in pursuance to, said agreement, under-

standing, combination and conspiracy, the said respondent, The Philip Carey Manufacturing Company, also acting individually, did in about June, 1941 adopt, join in, and become a party to same; and respondents, Tulloch, Johns-Manville Corporation, and The Philip Carey Manufacturing Company, are still carrying on, enforcing, and maintaining said agreement, understanding, combination, and conspiracy, and are performing many, if not all, of the methods, policies, and practices done in furtherance thereof and in pursuance thereto, as herein alleged.

PAR. 9. Pursuant to, in furtherance of, and to effectuate, the said agreement, understanding, combination and conspiracy, respondent corporations and respondent, Tulloch, cooperatively and concertedly, formulated, adopted, performed, and put into effect, among others, the following collusive methods of competition, policies, and trade practices:

1. Fixing and maintaining the prices at which, and the conditions under which, both licensed and non-licensed materials are offered for sale, and sold by respondent corporations to the various purchasers and users thereof.

2. Requiring and adopting a uniform method of computing and fixing the prices at which said licensed and non-licensed materials are offered for sale, and sold by respondent corporations to the various purchasers and users thereof, through the use by respondent corporations of a so-called "Manual of Unit Prices for Pipe Covering and Insulating Blocks," and by other means and methods.

3. Adopting and using uniform definitions of various classes of purchasers of said materials, so that respondent corporations all classify their respective customers in the same manner for pricing purposes.

4. Fixing, establishing, and maintaining fixed differentials in prices between different classes of customers.

5. Adopting and maintaining, by respondent corporations, uniform contracts for the sale of said materials by respondent corporations.

6. Adopting and maintaining by respondent corporations a system of selling said materials at delivered prices only, which system is designed to prevent, and does prevent, the differences in the cost of freight delivery from the respective places of business of respondent corporations to those of purchasers of such materials, from creating any advantage or disadvantage in price to said purchasers without regard from which of respondent corporations such purchasers may desire to purchase said materials. Such system of identical delivered prices is predicated upon the use by respondent corporations of so-called basing points, whereby the delivered prices on said materials shipped from the widely separated places of business of respondent corporations are calculated as though shipments were made from a single point or points having a common freight rate or common delivery cost to any given destination.

7. Adopting and maintaining a plan whereby the United States is divided into certain price zones, so that the purchasers from all the respondent corporations within a designated price zone or area, regardless of the varying costs of delivery from the places of business of respondent corporations to the places of business of such purchasers, are quoted and charged the same delivered prices on said materials sold by respondent corporations.

8. Simultaneously shifting particular localities or States from one delivered price zone in the United States to another such zone.

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9. Establishing standards for the size and thickness of said materials and also of low-pressure asbestos covering embodying some or all of said materials, and fixing differentials in price between said materials or coverings of different sizes or thickness.

10. Discussing and adopting, before the granting of the Toohey patent on September 4, 1934, at meetings attended by respondent corporations, including the wholly owned subsidiary of respondent, The Philip Carey Manufacturing Company, The Philip Carey Company and respondent, Tulloch, a merchandising plan to be used, and which was used, by respondent corporations for the sale by them of both licensed and non-licensed materials and also of low-pressure pipe covering embodying some or all of such materials, under which merchandising plan said respondents specifically agreed, among other things, upon

(a) The classification of buyers from respondent corporations of said materials and covering, in order to determine the discounts and prices which customers of said corporations, so classified, were to receive.

(b) The zoning of the various States of the United States for pricing purposes, in order to nullify and neutralize differences in freight rates on said materials and coverings.

(c) The terms and conditions of sale which respondent corporations should, and did follow in the sale of said materials and of said covering.

(d) The imposition of rigid control of the prices respondent corporations charge their purchasers for said materials and said coverings under threat of the imposition of penalties against respondent corporations for any digressions therefrom.

(e) The arrangement for the appointment by each respondent corporation of a limited number of distributional accounts which were to be given, and were given, certain stated special discounts.

(f) The filing of price lists of said materials and covering, by respondent corporations, with respondent Tulloch, which price lists contained the delivered prices for and within the various price zones.

This merchandising plan was adopted during the period the National Industrial Recovery Act was in effect by respondent corporations, including The Philip Carey Company, the wholly owned subsidiary of respondent, The Philip Carey Manufacturing Company, but it never was approved by the Administrator of the National Recovery Administration.

11. Discussing and agreeing upon, in meetings, by correspondence and by other means and methods, a proposed form of licensing agreement between respondent, Johns-Manville Corporation, and respondent, Tulloch, regarding the use and sale of the licensed materials and products covered by the Toohey patent, a form of sub-license agreement between respondent, Tulloch, and respondent corporations regarding the same subjects and a schedule of prices, terms, and conditions of sale of licensed materials by respondent corporations under such sub-license agreement.

12. Entering into and carrying out said licensing agreement between respondent, Johns-Manville Corporation, and respondent, Tulloch, and also entering into and carrying out such non-exclusive sublicense agreements between respondent, Tulloch, and respondent corporations, including both respondent, The Philip Carey Manufacturing Company, and its wholly owned subsidiary, The Philip Carey Company, under the terms of which sub-license agreements respondent corporations are required to sell the licensed materials according to the schedule of prices,

terms, and conditions of sale which are fixed by agreement among said respondents.

13. Adopting by respondent corporations, as an integral part of said sub-license agreements which said respondent corporations had with respondent, Tulloch, a merchandising plan substantially identical with the plan hereinbefore set out in subparagraph (10) of this paragraph, with respondent, Tulloch, managing and supervising the operation and enforcement of same and also imposing penalties upon respondent corporations for failure to sell either the licensed or non-licensed materials at the delivered prices provided for in said plan.

14. Discussing and agreeing in advance, as to the changes and amendments to be made to sub-license agreements which respondent, Tulloch, had with respondent corporations for the sale by said corporations of both licensed and non-licensed materials, before respondent, Tulloch, actually announced such changes and amendments.

15. Agreeing upon the inclusion of non-licensed materials to be covered by said merchandising plan and thereby fixing the prices, terms, and conditions of sale of said materials.

PAR. 10. As an incident to, and a necessary result of, respondent corporations' agreement to use, and their use of, the basing point system of delivered prices, delivered prices were made identical within certain zones or areas defined by respondent corporations through agreements and understandings among said respondent corporations, notwithstanding differences in the actual freight from their respective places of business to various destinations within the same zone or area. As a further incident and necessary result, respondent corporations have habitually and systematically demanded, charged, accepted and received within the same delivered price zones and in other such zones, larger sums per unit of product from their customers located near their respective places of business than from their other customers located at greater distances within the same zones and in other such zones, and have thereby forced their nearby customers to pay more to respondent corporations for the licensed and non-licensed materials and the low-pressure pipe covering embodying such materials, in order that the more distant customers within the same area might pay less, thus depriving the nearby customers of any price advantage, which otherwise they would have by reason of their proximity to the places of production.

PAR. 11. Each of respondent corporations has acted, and some still act, in concert and cooperation with one or more of the other respondent corporations, by means of, and through, respondent, Tulloch, or by, and through, other means and methods, in doing and performing the methods, policies, practices, and agreements, hereinbefore set forth.

PAR. 12. The methods, policies, practices, and agreements of respondents, as herein alleged, are all to the prejudice of actual and potential competitors of respondent corporations and of the public; have a dangerous tendency to, and have actually hindered and prevented competition in commerce, between and among the various States of the United States and in the District of Columbia in the sale of both licensed and non-licensed material and of low-pressure pipe covering embodying some or all of such materials; have unreasonably restrained such commerce in said products; have a dangerous tendency to create in respondent corporations a monopoly in the sale and distribution of such products, and constitute

unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 10, 1941, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption thereof; and thereafter, on December 27, 1941, issued and subsequently served its amended complaint in this proceeding upon the respondents named in the caption thereof, charging them with unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. After the issuance of said amended complaint and the filing of respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, this proceeding regularly came on for final hearing before the Commission on said amended complaint, the answers filed thereto, testimony and other evidence, report of the trial examiner and exceptions thereto, briefs in support of and in opposition to the complaint, and oral arguments by opposing counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. (a) Respondent, Acme Asbestos Covering and Flooring Company (hereinafter sometimes referred to as Acme Asbestos), is a corporation, organized and existing under the laws of the State of Illinois, with its office and principal place of business located at Fulton and Elizabeth Streets, Chicago, Ill. It is a winder or converter of insulating materials, and on or about October 15, 1935, became a sublicensee of respondent, Tulloch, under United States Patent No. 1972500, hereinafter frequently referred to as the Toohey patent.

(b) Respondent, Asbestos, Asphalt and Insulation Manufacturing Company (hereinafter sometimes referred to as Asbestos Asphalt), successor to the Illinois Philip Carey Company, is a corporation, organized and existing under the laws of the State of Illinois, with its office and principal place of business located at 2100 West Fullerton Avenue, Chicago, Ill. It is a winder or converter of insulating materials, and on or about October 24, 1935, became a sublicensee of respondent Tulloch under the Toohey patent.

(c) Respondent, Atlantic Asbestos Corporation (hereinafter sometimes referred to as Atlantic Asbestos), is a corporation, organized and existing under the laws of the State of New York, with its office and principal place of business located at 2128 Westchester Avenue, Bronx, N. Y. It was organized on January 1, 1939, and was the successor by change of name to J. Ozurovich, Inc. It is a manufacturer of insulating materials, and on or about January 31, 1936, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(d) Respondent, A. H. Bennett Company (hereinafter sometimes referred to as Bennett), is a corporation, organized and existing under the laws of the State of Minnesota, with its office and principal place of business located at 113 First Street North, Minneapolis, Minn. It is a winder or converter of insulating materials, and on or about March 13, 1936, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(e) Respondent, The Philip Carey Manufacturing Company (hereinafter sometimes referred to as Carey), is a corporation, organized and existing under the laws of the State of Ohio, with its office and principal place of business located at Lockland, Ohio. It is a manufacturer of insulating materials, and on or about October 12, 1935, it became a sublicensee of respondent, Tulloch, under the Toohey patent. The Philip Carey Company, a New Jersey corporation, was a wholly owned subsidiary of and had common officers with Carey, and was engaged in the sale and distribution of products manufactured by Carey. It was dissolved by its parent in June 1941 for tax reasons and its parent corporation took over its business, its assets, and its obligations. Because of this relationship, no effort is made hereafter to distinguish between acts performed by Carey and those of its wholly owned and controlled subsidiary.

(f) Respondent, The Clark Asbestos Company (hereinafter sometimes referred to as Clark Asbestos), is a corporation, organized and existing under the laws of the State of Ohio, with its office and principal place of business located at 1893 East 55th Street, Cleveland, Ohio. It is a winder or converter of insulating materials, and on or about January 22, 1936, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(g) Respondent, Empire Asbestos Products, Inc., (hereinafter sometimes referred to as Empire Asbestos), is a corporation, organized and existing under the laws of the State of New York, with its office and principal place of business located at Atlas Terminal, Glendale, Long Island, N. Y. It is a manufacturer of insulating materials, and on or about September 23, 1935, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(h) Respondent, Gillen-Cole Company (hereinafter sometimes referred to as Gillen-Cole), is a corporation, organized and existing under the laws of the State of Oregon, with its office and principal place of business located at 714 S. W. Front Avenue, Portland, Oreg. It is a winder or converter of insulating materials, and on or about November 17, 1936, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(i) Respondent, Johns-Manville Corporation (hereinafter sometimes referred to as Johns-Manville), is a corporation, organized and existing under the laws of the State of New York, with its office and principal place of business located at 22 East 40th Street, New York, N. Y. It is a manufacturer of insulating materials and is owner of the Toohey patent. On or about September 11, 1935, it granted an exclusive license under said patent to respondent, Tulloch, carrying the exclusive right to sublicense others, and coincidentally therewith it received a sublicense under said patent from respondent, Tulloch.

(j) Respondent, Keasbey & Mattison Company (hereinafter sometimes referred to as Keasbey & Mattison), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business located at Ambler, Pa. It is a manufacturer

of insulating materials, and on or about September 20, 1935, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(k) Respondent, L. A. Rubber & Asbestos Works, Inc. (hereinafter sometimes referred to as L. A. Rubber), is a corporation, organized and existing under the laws of the State of California, with its office and principal place of business located at 124 East Third Street, Los Angeles, Calif. It is a winder or converter of insulating materials, and on or about November 23, 1936, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(l) Respondent, G. A. MacArthur Company (hereinafter sometimes referred to as MacArthur), is a corporation, organized and existing under the laws of the State of Minnesota, with its office and principal place of business located at 2387 Hampden Avenue, St. Paul, Minn. It is a winder or converter of insulating materials, and on or about March 14, 1936, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(m) Respondent, Norristown Magnesia and Asbestos Company (hereinafter sometimes referred to as Norristown), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business located in Norristown, Pa. It is a manufacturer of insulating materials, and on or about October 9, 1935, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(n) Respondent, W. S. Nott Company (hereinafter sometimes referred to as Nott), is a corporation, organized and existing under the laws of the State of Minnesota, with its office and principal place of business located at Second Avenue North and Third Street, Minneapolis, Minn. It is a winder or converter of insulating materials, and on or about February 6, 1936, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(o) Respondent, Pacific Asbestos & Supply Company (hereinafter sometimes referred to as Pacific Asbestos), is a corporation, organized and existing under the laws of the State of Oregon, with its office and principal place of business located at S. W. Front and Clay Streets, Portland, Oreg. It is a winder or converter of insulating materials, and on or about November 17, 1936, became a sublicensee of respondent Tulloch under the Toohey patent.

(p) Respondent, Plant Rubber & Asbestos Works (hereinafter sometimes referred to as Plant Rubber), is a corporation, organized and existing under the laws of the State of California, with its office and principal place of business located at 537 Brannan Street, San Francisco, Calif. It is a winder or converter of insulating materials, and on or about November 20, 1936, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(q) Respondent, The Ruberoid Company (hereinafter sometimes referred to as Ruberoid), is a corporation, organized and existing under the laws of the State of New Jersey, with its office and principal place of business located at 500 Fifth Avenue, New York, N. Y. It is a manufacturer of insulating materials, and on or about October 7, 1935, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(r) Respondent, Sall Mountain Company (hereinafter sometimes referred to as Sall Mountain), is a corporation, organized and existing under the laws of the State of Delaware, with its office and principal place of business located in Rockdale, Ohio. It is a manufacturer of insulating

materials, and on or about December 18, 1935, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(s) Respondent, Standard Asbestos Manufacturing Company (hereinafter sometimes referred to as Standard Asbestos), is a corporation, organized and existing under the laws of the State of Illinois, with its office and principal place of business located in Chicago, Ill. It is a manufacturer of insulating materials, and on or about October 15, 1935, became a sublicensee of respondent, Tulloch, under the Toohey patent.

(t) Respondent, Donald Tulloch, Jr., is an individual, with his office and place of business located in Philadelphia, Pa. On or about September 11, 1935, he was granted an exclusive license by respondent, Johns-Manville, under the Toohey patent, with the exclusive right to grant non-exclusive sublicenses thereunder to others. Pursuant to this exclusive license, respondent, Tulloch, sublicensed the corporate respondents as aforesaid.

PAR. 2. The corporate respondents named in paragraph 1, except as otherwise specifically set forth therein, are engaged in the manufacture, processing, sale, and distribution of insulating materials, and in the course thereof each competes with others of said respondents to the extent that competition has not been restrained, lessened, or destroyed as hereinafter set forth. Pursuant to sales made in the course and conduct of its business, each such corporate respondent (with the possible exception of Gillen-Cole) regularly transports insulating materials, or causes such materials to be transported, across State lines to purchasers thereof at locations outside the State in which such shipments originate. Said corporate respondents have maintained, and now maintain, a constant course of trade and commerce in insulating materials among and between the several States of the United States. Respondent, Donald Tulloch, Jr., is not individually engaged in the production, sale, or distribution of insulating materials, but has participated in, aided, assisted, and cooperated with the other respondents in planning, doing, and performing the acts and practices hereinafter set forth.

PAR. 3. (a) The principal products involved in this proceeding are asbestos paper, asbestos rollboard, wool felt paper, and sponge felt paper, which are made in various weights or thicknesses; corrugated asbestos paper, which consists of a sheet of flat paper to which a sheet of corrugated paper has been cemented; and pipe coverings, boiler jackets, sheets and blocks, consisting of several plies of corrugated paper. Pipe coverings are made by rolling corrugated paper spirally so as to form a cylinder, then cut into short sections which are split longitudinally with one side open and the other hinged to facilitate fitting the two halves around a pipe. Pipe covering is made in varying numbers of plies of corrugated paper and in varying inside diameters to fit different sizes of pipe. The more common forms of pipe covering are low-pressure coarse corrugated, low-pressure fine corrugated, low-pressure laminated, wool felt, sponge felt, antisweat, frostproof, and high-pressure laminated. Pipe covering is usually sold in three-foot lengths, accompanied by staples and metal bands for use in holding it in position when placed around pipes. Some pipe covering is wrapped with canvas, and this canvas may be of varying weights or strength. Waterproof jackets are sold for use with pipe covering which, when installed, will be exposed to the elements. These jackets may be attached to the pipe covering when sold or furnished separately for attachment at a later time. There are numerous modifications and variations with respect to the above products not necessary to describe

here, and the record contains more detailed descriptions of the various products mentioned above. There is a substantial market for both plain and corrugated paper entirely apart from its use by respondents as a material in producing pipe covering, sheets, or blocks.

(b) Some of the respondents in this proceeding produce paper, corrugate it, fabricate it into pipe covering, sheets, and blocks; some do not produce paper, but carry out the other processes; and some merely convert corrugated paper into pipe covering, sheets, and blocks. Those who only fabricate paper purchased from others are known in the trade as winders or converters.

PAR. 4. (a) An NRA Code for the asbestos industry was approved November 1, 1933, with provision for establishing five divisions of the asbestos industry. The division pertinent to this proceeding was the Asbestos Paper and Allied Products Division, of which respondent, Tulloch, who had previously been secretary of a trade association in the asbestos industry and who had been connected with that industry since about 1922, was made manager. The Code provided for the filing of prices and for adherence thereto until other prices were filed. In addition, it authorized the members of each division to prepare simplification and standardization specifications and a merchandising plan which, subject to review by the administrator, became binding upon the members of the industry when approved by three-fourths of the members of the division to which it applied.

(b) Under the Code provision mentioned the members of the Asbestos Paper and Allied Products Division established a merchandising plan for their products the third revision and correction of which, dated December 21, 1933, became effective. The nature and particularity of the plan is illustrated by its provisions relating to pipe covering. It covered all sales of pipe covering by members in all parts of the United States except a Pacific Coast zone the limits of which were specified. It established and defined classes of buyers, required members to submit the names of customers to a merchandising committee of the division, and after approval by such committee, for the compilation therefrom of a master classified list to be available to members of the Code, with provision for additions or deletions subject to final decision by the Code manager. Definitions were established of carload, mixed car, stopover car, and less-than-carload shipments, with prohibition against hiring the trucks of customers or renting trucks to customers or making allowance for trucking charges where the material was picked up at the factory or warehouse by customers' trucks. Factory points, metropolitan areas, and manufacturers' warehouses were defined. Units of sale were established. Sales were required to be made at prices derived from one standard list price. Price differentials were fixed as between different thicknesses of coverings and different types of construction, as between the different geographical zones, and as between the various classifications of purchasers. Price differentials were fixed for differences in weight of canvas used on pipe coverings, for waterproof jackets, and for various types of bands. Procedures were established for many details of the handling of quotations and shipments, as well as the treatment of different classes of customers following an advance or decline in price. The method of determining warehouse prices was specified; the terms of payment, including cash discounts to different classes of buyers, were fixed; and important features of contracts were standardized. Consignment stocks were prohibited.

Substandard materials could not be offered below the normal selling schedule of the manufacturer. Territorial zones were defined for purposes of determining freight allowances. Similarly detailed schedules applied to other products.

(c) Before NRA there were a few practices such as zoning, customer classification, freight equalization, and the use of a standard price list, which were in general use in the industry, but with differences in detail as among different companies. The merchandising plan, a portion of which is briefly described above, was a composite and elaboration of these more or less general practices, supplemented by numerous other provisions, all of which were fitted together into a detailed and definite written document. This merchandising plan was continued in operation until the Schechter decision, and in general was used thereafter until it was replaced in November 1935 by a patent-licensing system, though with departures therefrom by individual manufacturers, the distinction being that it was not rigidly followed in all its details after the Schechter decision.

PAR. 5. (a) In September 1931, application for patent was made by certain employees of Johns-Manville and pursuant thereto U. S. Patent No. 1972500 was granted on September 4, 1934, and became the property of Johns-Manville. Without reference to the technical details of this patent, the change effected by its use in the manufacture of asbestos paper and insulating fabrics is the addition of a small proportion of melted paraffin and other ingredients to the mixture of water and asbestos or other fibers while in the paper beater being prepared for felting into paper. This is claimed to reduce the ability of the fibers so treated to absorb moisture from the air without resulting in a paper in which the pores between the fibers are closed. Also described is a means of treating the surface of the insulating fabrics with water-repellent materials to decrease the capillarity of the surface fibers for water. The claims of the patent, ten in number, cover various insulating materials, including those heretofore described, in which the wax treatment mentioned has been used.

(b) When pipe covering made in the ordinary way is exposed to moisture-laden air it absorbs moisture and expands slightly, and when thereafter it is applied to pipes carrying hot gases or liquids, the heat from such pipes drives the moisture from the covering and some shrinkage results. In instances where this occurs the shrinkage tends to create separations between sections of the pipe covering, thus exposing small sections of pipe and detracting from the appearance and in some degree the efficiency of the insulation. Pipe covering made pursuant to the Toohey patent is said not to shrink, or to shrink but little, thus overcoming or substantially reducing the effects of shrinkage as described above. The experimental and developmental costs of this patent to Johns-Manville were about \$20,000.

PAR. 6. (a) There is conflicting testimony as to whether or not respondent, Tulloch, approached a member of the industry in 1933, prior to the NRA Code, with a plan to use a patent for preshrinking asbestos paper as a means of stabilizing the price and merchandising conditions in the industry through a patent-licensing system. It is clear, however, that while Mr. Tulloch was manager for the Asbestos Paper and Allied Products Division of the Asbestos Code he was engaged upon a licensing plan for the industry under the Toohey patent. Within a month after the issuance of the Toohey patent Mr. Tulloch, with the cooperation and assistance of the larger and more important members of the industry, was

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promoting and developing a licensing system and merchandising plan. Under date of October 11, 1934, Mr. Tulloch wrote the general sales manager of Keasbey & Mattison:

General—J. M. Patent No. 1,972,500
on Insulating Material

I am enclosing a copy of the above Patent for your perusal and to be turned over to Mr. Blagden if he cares to read it (Com. Ex. 358).

These patent-licensing proposals were being considered as an industry project for the common benefit of the members of the industry. Illustrative of this, on December 7, 1934, Mr. Tulloch, in his capacity as manager of the Asbestos Paper and Allied Products Division of the Code, wrote to Mr. Herbert Abraham, president of The Ruberoid Company, as follows:

Meeting—Re: Patents

I would like to arrange a meeting Thursday, December 13th in New York City, to discuss the Low Pressure Situation particularly in connection with certain new patents.

Would it be possible for you to attend such a meeting?

If not would Friday, the 14th, meet your conveniences.

The matter is vital to the paper and aircell division and your cooperation will be appreciated (Com. Ex. 32).

On December 11, 1934, Mr. Tulloch, in his capacity as manager under the Code, wrote A. S. Blagden, president of Keasbey & Mattison, as follows:

Re: Low Pressure Patents

Referring to my letter of the 10th, the meeting on the above subject, originally called for the Johns-Manville Conference room, has been transferred to the Commodore Hotel New York City, at the same time, 10:30 A.M., Thursday, Dec. 13th.

The room will be reserved in my name and posted on the bulletin board (Com. Ex. 361).

Counsel for Johns-Manville wrote that company on December 12, 1934, enclosing

* * * three copies of a draft agreement between Johns-Manville Corporation and Mr. Tulloch and three copies of a draft of sub-license agreement to be entered into by Mr. Tulloch and various members of the trade. * * * I am sending them to you now so that you may look them over before the meeting tomorrow morning * * * (Com. Ex. 348).

After the above meeting was held, Mr. Tulloch, under date of December 26, 1934, wrote Mr. Abraham of Ruberoid, who had been unable to attend because of absence from New York:

Re: License Agreement

I attach copy of revised license agreement.

This is submitted for your consideration and I will be glad to have any comments you care to make (Com. Ex. 51).

The enclosure accompanying this letter (Com. Ex. 52-A to N, inclusive) is a draft of a proposed license under the Toohey patent showing

respondent Tulloch as licensor. This draft is significant in indicating what the negotiating parties had in mind. It provided that the licensor could establish minimum selling prices and maximum terms and conditions of sale to the various classes of trade, and further:

The right and license granted hereunder is granted upon the express conditions and limitations that the Licensee shall not make, use or sell any sectional Asbestos Paper Pipe Covering, Sheets or Blocks, Rag Felt or Wool Felt Sectional Pipe Covering, Sheets or Blocks or other similar product used for the same or similar purpose, which does not embody, employ and contain the invention patented by said Letters Patent; that the Licensee shall not sell to any manufacturer of sectional Asbestos Paper Pipe Covering, Sheets or Blocks, Rag Felt or Wool Felt Sectional Pipe Covering, Sheets or Blocks or such other similar product, any paper or other product useful for any purpose for which paper embodying, employing and containing the invention patented by said Letters Patent is useful, unless such paper or other product embodies, employs and contains the invention patented by said Letters Patent; and that the Licensee shall not sell any paper or any such other product embodying, employing and containing the invention patented by said Letters Patent to persons or corporations which are not Licensees in good standing under a license granted by the Licensor under the said Letters Patent as herein provided.

When finally executed, the license did not contain the provision quoted above. Evidently Mr. Tulloch sent similar drafts of the proposed license to other important manufacturers. A letter dated February 8, 1935, from Keasbey & Mattison to Mr. Tulloch refers to Mr. Tulloch's letter of December 26, and states: " * * * we have given consideration to the agreement which accompanied it proposing a license under U. S. Patent No. 1,972,500, and have the following comments to make." The letter continues by criticizing the possibility that under one of its provisions Keasbey & Mattison might be required to pay double royalty, suggested that provision be made for an interval to afford a licensee time to change schedules when changes are required by the licensor, and concludes by stating:

If manufacturers and small winders representing a sufficient per cent of the output of the products coming within the scope of this patent, agree to become Licensees, and you will make the changes we have suggested in the proposed agreement, we shall be pleased to give the matter further consideration (Com. Ex. 33).

Under date of January 5, 1935, Mr. Tulloch wrote Mr. A. K. Burgstresser, president of Norristown:

General—Meeting—Wed. 1/9 (Toohey Patent)

I would like you to act as a member of an Advisory Committee on a merchandising plan under the Toohey Patent.

Will you please advise whether you could attend a meeting of this committee Wednesday, January 9, at 10:30 A.M. at the Hotel Commodore, New York. Unless I hear from you to the contrary, will expect you to attend (Com. Ex. 4).

The Committee referred to in the above letter to Norristown included representatives of Johns-Manville, Carey, Ruberoid, Norristown, and Keasbey & Mattison. From his long experience in the industry, Mr. Tulloch considered the volume producers to be Johns-Manville, Carey, Ruberoid, Norristown, Keasbey & Mattison, and Sall Mountain.

(b) While these negotiations were in progress, the Schechter decision was handed down and members of the Asbestos Code, including many of the respondents in this proceeding, prepared and submitted a so-called voluntary agreement to continue many features of the Code, including the filing of prices with the administrative agency and adherence to the prices and terms so filed, and with provisions looking to the preparation of a merchandising plan. The agreement was prepared in June and July of 1935 but was never approved by Governmental authorities and never became operative.

(c) During all this period, meetings were held by Mr. Tulloch with representatives of the more important of respondent manufacturers at which the proposed licensing plan, the terms of the license from Johns-Manville to Mr. Tulloch, the terms of the sublicenses to be issued by Mr. Tulloch, and the terms of the merchandising plan to be attached to such sublicenses were considered in detail. Drafts of such agreements were prepared and revised from time to time pursuant to suggestions by various parties. Several of the meetings referred to were held in New York, and at least one such meeting was held in Chicago.

(d) Illustrative of the final stages of the negotiations carried on concerning the license agreements, Mr. Tulloch, under date of September 5, 1935, wrote George W. Mills, Jr., of Carey:

I enclose agreements for your consideration in connection with the proposed license under the Toohey Patent.

I understand that you will advise me Monday whether these meet your approval for signature by your company (Com. Ex. 5).

On September 7, 1935, Mr. Mills of Carey replied, acknowledging the above letter and "draft of September 4, 1935 Agreement between Johns-Manville Corporation and yourself," suggested a number of changes, and continued:

I have hastily examined this agreement in order to be able to have something in your hands Monday morning. I will examine it further and if I have any other suggestions or comments will wire you Monday. If you have no word from me by wire Monday, you may consider this as my approval of the proposed license between Johns-Manville Corporation and yourself, granting you the right to license others. This, however, does not constitute my approval of the form of sublicense referred to as "Exhibit A" which is to be attached to this agreement as I have not as yet had an opportunity to examine same. As I advised you over the phone Thursday, I would try to approve the form of license between you and Johns-Manville, whereby you acquire the right to license others, so that you would have my approval or disapproval not later than sometime Monday, but I did not agree, as your letter suggests, to advise you by Monday whether the sublicense form Exhibit A met with my approval for the signature of the Philip Carey Company. That is a matter that requires not only my consideration but also conferences with our officials respecting the proposed schedules which you included in yours of August 30. * * * (Com. Ex. 6-A, B).

PAR. 7. (a) On September 11, 1935, an exclusive license from Johns-Manville to Mr. Tulloch granting him exclusive right to sublicense, and a sublicense thereunder from Mr. Tulloch to Johns-Manville with accompanying "Schedule of Minimum Prices, Terms and Conditions of Sale" for licensed materials, which schedule was known as the merchandising plan, were finally executed. Some changes of little conse-

quence were made at the time these agreements were signed. In writing Mr. Mills of Carey on September 13, 1935, sending him copies of the documents as executed, Mr. Tulloch characterized such changes thus:

You will note that there are a few changes but I think only minor ones (Com. Ex. 8).

(b) In the form executed, the exclusive license to Mr. Tulloch, among other provisions, gave him the exclusive right to sublicense others on terms no more favorable than those contained in the accompanying sublicense to Johns-Manville; required the payment by Mr. Tulloch of \$1,250 per year compensation to Johns-Manville; provided means for either party to terminate the agreement; and provided that at request of Johns-Manville Mr. Tulloch should bring suit against any infringer of the patent. The sublicense referred to in the exclusive license gave Johns-Manville a non-exclusive license under the patent; required payment of royalty fees to Mr. Tulloch amounting to one-fourth of one percent of the list value of licensed materials described in an accompanying schedule; provided right of inspection of books; prohibited the sublicensee from selling at lower prices or upon terms or conditions of sale more favorable than specified by the licensor; provided liquidated damages of 50 percent of the proper net selling price be paid to the licensor on any sales of licensed materials in violation of the licensor's schedule; established procedure for arbitrating disputes concerning the agreement; provided means for terminating the agreement; and contained a number of other provisions.

(c) The merchandising plan established pursuant to the sublicenses granted by Mr. Tulloch defined the various classes of purchasers and permitted classification or reclassification of any buyer by the licensor; required that contracts with buyers be in conformity with the merchandising plan; established time limits on quotations and shipment of orders; specified the manner of handling price advances or declines with customers and the nature and extent of protection which might be accorded customers or classes of customers; fixed the cash discount and terms of payment; prohibited future dating of invoices or the furnishing of consignment stocks; fixed a differential for warehouse prices; prohibited sales of substandard materials at less than the established prices without special permission; specified the manner of handling returns of material; required that unit prices be figured to the fourth decimal point and provided for the disposition of subsequent decimals and the manner of figuring extension totals; prohibited loans of licensed materials; established a pricing method on other than standard size materials; required that all invoices, estimate blanks, quotation sheets, or other papers used in quoting or selling conform to pertinent provisions of the license; forbade alternate quotations on public bids which resulted in a lower price than authorized; detailed the manner of invoicing materials; prohibited splitting of commissions with purchasers or the use of fictitious invoices; required that estimates from blue prints be for a specific quantity and that any additional materials needed to complete the job be charged for at the same rate; and prohibited anything not specifically permitted in the schedule.

Following these general provisions, the special conditions attached to the sale and distribution of the various licensed products were set out separately. One of these schedules covered pipe coverings, sheets and blocks, of the several types and defined standard construction thereof;

specified units of sale; supplied tables for calculating areas of sheets and blocks; fixed standard list prices for pipe coverings, sheets and blocks, and required prices be quoted in terms of discounts therefrom; outlined factory zones; divided the country into geographical zones for pricing purposes; specified the extent to which freight allowances might be made; established price differentials for different weights of canvas, for different types and number of bands, and for waterproof jackets with or without accessories; specified the method of figuring prices on sheets and blocks, flat, curved, or with cutouts; defined carload quantity, the method of applying carload prices, and the handling of stopover cars.

The schedule on corrugated or indented asbestos paper excluded from its application a few of the extreme western States, the exact limits excluded being defined; fixed the unit of sale and specified standard sizes; specified the prices to the various classes of purchasers in carlot and LCL quantities; defined carload and LCL shipments; fixed differentials for warehouse prices; made provision for special grades of these products and prices thereof; and outlined the manner in which freight might be equalized, naming the points to be used for equalization purposes.

The schedule for high-pressure laminated asbestos pipe covering, sheets and blocks, defined the unit of sale; specified constructions considered standard; required that prices be made f.o.b. factory in terms of discount from a standard list; specified points to be used for freight equalization purposes; forbade quoting prices on a freight-allowed basis unless demanded, and then only when calculated according to a specified formula; established differentials for different weights of canvas, types and number of bands, and waterproof jackets; stated a formula for figuring prices on sheets and blocks and price additions for special sizes, curved, or cylindrical shapes or cutouts; made the plan applicable to all but the Pacific Coast territory as defined; and fixed the prices for the different classifications of purchasers.

The schedule on asbestos paper and rollboard was made applicable to all of the United States except a Pacific Coast zone which was defined; specified units of sale; established standard weights and dimensions and fixed the prices therefor in carlot or LCL quantities and as between different classifications of customers; defined carload shipments, mixed cars, pool cars, and LCL shipments; fixed differentials for warehouse prices and prices on special grades; provided the formula for equalization of freight and specified points to be used for freight equalization purposes; established the relation between weights and thicknesses of paper and rollboard and required that other thicknesses be quoted on the basis of the next higher standard weight.

(d) The merchandising plan described above is in general outline and in many details merely a re-establishment, with additions, of the merchandising plan created by these respondents and others under NRA. The principal differences are that the present plan substitutes direct price fixing for price reporting, stops some loopholes for competition which existed in the NRA plan, and provides more direct and effective means of enforcement. The differences which exist between the two plans are largely a matter of degree rather than principle.

PAR. 8. (a) At various dates between September 11, 1935, when the license agreements were executed by Johns-Manville, and October 25, 1935, sublicenses were executed with twelve other members of the industry, including more important members such as Carey, Ruberoid,

Norristown, and Keasbey & Mattison. The merchandising plan attached to the sublicense to Johns-Manville bears the statement: "Effective—upon a date to be fixed hereafter by licensor." These sublicensees did not proceed individually to operate under the sublicenses when granted, or as soon thereafter as possible. Mr. Tulloch fixed November 1, 1935, as a common effective date for the commencement of operations under the patent in accordance with the merchandising plan described.

(b) The licensing system was viewed by members of the industry as being a program by and for the industry. This attitude on the part of both licensed and unlicensed concerns is illustrated below. The Chicago office of Johns-Manville announced the effective date of the merchandising plan to their salesmen by a circular dated November 1, 1935, reading in part:

We have been advised that effective November 1, 1935, the Low Pressure Insulation Manufacturing Industry begins operations under a patent and license agreement. The patent covers the manufacture of "Pre-shrunk" insulation materials.

Under the terms of the license, we and other manufacturers must manufacture and sell our products involving the patent in strict accordance with rules and price schedules established by the Licensor.

We have just been advised by the Licensor of the establishment of a schedule of selling prices, effective November 1, as per attached copy.

Note particularly that this schedule provides for an increase in the price of Low Pressure Pipe Coverings * * * (Com. Ex. 302).

On December 17, 1935, Clark Asbestos, which was not then a licensee, wrote Mr. Tulloch, stating:

Not having received any further correspondence since November 14th, 1935, we are anxious to know if the present set-up on low-pressure covering is in effect now.

The reason we ask, is that we have been following the prices as you laid down and find that our competitors are not doing this. In fact, the Poewils Asbestos Company had stated that they did not receive any new prices and are still quoting the old.

Please let us hear from you at once (Com. Ex. 183).

On December 21, 1935, Ehret Magnesite Manufacturing Company wrote Mr. Tulloch in part:

If you expect the Ehret Company to live up to the letter of your Merchandising Plan it is going to be necessary for you to send direct to us any memos or rulings, particularly regarding change in price or price clarification.

* * * * *

We realize we are not a Licensee under your patent but we are desirous of living up to all the rules and regulations just as if we were, but we can not do it unless we get the information just as soon as all Licensees get it (Com. Ex. 137).

Under date of December 27, 1935, Norristown acknowledged a memorandum from Mr. Tulloch concerning the above request by Ehret, and concluded by stating:

We would suggest at the time you send the Ehret Magnesite Mfg. Company their copy that you forward copy of such information direct to Grant Wilson, Inc., 4101 W. Taylor Street, Chicago, Ill. (Com. Ex. 138).

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On January 2, 1936, Mr. Tulloch wrote Norristown concerning the Ehret request, stating in part:

In view of the fact that their financial arrangement is such that they practically control two accounts, which I hope will be Licensees, it does not seem to me that there can be any great amount of harm done (Com. Ex. 139).

Clark Asbestos, upon the insistence of Ehret, one of whose officials stressed to Mr. Clark the price-control and stabilization benefits rather than any advantages of preventing shrinkage through the use of the patent, became a licensee soon after the correspondence quoted above. Atlantic Asbestos, one of the respondent licensees, received the understanding that the licensing agreements and merchandising plan merely constituted a method adopted by the industry to stabilize asbestos products.

PAR. 9. The merchandising plan put into effect November 1, 1935, represented the result of common consideration by and understandings and agreements among some of the more important members of the industry, including Johns-Manville, Carey, Ruberoid, Norristown, and Keasbey & Mattison. Beginning soon after November 1, 1935, and continuing thereafter changes were made from time to time in its provisions. In general, these changes were made as a result of common consideration by the sublicensees and, insofar as possible in such a group, understanding and agreement among them. From a technical standpoint, all changes made were necessarily ordered by Mr. Tulloch in his own name, but such changes rarely, if ever, represented truly independent action by him. In fact, Mr. Tulloch consistently followed a policy of holding meetings with groups of licensees at frequent intervals to discuss proposed changes in prices, terms of sale, and other features of the merchandising plan which were suggested by him or by others. In addition, he regularly conducted negotiations concerning such matters with licensees individually and as a go-between for various licensees. The examples set out below illustrate these activities as well as the industry attitude referred to in the preceding paragraph. In a memorandum of February 3, 1936, addressed "TO ALL LICENSEES" Mr. Tulloch stated:

I would like to call a meeting of all Licensees at the Commodore Hotel, New York City, on Wednesday, February 19th at 10:30 A.M.

There are a number of matters of importance to discuss. Please advise promptly whether or not you will be present (Com. Ex. 142).

In a memorandum of February 20, 1936, addressed to licensees Mr. Tulloch stated:

*Subject: Committee Meeting—
Asbestos Paper Group*

I would like to call a meeting of the above group to shape policies on several matters for submission to a meeting of licensees around the middle of March.

The meeting is called for my office at 10:00 A.M., Thursday, February 27.

Please advise promptly whether you can attend (Com. Ex. 146).

In writing Mr. Tulloch on February 24, 1936, the president of Norristown, in discussing pricing of foil and asbestos, stated in part:

We do think, however, that the Industry should reprice the $\frac{1}{2}$ " thick Aircell Boards when sold as a board without foil and this price should not exceed $3\frac{1}{2}$ ¢ per square foot to keep it in line with other thicknesses. My reason for asking this is that there will be some demands for this class of material and contrary to what we might say or think there is now being discussed this price by the user of such thickness of board. In the event the Industry agrees to this we would not price our $\frac{1}{2}$ " thickness of board lower than the price originally agreed upon or \$0.0608 per square foot and we will base our quotations on this price. I wish you would take this up with the Industry and see whether they will not agree on the price as outlined above (Com. Ex. 147).

Under date of July 28, 1936, Mr. Tulloch addressed a memorandum to licensees concerning change in Price Schedule II, stating in part:

Under separate cover you are being forwarded copies of revision of Schedule II.

You will note that many points indicate that I have used my best judgment in adopting compromises which seem to be in the best interests of the industry where differences of opinion on the part of licensees existed (Com. Ex. 321).

On September 22, 1936, Mr. Tulloch's office addressed a memorandum "TO ALL LICENSEES" concerning cut-size boards to equipment accounts, stating in part:

At our recent meeting it was agreed you would give further consideration to the above subject and make a study of the following suggestion designed to eliminate loss on waste. I shall appreciate your comment at your earliest convenience. The following is the suggestion * * * (Com. Ex. 324).

On October 29, 1936, Mr. Tulloch wrote Acme Asbestos concerning removing a provision in the schedules for protection of mechanical contractors and stated in part:

So far as the east is concerned, I'm sure we can remove it.

Can you let me hear on this by return mail so that we can make a decision before printing our new schedules.

Will appreciate it if you can agree with this viewpoint, and would like to know whether others in your territory, according to your recollection, feel as you do about it (Com. Ex. 214).

On November 9, 1936, Acme Asbestos replied to Mr. Tulloch's inquiry, expressing disagreement with a suggestion that the particular provision be removed and the matter be handled by special authorizations, stating in part:

For our own part we are very skeptical about the ultimate workability of any agreement in such a group as ours if it contains any number of "special authorizations." If we were entitled to such an arrangement, others would feel they were entitled to the same or different "special authorizations" which they thought desirable for their business.

If, on the other hand, by "special authorization" you mean it would be authorized in a bulletin to all licensees and in the same terms and conditions that now exist in the present schedule, this would not seem to us to be seriously out of order.

I do think Don you should strongly resist the effort of any one group or trade classification in the industry to appropriate too much of the protection and benefit of the License Agreement to itself. I feel that you as a guiding spirit of the low pressure industry should foster the interests of the plumbing and heating contractor and the job-

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ber just as much as the approved insulation contractors who are even now getting the long end of the deal * * * (Com. Ex. 215-A, B).

Under date of March 10, 1937, Mr. Tulloch's office addressed a memorandum to licensees concerning flexible range boiler jackets, stating:

Comments made on proof of the above Schedule were sent you February 4 and February 24. While there has been some difference of opinion relative to suggested changes, the general view seems to favor the following changes in the original proof.

* * * * *

If licensees approve the above, we can proceed at once to make effective Schedule VI—so your prompt comments are urged (Com. Ex. 221).

Under date of August 25, 1937, Acme Asbestos wrote Mr. Tulloch in response to his memorandum of August 13th concerning price protection in the event of price advances, stating in part:

We have reviewed your remarks very carefully and I hope you will defer ruling protection out until the matter has been openly discussed in a meeting. We think it quite too serious to pass on otherwise.

* * * * *

The advances our lines have made have been in some cases considerable over the last 12 or 18 months, but we think they have been accepted a lot more cheerfully in the trade by reason of the protection we have held out to them from time to time as advances have been published than might otherwise have been the case (Com. Ex. 225).

On December 9, 1937, Mr. Tulloch advised licensees in part:

A large majority of Licensees selling Flexible Range Boiler Jackets favor eliminating freight allowance on less than ten jackets.

* * * * *

Therefore on December 25th the following ruling becomes effective:

"Prices on less than 10 jackets F.O.B. factory. On 10 or more jackets prices are F.O.B. factory with full freight allowed" (Com. Ex. 227).

A few days later, on December 14, 1937, Mr. Tulloch advised licensees with regard to the same subject:

This is to advise that developments since publication of elimination of freight allowance on less than 10 jackets indicate the necessity for rescinding this ruling.

Will you therefore disregard the memo of December 9th on this subject.

It has been extremely difficult to find a common ground on which to solve this problem. It is obvious that allowance of freight on these small lots is expensive.

I would like your consideration of a general revision of Range Boiler Jacket prices, sufficient to take care of advancing costs, to be made effective sometime after the first of the year (Com. Ex. 228).

The respondent sublicensees who did not participate in the organization of the licensing system could not have remained ignorant of the fact that the merchandising plan was being administered upon the basis of cooperation, agreement, and understanding between and among the sublicensees and the licensor. The numerous communications from Mr. Tulloch to all his licensees alone make this plain, without reference to other negotiations and meetings.

PAR. 10. (a) Respondent Norristown owns a patent relating to range boiler jackets used principally for insulating household hot water tanks. Under this patent such jackets are made in flexible form, thus conserving shipping space and substantially reducing shipping costs as compared with rigid jackets. In 1933 Norristown licensed Carey under this patent but did not include any price-control provision in the license. In 1934 it licensed Johns-Manville and Sall Mountain under this patent, with provisions for price control. During the time Mr. Tulloch was actively negotiating arrangements for licensing under the Toohey patent, Norristown suggested to him that he also handle licenses under the Norristown patent. On June 26, 1934, Norristown wrote Mr. Tulloch in part:

We had a conversation some time ago with reference to your handling the License Agreements in connection with our flexible boiler jacket. We now hold such Agreement with Carey and J-M, and, while none of them are very profitable and we are not expecting them to be, we believe that by such cooperation far better results can be obtained (Com. Ex. 95).

On December 4, 1935, Norristown wrote Mr. Tulloch:

What progress have you made since we have turned over to you the License Agreement on Flexible Jackets?

There are a number of manufacturers such as National Asbestos, Standard Asbestos at Chicago, etc., who we think should be brought into line.

An expression from you will be appreciated by (Com. Ex. 104).

The lack of a price-control feature in the license to Carey was a hindrance to Norristown and Tulloch in securing licensees under the flexible jacket patent, and unsuccessful efforts were made to persuade Carey to accept a price-control provision in its license. For example, Norristown wrote Carey on November 9, 1934, in part:

Several days ago I was talking to Roy Hoff of the J-M Company and he told me that while in your company some time ago he mentioned the flexible jacket and the arrangement they have with us and the fact that he believed that a lack of cooperation on the part of some of the manufacturers was penalizing the profits that might be derived from the sale of these jackets. I have had this matter up with both Mr. Steffens and Mr. Moore from time to time and I want to give you an exact picture of our working arrangements at the present time.

You were the first manufacturer to cooperate with us and sign a License Agreement for the making of the flexible jacket. At that time we did not incorporate (sic) a price control, believing that we could work the matter out without such provision. Later the J-M Company signed an Agreement and in this we incorporated the price control and have found that it works very satisfactorily. They naturally want the same cooperation from other manufacturers who are under a License Agreement.

I realize that you are making several types of jackets and that for this reason you are not as much interested in the handling of this matter on a price basis as others might be but the fact that we have not been able to reach a satisfactory working arrangement with you on this part of the Agreement is the cause for our not being able to have several other manufacturers consent to handle the License Agreement for the present at least. This morning Keasbey & Mattison expressed their willingness to work with us on such an Agreement, again with the proviso that everybody of importance would do the same thing. I am, therefore, writing you and asking whether it would be possible to have you agree to such an arrangement (Com. Ex. 84).

The negotiations continued in a desultory manner during the remainder of 1934 and all of 1935. Mr. Tulloch made some efforts to secure licensees under the Norristown patent, and from time to time during this period various matters were taken up with him concerning operations under the Norristown patent. For example, on May 28, 1935, Norristown wrote Mr. Tulloch:

Some time ago I asked you to confirm the fact that K & M are not quoting our published prices on flexible jackets. Contrary to what you assume, they still have prices with some of the utilities that show a great reduction.

I wish you would check this very closely and if they do not intend playing ball we shall serve a legal notice on them to discontinue the making of this type material. We feel this is necessary to protect our interests as well as the other Licensees (Com. Ex. 100).

On January 8, 1935, Johns-Manville wrote Norristown in part:

We assume you will keep us advised periodically regarding your negotiations with Keasbey & Mattison and other range boiler cover manufacturers in regard to their accepting a license under your patent, as it would seem that this will have to be accomplished if we are ever to realize stabilization of prices in this field (Com. Ex. 91).

In writing Mr. Tulloch on January 16, 1936, concerning price cutting on boiler jackets in Detroit, Norristown stated in part:

* * * As you probably know, Empire and National are both selling boiler jackets today at ten per cent less than we are quoting. This is the reason I have thought it important that you proceed without further delay on the jacket proposition because it is coming (sic) serious in that area (Com. Ex. 141).

Sometime during 1936 the idea of bringing flexible boiler jackets under the Toohey patent was advanced and interest in securing licensees under the Norristown patent ceased. On July 23, 1936, Mr. Tulloch addressed a memorandum to his licensees reading:

I have a recommendation from one member of the Industry to the effect that Range Boiler Jackets which should be, and probably are being made out of patented materials, should be included in the schedules which I publish.

In order to get quick comments on the above, I am attaching, hereto, recommendations for both the rigid type and flexible type jackets.

I would appreciate your consideration of both of these, and your comments thereon (Com. Ex. 209-A).

(b) After extended consultations with and among licensees and after various revisions, Mr. Tulloch in the spring of 1937 published and put into effect under the Toohey patent Schedule VI, which controlled the pricing and merchandising of flexible range boiler jackets made from materials produced under the Toohey patent. This product had not theretofore been included in the merchandising plan. The schedule published was similar in scope, character, and degree of particularity to other schedules previously described. After the incorporation of flexible boiler jackets in the Tulloch merchandising plan, Norristown ceased publishing its own individual price schedules for this product and adopted the schedule published by Mr. Tulloch under the Toohey patent, as did its licensees and those of Mr. Tulloch who produced such jackets.

PAR. 11. (a) It was the policy and practice of respondent, Tulloch, to include in each sublicense only those of the products claimed to be subject to the patent as were produced by the particular concern to which

the sublicense was granted. The licenses to respondents, Bennett, Clark, Gillen-Cole, and Nott, covered only low-pressure pipe covering, sheets and blocks. Those issued to respondents, Acme Asbestos, Asbestos Asphalt, Empire Asbestos, L. A. Rubber, and MacArthur, included only low-pressure pipe covering, sheets and blocks, and corrugated asbestos paper. Those to Pacific Asbestos and Plant Rubber, included low-pressure pipe covering, sheets, and blocks, corrugated asbestos paper, and high-pressure laminated pipe covering, sheets and blocks. That to Atlantic Asbestos included low-pressure pipe covering, sheets and blocks, corrugated asbestos paper, and asbestos paper and rollboard. Those to respondents, Carey, Johns-Manville, Keasbey & Mattison, Norristown, Ruberoid, Sall Mountain, and Standard Asbestos, included low-pressure pipe covering, sheets and blocks, corrugated asbestos paper, high-pressure laminated pipe covering, sheets and blocks, sponge felt paper, wool felt paper, and asbestos paper and rollboard.

(b) The prices and merchandising plans established by respondent Tulloch applied only to the first sale of a licensed product by a licensee, except when the purchaser was also a licensee. Those respondents designated as winders or converters did not produce paper and necessarily bought their supplies thereof from others. The question of purchases by one licensee from another came up early in the history of the licensing plan. On January 21, 1936, Mr. Tulloch advised all licensees that:

It is quite definite that purchasing licensees must respect my selling schedules and pay royalties on materials they buy and sell, as well as materials they make and sell
* * * (Com. Ex. 308).

Although the sublicenses established minimum prices and completely controlled the merchandising of all of the products mentioned in (a) above, and also flexible boiler jackets, Mr. Tulloch did not require or collect royalties from licensees on any of the licensed products except pipe coverings, sheets and blocks.

(c) As heretofore stated, the sublicenses provided for liquidated damages when a licensee violated the merchandising plan. Under this provision Mr. Tulloch from time to time assessed and collected damages from licensees for infractions of the merchandising schedules.

(d) The amount paid to Johns-Manville by Mr. Tulloch for the exclusive license, \$1,250 per year, at most could no more than reimburse Johns-Manville for the development cost of the patent. When considered in connection with the fact that Johns-Manville was obligated to pay a royalty of one-fourth of one percent on all the licensed pipe covering, sheets, and blocks sold or used by it (and it produced no other kind), the financial return to Johns-Manville from the ownership of the patent was insignificant. Johns-Manville contends that it hoped to benefit from the licensing of others under the Toohey patent through the creation of a broader market for the licensed materials in which it would be able to hold its relative position. As a matter of fact, however, the other corporate respondents did little or nothing to promote and create demand for licensed products as against unlicensed. It is also evident from the record that insufficient consumer demand for licensed products developed to make it necessary, as a business policy, for respondents to remain in a position to supply licensed products to purchasers.

PAR. 12. The Commission has given consideration to the contention by some of the respondents that the various negotiations which preceded

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the granting of the exclusive license to Mr. Tulloch represented no more than his efforts to ascertain whether it would be a profitable business venture for him to assume the obligations imposed by the exclusive license, and to the further contention that the negotiations concerning charges in or additions to the merchandising plans represented no more than the efforts of an intelligent business man, not himself engaged in the manufacture and sale of any of the licensed products, to inform himself of the conditions which existed in the manufacture and sale of such products to the end that he might properly administer the licenses. In view of the facts and circumstances shown in the record, however, the Commission concludes that these contentions are without merit.

PAR. 13. (a) The sublicenses granted by respondent Tulloch did not prohibit the sale by licensees of insulating materials made without utilizing the Toohey patent. Although sublicenses were accepted by some 25 concerns, including all the more important ones, there were some producers of pipe coverings and other insulating materials who did not accept sublicenses from Mr. Tulloch. Competition from these unlicensed concerns resulted in many sublicensees selling pipe coverings and other insulating materials not produced under license at prices less than those specified in the Tulloch schedules for licensed materials. Apparently Johns-Manville was the only sublicensee who did not meet such competition in this manner. Carey followed a policy of regularly selling in conformity with the Tulloch schedules except when a competitor offered lower prices on unlicensed materials. If Carey met such lower prices, it furnished unlicensed materials in filling such orders. The record shows a limited number of cases where unlicensed insulating materials were sold in accordance with the prices, terms, and conditions of the Tulloch merchandising plan. The price lists, conditions, and terms of sale issued by respondents to their customers were in accord with the Tulloch plan: they did not have two price lists or two merchandising plans, one for patented and the other for unpatented products. It is plain from the record that a number of the features of the Tulloch plan were frequently, if not regularly, used by respondents in the sale of unlicensed materials. These include matters such as terms of sale other than price, sales of certain types of products on a delivered-price basis and of other types on a freight-equalization basis, differences resulting from the use of the geographical zones, and other features of the merchandising plan. Respondents did not maintain and concurrently use two different merchandising plans for products which were alike except for the wax treatment, and as a practical matter it would have been difficult to do so.

(b) Certain unpatented materials are sold with pipe covering. These include canvas covers made a part of the pipe covering and accompanying accessories such as staples, metal bands, and waterproof jackets. The price for boiler jackets also included unpatented articles such as bands, staples, and asbestos cement, and differentials for extra bands were specified. By establishing price differentials on the same pipe covering when different weights of canvas were used, when different kinds or varying numbers of bands were supplied, and when waterproof jackets were furnished, as well as for unpatented articles used with boiler jackets, the sublicenses issued by Mr. Tulloch effectively fixed the prices for these unpatented articles when sold with pipe coverings or boiler jackets, as they usually are.

PAR. 14. (a) During the period the patent-licensing plan was being negotiated, prices of products covered by its claims were at a low level. When the licensing plan became operative, the prices of such products licensed under the Toohey patent were increased while similar products not made under that patent continued at the previous price levels until about the end of 1936. At that time a general upward trend began and continued until some indefinite time about 1940, when the condition known as a "seller's market" in such products was reached. It is common knowledge that in a seller's market sellers have little occasion for the use of or for interest in a price-stabilization program such as that provided by the Tulloch licensing plan heretofore described.

(b) The record shows that those respondents who discontinued the use of the Toohey patent ceased paying royalties to Mr. Tulloch on or about the following dates:

Pacific Asbestos	September 1937
W. S. Nott	March 1938
Plant Rubber	August 1938
L. A. Rubber	September 1938
Atlantic Asbestos	October 1938
Gillen-Cole	December 1938
Clark Asbestos	December 1938
Standard Asbestos	March 1939
Keasbey & Mattison	May 1939
Norristown	June 1939
Empire Asbestos	June 1939
Acme Asbestos	October 1939
Sall Mountain	January 1940
Ruberoid	May 1940
Bennett	July 1940
MacArthur	March 1941
Asbestos Asphalt	April 1941

Johns-Manville and Carey have continued to utilize the sublicenses which they hold and to produce and sell products covered by the Toohey patent.

(c) The sublicenses provided that they might be canceled on December 31 of any year by either party giving the other written notice 90 days in advance of that date. Some of the respondents have canceled their licenses in the manner provided; some have not done this, but have simply ceased utilizing the rights granted them by the sublicenses and therefore stopped paying royalties to Mr. Tulloch; and as to some, the record does not show whether or not cancelations in accordance with the terms set out in the sublicenses have been made.

PAR. 15. The Commission concludes from the evidence of record, and therefore finds, that the license from Johns-Manville to Mr. Tulloch was granted and the patent-licensing and merchandising plan heretofore described was established as a part of and as a means of effectuating the combination and conspiracy entered into and maintained by the respondents herein in the manner aforesaid. It further finds that the capacity, tendency, and effect of said combination and conspiracy and the acts and practices performed thereunder and in connection therewith by said respondents as set out herein has been, and is, to lessen, restrain, and suppress competition in the sale and distribution of pipe covering

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and other insulating materials as described herein in, among, and between the several States of the United States; to fix and maintain prices, terms, and conditions of sale for such materials and to deprive purchasers of such materials of benefits of competition in price; to collectively determine and establish classifications of customers for pricing purposes, and fix and determine price differentials as among such classes; to create substantial uniformity in contracts of sale and in terms and conditions specified therein; to determine and maintain uniform delivered prices on certain insulating materials; to determine and maintain uniform delivered costs to particular purchasers through a freight-equalization plan based upon specified equalization points; to determine and maintain geographical zones within which prices of certain insulating materials were made uniform, and using such zones so established for pricing purposes; to establish standard construction, size, and thickness specifications of products to facilitate price fixing thereon; and otherwise to promote and maintain their price-fixing combination and conspiracy and obstruct, lessen, and defeat any form of competition which threatened the maintenance and purpose of said combination and conspiracy.

CONCLUSION

The aforesaid combination and conspiracy, and the acts and practices of respondents pursuant thereto and in connection therewith, as hereinabove found, under the conditions and circumstances set forth, constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the answers filed thereto by respondents, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before an examiner of the Commission theretofore duly designated by it, report of the trial examiner and exceptions thereto, briefs in support of the amended complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of Section 5 of the Federal Trade Commission Act.

It is ordered, That the corporate respondents, Acme Asbestos Covering and Flooring Company; Asbestos, Asphalt and Insulation Manufacturing Company; Atlantic Asbestos Corporation; A. H. Bennett Company; The Philip Carey Manufacturing Company; The Clark Asbestos Company; Empire Asbestos Products, Inc.; Gillen-Cole Company; Johns-Manville Corporation; Keasbey & Mattison Company; L. A. Rubber & Asbestos Works, Inc.; G. A. MacArthur Company; Norristown Magnesia and Asbestos Company; W. S. Nott Company; Pacific Asbestos & Supply Company; Plant Rubber & Asbestos Works; The Ruberoid Company; Sall Mountain Company; and Standard Asbestos Manufacturing Company, their respective officers, agents, and employees; and respondent, Donald Tulloch, Jr., his agents, representatives, and employees, in or in connection with the offering for sale, sale, and distribution of insulating materials (asbestos paper or rollboard, wool felt or sponge felt paper, cor-

rugated asbestos paper, high- or low-pressure laminated asbestos pipe covering, sheets or blocks, low-pressure air-cell asbestos pipe covering, sheets or blocks, wool felt, antisweat, or frostproof pipe coverings, boiler jackets, waterproof jackets, and accessories usually sold with the above materials) in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establishing or maintaining uniform prices, discounts, terms, or conditions in the sale of said materials, or in any manner agreeing upon, fixing, or maintaining any prices, discounts, terms, or conditions of sale at which such materials are to be sold.

2. Establishing or maintaining uniform differentials in price applicable to designated differences in specifications of said materials or to differences in the type or quantity of accessories sold with said materials.

3. Establishing or maintaining any classification of customers or any method or formula for classifying customers used or to be used in determining prices, discounts, terms, or conditions of sale to purchasers.

4. Continuing the uniform delivered-price zones heretofore fixed for making quotations and sales of materials, or establishing or maintaining any delivered-price zones which are similar to those heretofore used in that their use would result in making respondents' delivered prices identical despite their different costs of delivery.

5. Selecting or designating particular locations to be used as freight equalization points for pricing purposes.

6. Establishing or maintaining an exclusive method (such as f.o.b. factory, or f.o.b. factory with freight equalized, or delivered to destination) for quoting and pricing a particular material or group of materials.

7. Establishing or maintaining any formula for calculating unit prices, or for calculating total prices from unit prices, or using any formula so established or maintained.

8. Maintaining or continuing or aiding or assisting in the maintenance or continuance of the licensing system and merchandising plan heretofore established under and pursuant to the Toohey patent.

It is further ordered, That nothing in this order shall be construed to prohibit the owner or owners of the Toohey patent from granting lawful licenses to others to use said patent, or to prevent any respondent herein, or others, from taking lawful licenses to use said patent.

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

IN THE MATTER OF

EDWARD LOWENTHAL, TRADING UNDER THE NAMES
INTERNATIONAL RESEARCH AND BUREAU OF INDUS-
TRIAL ALLOCATION; AND SIDNEY DEAN SARFF AND
H. J. WHITTINGTON

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

Docket 4832. Complaint, Sept. 8, 1942—Decision, Apr. 27, 1944

Where an individual with whom were associated two other persons as below set forth, engaged in interstate sale and distribution of mailing cards, forms, questionnaires and other printed matter designed for use in obtaining information concerning alleged delinquent debtors and to deceive persons from whom information was sought as to their purpose, and including a printed sheet headed "INTERNATIONAL RESEARCH, Room 801—Evans Bldg., 1420 New York Ave., N.W., Washington, D. C." and "RE: TRUST FUND NO. ———," which—after advising addressee that his name was "among those to whom we have been ordered to pay a sum of money from the above trust fund" and that "from information received we believe you are this person, but under the provisions of the trust, we are compelled to obtain positive identification before payment can be made," that, therefore, the complete information "requested below" was required, upon receipt of which remittance would be made but that failing to receive requested information not later than 15 days "we are instructed to make other dispositions of the amount involved"—called on the attached form, addressed to said International Research" at the above address and, under the statement "for the purpose of establishing my identity with your firm, I submit the following information," for debtor's name and address, those of his employer and bank and a personal reference—a similar form being used in addressing persons other than debtors;

Making use of a plan under which said form, accompanied by an envelope addressed to said "International Research," was enclosed in an unaddressed envelope, the units were sold to creditors and collectors and collection agencies who addressed and stamped them and shipped them in bulk to aforesaid two other persons associated with said individual, at the address above given in Washington, D. C., by whom they were mailed separately in said city so that each was postmarked Washington, D. C., and by whom the unopened replies received were shipped in bulk to said individual in Chicago, where latter identified the returns by numbers and sent them to the customers to whom the blank forms were originally sold, and mailed to person executing the questionnaire, from one to five pennies, from a supply of small change maintained in a cigar box in his home enclosed in a small envelope on which was printed: "RE: TRUST FUND NO. ——— QUESTIONNAIRE RECEIVED AND PROPERLY ANSWERED. ENCLOSED YOU WILL FIND THE AMOUNT RESERVED AND SET ASIDE FOR YOU. OUR FILES ARE CLOSED AND FURTHER CORRESPONDENCE UNNECESSARY. INTERNATIONAL RESEARCH."—

- (a) Falsely represented, and placed in the hands of his customers means of falsely representing that "International Research" had its place of business in Washington, D. C., and that recipients of forms might be the beneficiaries named in some trust and entitled to money or other property in substantial amount;

The facts being said representations, notwithstanding the subsequent establishment by him of a so-called trust fund in the amount of \$100, of which his wife was desig-