

Syllabus

IN THE MATTER OF
CROWN MANUFACTURERS ASSOCIATION OF AMERICA
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 4602. Complaint, Sept. 30, 1941—Decision, Aug. 4, 1948

In a proceeding in which the manufacturer-sellers of a certain product knowingly made concurrent use of a freight equalization plan or system under which (having brought about uniformity in base prices and terms and conditions) the manufacturer making the sale either credited the purchaser—who customarily paid the freight—upon the invoice, or otherwise allowed him the difference between his actual freight from the manufacturer-seller and the rate to his location from the nearest manufacturer, with the result that the price paid was the same regardless of which manufacturer made the sale: the contention of the manufacturers that in so matching prices with each other at any given destination they were merely “meeting competition” was not a valid one. In the use of said plan, and in order to produce such matched prices, sellers of the product were required, at numerous destinations, to accept net receipts for their products which varied according to the freight absorbed as a result of the closer proximity to the purchaser of some other seller, and each participant consciously intended that no attempt be made to exclude any seller from the natural freight-advantage territory of another, and by the use of the plan invited other sellers to share the available business in his natural market in return for similar treatment for itself in the trade territories of all other participating sellers. The price rigidity existing in the industry concerned since 1938, and the failure of prices to respond in any way to changing conditions of supply and demand were not consistent with the existence of effective competition, and the complete standardization of the product as a result of admitted efforts made by the manufacturer-sellers involved, and other circumstances showing an overriding desire on their part to present to a prospective customer a completely united front insofar as products, prices, and terms of sale were concerned indicated the total absence of such competition. And when, as in such an industry, the price of the seller nearest the purchaser is always accepted by other sellers and there is no bargaining on any basis between buyers and sellers, fundamental requirements of a true competitive market are lacking, and prices are not the result of market action in the economic sense, but are mere expressions of an artificial and monopolistic price structure.

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Where some thirteen concerns, engaged in the manufacture and interstate sale and distribution of crown bottle caps as closures for bottles and cans of carbonated beverages and other liquids (and also, in the case of some, of composition cork discs for use in the manufacture of said caps), responsible for the production and sale of 80 to 85 percent of all caps sold, and, with the exception of one (which, however, cooperated in acts and practices below set forth), members of a trade association which, in addition to performing such legitimate functions as the collection and distribution to members of statistical information relating to the shipped sales of crown bottle caps, and the circulation to members of information respecting legal requirements as to labeling, etc., was a medium through which they sought to bring about other objectives as below set out—

(a) Took collective action to standardize bottle caps with respect to design, decorations, lettering, combination of colors, and other details which characterized the different types, through including "adoption of regulations for standardization" as one of the "objects" of the association in its constitution, and through the appointment of a Standardization Committee composed of officers of certain member manufacturers, and the dissemination among the members by the secretary of the Committee's selection of designs, lettering, combination of colors, etc.; and through various other association and member activity with respect thereto;

With the result that stock crowns purchased thereafter from any manufacturer concerned herein were identical in all respects with those purchased from any other, and possibility of a purchaser obtaining any advantage in price or otherwise by reason of competition among said manufacturers in the realm of design, combination of colors and appearances of crown bottle caps was completely non-existent;

(b) Made the agreement on and adoption of a standard uniform form of contract the subject of collective action (as evidenced by the minutes of a meeting on July 24, 1928) as a means for bringing about uniform action with respect to such matters as basing charges on products shipped rather than contracted for, expiration dates of contracts, allowable deductions from and additions to the maximum base price set out in a schedule printed in the body of the contract, and construction and packing charges;

(c) Acted collectively with respect to such other matters as the establishment of standard quantity differentials, the difference in cost experience in the manufacture and sale of crowns on a volume basis, changes in prices to reflect changes in freight rates, and standardization of different types of crowns; and

(d) Made use of a freight equalization plan or system under which the seller credited the purchaser with the difference between the actual freight paid by him from the manufacturer-seller's location and the rate to him from the manufacturer nearest him;

With the result that a purchaser at any given locality paid the same delivered price for crown bottle caps, regardless of the manufacturer from which he purchased, and, since 1938 at least, it was impossible for any purchaser at any location to obtain crowns from any manufacturer for a less price or on better terms than those imposed by any other manufacturer involved; and

Where one of said manufacturers, having obtained a number of patents, of which some related to materials, processes and apparatus for the manufacturer of unpatented crowns, and of which others covered spot crowns themselves—

(e) For the purpose and with the effect of furthering the aforesaid understanding, etc., entered into license agreements with the others, with respect to said patents and to such applicable future patents as it might thereafter acquire, which covered all spot crowns, whether patented or not, made under the various patents involved, and exceeded said licensor's legitimate monopoly rights as owner of the patents, and which included the condition, among others, that said licensee-manufacturers initially observe the schedule of minimum prices attached to the agreement, and such subsequent amendments thereof as licensor might issue;

Whereby prices were fixed for different kinds of crowns, and quantities, and for stock and special orders; cash discounts were specified; "free points" for the equalization of freight were designated; and method of charging for spot crowns included in shipments of nonspot was set out; and with the result that, having been thus established, such prices, etc. continued to be observed, notwithstanding licensor's eventual cancellation of the price-fixing provisions; and with the result that, having been thus established, such prices, etc., continued to be observed, notwithstanding licensor's eventual cancellation of the price-fixing provisions; and

Where aforesaid manufacturer, and respondent manufacturer G, following the termination of patent infringement litigation between them involving products concerned—

(f) with the purpose of establishing and maintaining uniformity in price and terms of sale as between themselves, as distinguished from the protection of their rights under their respective patents, entered into cross-licensing agreements pursuant to which each was licensed to—but did not and never intended to—manufacture caps under the other's patents, and in accordance with specified price schedules, which they exchanged as required thereby, from time to time, and which, like those issued by the others herein concerned, followed very closely the schedules set forth in the July 24, 1928 minutes of the association hereinbefore referred to; and having achieved their objective, cancelled said unlawful price-fixing provisions; and

Where manufacturer B, owner of a patent covering a process and apparatus for the manufacture of articles of comminuted cork—

(g) Entered into agreement with manufacturer A licensing it to use said process and apparatus in the manufacture of composition cork material for crown bottle cap discs, subject to the provision that it observe minimum prices established by B; and from time to time furnished it, pursuant to said provision, with price lists which included also the terms and conditions under which such discs were to be sold; and

Where said A—

(h) Endeavored to keep the prices of its cork discs the same as those of the other manufacturers herein;

Tendency, capacity, and effect of which combination and conspiracy, and acts and practices performed thereunder and in connection therewith, had been and were—

(1) To substantially restrain and suppress competition among said manufacturers in the interstate sale of said caps and discs;

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(2) To prevent price competition between and among said manufacturers in the interstate sale of said products;

(3) To empower and enable said association and manufacturers and their officers to control the market therefor; and

(4) To create a monopoly in said manufacturers in the manufacture and sale of said products in interstate commerce:

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

As regards the prior adoption of a standard contract for the use of the different members, with respect to various matters such as uniform deductions, packing, etc.; while it was not the current practice of the member manufacturers in said proceeding to negotiate contracts with crown purchasers, each of said member manufacturers, and also the nonmember manufacturer above referred to, employed the same general schedule of deductions from and additions to base prices, and the same schedule of differentials, as those adopted at the association meeting which acted with respect to said contract; and there being no substantial evidence that the course of action mapped out in the document referred to dealing with the association action had ever been abandoned or substantially changed: it was the Commission's conclusion that the continuation of said practices by such manufacturers was the result of a continuing understanding among them.

As respects the aforesaid matters, and the point made by a number of the manufacturers that they were not represented at the meeting in which such schedules were worked out and adopted: said fact, in the opinion of the Commission was immaterial, and, said respondents having slavishly followed the plan adopted by the others, were equal participants in the practice with them and could not thereafter escape the consequences of their participation by disclaiming responsibility for the idea originally.

While certain evidence in said proceeding had to do with concerted activities which occurred during the existence of the National Industrial Recovery Administration, such evidence, when considered in connection with that which related to activities which occurred both before and after the N. R. A., clearly indicated a continuous effort on the part of respondents to maintain uniform prices and terms of sale for their products.

In said case, in which there had been no systematic exchange of base prices as among the respondent manufacturers since 1938, or prior thereto of changes in said prices, but in which price uniformity was nevertheless accomplished, the successful operation of the system did not require the exchange of such information. Through customers and salesmen in the field, who carried printed price lists, and by various other means, all information relating to prices and terms of sale of any manufacturer involved reached the other manufacturers in the same area almost immediately, so that every respondent manufacturer was informed at all times of the prices and the terms of sale of all the others. Furthermore, in addition to knowledge of the base prices of all of the others, each manufacturer knew that every other manufacturer used the plan of equalizing freight with the location of the manufacturer nearest the purchaser, and would

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thereby be able to deliver its product to every purchaser at any given destination for the same delivered price, and that thus all users of the plan would be able to present to a prospective purchaser a condition of matched prices in which such purchaser was deprived of any choice on the basis of price.

The fact that respondent manufacturers cancelled, after they had been in effect for five or six years, price-fixing provisions which they had included, as patent owners and licensors, in their agreements licensing the other manufacturers under the different patents involved—and irrespective of whether or not said patents covered the articles themselves or merely materials or processes involved in the manufacture thereof—and, in the case of one, no longer furnished licensees with copies of its price schedules or with the information contained therein, did not serve to remove the illegality inherent in the arrangement, and afforded no ground for the respondents' argument that the unlawful conspiracy was thereby terminated. Uniformity having once been established among all the parties with respect to such matters as base prices of crowns, schedules of differentials, surcharges, and discounts of all the parties to the agreements, and the use of the freight equalization plan by all—which remained unchanged after the elimination of said price-fixing provisions—further exchange of information among them obviously was unnecessary.

In said proceeding the Commission was of the opinion, contrary to the conclusion reached by the trial examiner, that in the circumstances shown to exist an understanding or agreement under which said respondents acted and continued to act in concert might be inferred. Considering (1) the intention of the parties who participated in a certain association meeting, that all members sell their products at the same price and under identical terms and conditions, as evidenced from the minutes of said meeting; (2) subsequent use by all the participants of a general price plan then formulated, including schedules of deductions, additions and differentials; (3) the adoption thereafter of such plan by all of the other manufacturers involved; (4) the resulting uniformity in prices, etc., among them all; (5) the intention, clearly evidenced thereby, of all to continue in effect the original understanding; (6) the related and admitted efforts of respondents to standardize their products to such an extent that a prospective purchaser would have no choice as to color, lettering, etc., between the products of any two manufacturers; (7) the material addition to the combination of circumstances showing a deliberate and concerted effort to completely remove effective competition as among themselves, of the concurrent use by all of the freight equalization plan whereby identical delivered prices for all purchasers at any given destination were maintained; and, (8) the price-fixing provisions of the various license agreements, in excess of the legitimate rights of the licensors to protect themselves in the enjoyment of the fruits of their invention, along with all the other matters hereinbefore referred to:

The Commission had no difficulty in concluding, and therefore finding, that the respondents had in fact entered into and engaged in and carried out an understanding, agreement, combination, or conspiracy among themselves to restrict and suppress competition in the sale of their products.

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While the record, as respects the aforesaid understanding or agreement, and the activities relied on to establish it, did not show that each of said respondents participated in all of such activities, each did act in concert and cooperation with one or more of the others in doing and carrying out some of the acts and practices set forth, in furtherance of the understanding or agreement common to them all.

Before *Mr. W. W. Sheppard*, trial examiner.

Mr. Reuben J. Martin and *Mr. Floyd O. Collins* for the Commission.

Hershey, Donaldson, Williams & Stanley, of Baltimore, Md., for respondents generally, and along with—

Sutherland, Berl, Potter & Leahy, of Wilmington, Del., for Bond Manufacturing Corp., Inc.

Smith, Buchanan & Ingersoll, of Pittsburgh, Pa., and *Mr. Walter F. Kaufman*, of Lancaster, Pa., for *Joseph C. Feagley and Armstrong Cork Co.*

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 Association, corporations, and individuals named in the caption hereof, hereinafter referred to as respondents, have been and are now using unfair methods of competition in commerce, as commerce is defined in the said act, and it appearing to the said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The respondent Crown Manufacturers Association of America is an unincorporated association organized in the year 1925, with its principal office and place of business located in the Munsey Building in the city of Washington, within the District of Columbia. The membership of said respondent, Crown Manufacturers Association of America, is composed of corporations, partnerships, and individuals located in the various States of the United States and who are engaged in the manufacture and distribution or sale of crowns or closures for bottles and cans containing carbonated beverages and other liquids, hereinafter referred to as crowns, and of composition cork disks, hereinafter referred to as disks, used in the manufacture of said crowns or closures. Said Crown Manufacturers Association of America, hereinafter referred to as respondent Association, was organized for the declared purpose, among others, of promoting the general welfare of the industry; to encourage a spirit of good will and mutual confidence between members of the Association, the trade and the general public; to encourage the increase in and the use of products

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generally with which are used the commodities produced by members of the Association.

The names and addresses of the officers of said respondent Association, who, individually and as such officers of said respondent Association, are named as respondents herein, are: L. C. McAuliffe, president, care of Mundet Cork Corp., 65 South Eleventh Street, Brooklyn, N. Y.; D. W. Hutchinson, vice president, care of W. H. Hutchinson & Son, Inc., 1031 North Cicero Avenue, Chicago, Ill.; E. J. Costa, treasurer, care of Crown Cork & Seal Co., Inc., Baltimore, Md.; and Louis B. Monfort, secretary, Munsey Building, Washington, D. C.

The board of directors of respondent Association is composed of the above-named officers of said Association and Joseph C. Feagley, care of The Armstrong Cork Co., Lancaster, Pa., and Benno Cohn, care of Ferdinand Gutmann & Co., Thirty-sixth Street and Fourteenth Avenue, Brooklyn, N. Y., all of whom, individually and as such members of said board of directors, are named as respondents herein.

PAR. 2. Respondent Arco Crown Cork & Cap Co., Inc., is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 3903 Second Avenue in the city of Brooklyn, within said State of New York.

Respondent The Armstrong Cork Co. is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business located in the city of Lancaster, within said State of Pennsylvania. Said respondent The Armstrong Cork Co. held an exclusive license from respondent Bond Manufacturing Corp., Inc., to manufacture articles of comminuted cork under patented process and with patented apparatus owned by respondent Bond Manufacturing Corp., Inc., until the expiration of said patent on or about May 1, 1940.

Respondent Bond Manufacturing Corp., Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at Sixteenth and Locust Streets in the city of Wilmington, within said State of Delaware. Said respondent Bond Manufacturing Corp., Inc., is the largest single manufacturer of composition cork disks, and was the owner of a patent on the process of the apparatus for manufacturing articles of comminuted cork, which said patent expired on or about May 1, 1940.

Respondent Crown Cork & Seal Co., Inc., is a corporation, organized and existing under the laws of the State of New York, with its principal office and place of business located in the city of Baltimore, within the State of Maryland. Said respondent maintains

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executive offices at 60 East Forty-second Street in the city of New York, within the State of New York. Said respondent Crown Cork & Seal Co., Inc., is the largest single manufacturer of crowns in the United States. It manufactures both patented and unpatented crowns, and its total volume is approximately 50 percent of all crowns manufactured and sold in the United States.

Respondent Carvin Bottle Cap Corp. is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 1155 Manhattan Avenue in the city of Brooklyn, within said State of New York.

Respondent Consolidated Cork Corp. is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 4012 Second Avenue in the city of Brooklyn, within said State of New York.

Respondent Ferdinand Gutmann & Co. is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at Thirty-sixth Street and Fourteenth Avenue in the city of Brooklyn, within said State of New York. Said respondent Ferdinand Gutmann & Co. manufactures both patented and unpatented crowns. The patented crowns manufactured by said respondent and by the respondent Crown Cork & Seal Co., Inc., together constitute approximately 35 percent of the entire volume of all crowns manufactured.

Respondent Hoosier Crown Corp. is a corporation organized and existing under the laws of the State of Indiana, with its principal office and place of business located in the city of Crawfordsville, within said State of Indiana.

Respondent W. H. Hutchinson & Son, Inc., is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 1031 North Cicero Avenue in the city of Chicago, within said State of Illinois.

Respondent Benjamin Kraus is an individual trading under the name and style of Bamberger, Kraus & Co., located at 401 Amberson Avenue, in the city of Pittsburgh, in the State of Pennsylvania.

Respondent Mitchell & Smith, Inc., is a corporation organized and existing under the laws of the State of Massachusetts, with its principal office and place of business located at 9469 Copland Avenue in the city of Detroit, within the State of Michigan.

Respondent Mundet Cork Corp. is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 65 South Eleventh Street in the city of Brooklyn, within said State of New York.

Respondent Western Stopper Co., Inc., is a corporation having its principal office and place of business located at Twenty-fifth and Potrero Avenue in the city of San Francisco, within the State of California. Said respondent is a wholly owned subsidiary of respondent Crown Cork & Seal Co., Inc.

The respondents hereinbefore named and set out in this paragraph are all members of said respondent Association, Crown Manufacturers Association of America, and have participated in its activities, and are hereinafter referred to for convenience as member respondents.

PAR. 3. Respondent Chicago Crown Co. is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 3235 South Kedzie Street in the city of Chicago, within said State of Illinois. Said respondent is not a member of respondent association, Crown Manufacturers Association of America, but has cooperated with it in its activities, as hereinafter set forth.

PAR. 4. All of said respondents hereinabove set out in paragraphs 2 and 3 are now and for more than 2 years last past, to wit, since prior to September 1939, have been engaged in the manufacture and distribution of crowns or closures for bottles and cans containing carbonated beverages and other liquids and, with the exception of respondent Ferdinand Gutmann & Co., of composition cork disks which are used in the manufacture of said crowns or closures which the said respective respondents sell to their respective customers located in the various States of the United States and in the District of Columbia, and cause said products when sold to be transported from the State of location of the respective respondents to the purchasers thereof located at various points in the several States of the United States other than the State of origin of such shipments and in the District of Columbia and foreign countries. Respondent Ferdinand Gutmann & Co. manufactures crowns or closures for bottles and cans containing carbonated beverages and other liquids, but does not manufacture composition cork disks used in the manufacture of said crowns or closures, purchasing its requirements of said composition cork disks from other manufacturers. Except for the acts and practices herein alleged to have been engaged in by said respondents, said respondents would be in free, open, and active competition with each other in the sale and distribution of their respective products in commerce between and among the several States of the United States and in the District of Columbia. There has been, and now is, a course of interstate trade and commerce in said products between said respondents and dealers in

and users of said products located throughout the several States of the United States and in the District of Columbia. At all times mentioned herein said respondents have been in competition with other corporations and with partnerships and individuals likewise engaged in the manufacture and sale in interstate commerce of crowns or closures for bottles and cans containing carbonated beverages and other liquids and of composition cork disks used in the manufacture of said crowns or closures.

PAR. 5. Said member respondents, acting in cooperation with each other and through and in cooperation with said respondent Association, and in cooperation with respondent Chicago Crown Co., for more than 2 years last past, to wit, since prior to September 1939, entered into and have engaged in and carried out an understanding, agreement, combination, or conspiracy among themselves and with and through said respondent Association and with said respondent Chicago Crown Co. to restrict, restrain, and suppress competition in the sale and distribution of crowns or closures for bottles and cans containing carbonated beverages and other liquids, and in the sale and distribution of composition cork disks used in the manufacture of said crowns or closures for bottles and cans containing carbonated beverages and other liquids to customers located throughout the several States of the United States and in the District of Columbia, as aforesaid.

PAR. 6. Pursuant to said understanding, agreement, combination, or conspiracy, and in furtherance thereof, the said respondents have done and performed and still do and perform the following, among other acts and things:

- (1) Said respondent members organized said respondent Association, Crown Manufacturers Association of America, and held meetings of said respondent Association, at which said meetings said respondents adopted regulations for the standardization of commodities produced by said respondent members; have caused said respondent Association, through its officers and employees, to study manufacturing and distribution costs and to devise uniform methods of cost accounting for the use of said respondent members in formulating prices; and have caused said respondent Association, through its officers and employees, to collect from and disseminate to its members, information concerning prices, costs, freight rates, and standardization methods in connection with the manufacture and sale of their said products.

- (2) Said respondent members and said respondent Chicago Crown Co. have agreed to fix and maintain uniform prices, terms, and dis-

counts at which crowns and disks made by said respondents are to be sold, and have cooperated with each other and with and through said respondent Association in maintaining the prices which have been fixed by them by agreement by means of the exchange of information between said respondents and through and with said respondent Association, and by the use of coercion and interference with the purchase of supplies by manufacturers of said crowns or disks who do not maintain the prices established and fixed by said respondents under their combination alleged herein.

(3) Said respondent members and respondent Chicago Crown Co. have adopted and used and now use standard cost systems, and have adopted and used and now use standard uniform contracts containing uniform terms and conditions of sale, and have cooperated in the use of a so-called freight equalization plan or system whereby so-called "free" cities are used as basing points from which delivered price quotations are calculated and freight to various destinations is equalized from these cities in order to equalize delivered price quotations made by the various respondent members and respondent Chicago Crown Co.

(4) Respondent Bond Manufacturing Corp. authorized respondent The Armstrong Cork Co., by an exclusive license, to manufacture, by means of a patented process and with patented apparatus owned by said respondent Bond Manufacturing Corp., composition cork disks used in the manufacture of crowns, and as a prerequisite to the right to use said process and apparatus, and in part compensation for the said license, required that said respondent The Armstrong Cork Co. should sell said composition cork disks so manufactured under said license at a price specified and designated by said respondent Bond Manufacturing Corp. Said patents on the process and apparatus for the manufacture of composition cork disks owned by said respondent Bond Manufacturing Corp. expired on or about May 1, 1940, and since said date said respondents Bond Manufacturing Corp. and The Armstrong Cork Co. have continued in effect the same understanding and agreement as to prices on composition cork disks that they formerly maintained by means of the said license agreement.

(5) Respondent Crown Cork & Seal Co., Inc., has entered into license agreements with practically all manufacturers of crowns, including the member respondents, under which said license agreements said respondent Crown Cork & Seal Co., Inc., authorized said licensees to manufacture spot crowns under patents owned and controlled by said respondent Crown Cork & Seal Co., Inc. In said license agreements said respondent Crown Cork & Seal Co., Inc., provided that all

of said spot crowns so manufactured under its patents shall be sold at not less than minimum prices designated by said respondent Crown Cork & Seal Co., Inc.

(6) Respondent Crown Cork & Seal Co., Inc., has granted to respondent Ferdinand Gutmann & Co. a license to manufacture spot crowns under patents owned and controlled by said respondent Crown Cork & Seal Co., Inc., and respondent Ferdinand Gutmann & Co. has cross-licensed said respondent Crown Cork & Seal Co., Inc., to manufacture spot crowns under patents owned and controlled by said respondent Ferdinand Gutmann & Co. Said respondent Crown Cork & Seal Co., Inc., and Ferdinand Gutmann & Co., have provided by said respective license agreements that spot crowns manufactured by them shall be sold only at prices designated by said respondent Crown Cork & Seal Co., Inc., although neither of said respondents manufactures its spot crowns under the other's patents but only under its own patents. Said respondents Crown Cork & Seal Co., Inc., and Ferdinand Gutmann & Co. have also agreed that not only patentee crowns manufactured by respondent Crown Cork & Seal Co., Inc., under the patents owned and controlled by respondent Ferdinand Gutmann & Co. but also all unpatented crowns shall be sold at prices designated by said respondent Ferdinand Gutmann & Co.

PAR. 7. The results of the acts and practices of the said respondents as hereinabove set out in paragraphs 5 and 6 have been and now are to substantially lessen, restrict, restrain, and suppress competition in the interstate sale of said crowns and disks used in the manufacture of said crowns throughout the several States of the United States and in the District of Columbia. Said acts and practices have a dangerous tendency to and have actually hindered and prevented price competition between and among said respondents in the sale of said products in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act, and have empowered and enabled the said respondents to control the market and to enhance the prices of said products above the prices which would prevail under normal, natural, and open competition between said respondents; have increased the prices of said products paid by the purchasers thereof, and consequently the prices paid by the public, and also tend to create a monopoly in said respondents in the manufacture and sale of said products in interstate commerce.

PAR. 8. The acts and practices of the respondents as herein alleged are all to the prejudice and injury of the public, 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 September 30, 1941, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging said respondents with the use of unfair methods of competition in commerce in violation of the provisions of that act. After the issuance of said complaint and the filing of respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the answers thereto, testimony and other evidence, recommended decision of the trial examiner and exceptions thereto filed by counsel supporting the complaint, 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. Respondent Crown Manufacturers Association of America, hereinafter sometimes referred to as the "Association," is an unincorporated trade association, with its principal office and place of business located in the Munsey Building, in the city of Washington, District of Columbia. The membership of said association is composed of corporations located in the various States of the United States, all of which are engaged in the manufacture and in the sale and distribution of crown bottle caps as closures for bottles and cans containing carbonated beverages and other liquids, and some of which are engaged in the manufacture and in the sale and distribution of composition cork disks used in the manufacture of said crown bottle caps.

PAR. 2. Respondent L. C. McAuliffe, executive vice president of respondent Mundet Cork Corp., at the time of the issuance of the complaint was president of respondent Crown Manufacturers Association of America. He was also a member of the board of directors of said Association.

Findings

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Respondent D. W. Hutchinson, of respondent W. H. Hutchinson & Son, Inc., at the time of the issuance of the complaint was vice president of respondent Crown Manufacturers Association of America. He was also a member of the board of directors of the Association. This respondent died in 1945.

Respondent E. J. Costa, general sales manager of respondent Crown Cork & Seal Co., Inc., at the time of issuance of the complaint was treasurer of respondent Crown Manufacturers Association of America. He was also a member of the board of directors of the Association.

Respondent Louis B. Monfort at the time of issuance of the complaint was secretary of respondent Crown Manufacturing Association of America. This respondent died in 1945.

Respondent Joseph C. Feagley, vice president of respondent Armstrong Cork Co., at the time of issuance of the complaint was a member of the board of directors of respondent Crown Manufacturing Association of America.

Respondent Benno Cohn, secretary of respondent Ferdinand Gutmann & Co., at the time of issuance of the complaint was a member of the board of directors of respondent Crown Manufacturing Association of America.

The respondents named in this paragraph (except respondent Louis B. Monfort) at the time of issuance of the complaint constituted the entire board of directors of respondent Crown Manufacturing Association of America.

PAR. 3. Respondent Arco Crown Cork & Cap Co., Inc., is a corporation organized and existing under the laws of the State of New York, with its home office and principal place of business located at 3903 Second Avenue, in the city of Brooklyn, State of New York.

Respondent Armstrong Cork Co., hereinafter sometimes referred to as "Armstrong," is a corporation organized and existing under the laws of the State of Pennsylvania, with its home office and principal place of business located in the city of Lancaster, State of Pennsylvania.

Respondent Bond Manufacturing Corp., Inc., now Bond Crown & Cork Co., is a corporation organized and existing under the laws of the State of Delaware, with its home office and principal place of business located at Sixteenth and Locust Streets, in the city of Wilmington, State of Delaware. Since the date of issuance of the complaint the assets of this respondent have been acquired by Continental Can Co., Inc., and its corporate name changed from Bond Manufacturing Corp., Inc., to Bond Crown & Cork Co.

Respondent Crown Cork & Seal Co., Inc., hereinafter sometimes referred to as "Crown," is a corporation organized and existing under the laws of the State of New York, with its home office and principal place of business located in the city of Baltimore, State of Maryland. This respondent maintains executive offices at 60 East Forty-second Street, in the city of New York, State of New York.

Respondent Carvin Bottle Cap Corp., now Penn Cork & Closures, Inc., is a corporation organized and existing under the laws of the State of New York, with its home office and principal place of business located at 1155 Manhattan Avenue, in the city of Brooklyn, State of New York. Since the date of issuance of the complaint the name of this respondent has been changed from Carvin Bottle Cap Corp. to Penn Cork & Closures, Inc., but the record does not show the circumstances under which this change was made.

Respondent Consolidated Cork Corp. is a corporation organized and existing under the laws of the State of New York, with its home office and principal place of business located at 4012 Second Avenue, in the city of Brooklyn, State of New York.

Respondent Ferdinand Gutmann & Co., hereinafter sometimes referred to as "Gutmann," is a corporation organized and existing under the laws of the State of New York, with its home office and principal place of business located at Thirty-sixth Street and Fourteenth Avenue, in the city of Brooklyn, State of New York.

Respondent Hoosier Crown Corp. is a corporation organized and existing under the laws of the State of Indiana, with its home office and principal place of business located in the city of Crawfordsville, State of Indiana.

Respondent W. H. Hutchinson & Son, Inc., is a corporation organized and existing under the laws of the State of Illinois, with its home office and principal place of business located at 1031 North Cicero Avenue, in the city of Chicago, State of Illinois.

Respondent Benjamin Kraus at the time of issuance of the complaint was an individual trading under the name and style of Bamberger, Kraus & Co., with his home office and principal place of business located at 401 Amberson Avenue, in the city of Pittsburgh, State of Pennsylvania. This respondent died in 1942 and his business has been taken over and is now being operated by Continental Can Co., Inc.

Respondent Mitchell & Smith, Inc., is a corporation organized and existing under the laws of the State of Massachusetts, with its home

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office and principal place of business located at 9469 Copland Avenue, in the city of Detroit, State of Michigan.

Respondent Mundet Cork Corp. is a corporation organized and existing under the laws of the State of New York, with its home office and principal place of business located at 65 South Eleventh Street, in the city of Brooklyn, State of New York.

Respondent Western Stopper Co., Inc., now Western Crown Cork & Seal Corp., is a corporation organized and existing under the laws of the State of California, with its home office and principal place of business located at Twenty-fifth and Potrero Avenue in the city of San Francisco, State of California. This respondent is a wholly owned subsidiary of respondent Crown Cork & Seal Co., Inc.

All of the respondents named in this paragraph (except respondent Benjamin Kraus, now deceased) are members of respondent Crown Manufacturers Association of America.

PAR. 4. Respondent Chicago Crown Co. formerly was a corporation organized and existing under the laws of the State of Illinois, with its home office and principal place of business located at 3235 South Kedzie Street, in the city of Chicago, State of Illinois. This respondent is now a partnership in which Charles H. Ziff is one of the partners, but the record does not show when, if ever, the corporation was dissolved or the names of the other partners. This respondent is not a member of respondent Crown Manufacturers Association of America, but it has participated and taken an active part and has cooperated with other respondent manufacturers and the respondent Association in certain of the acts and practices herein set forth.

PAR. 5. All of the respondents named in paragraphs 3 and 4 hereof are now, and for more than 8 years last past have been, engaged in the manufacture and in the sale and distribution of crown bottle caps used as closures for bottles and cans containing carbonated beverages and other liquids. All of said respondents, with the exception of Arco Crown Cork & Cap Co., Inc., Ferdinand Gutmann & Co., Hoosier Crown Corp., and Western Stopper Co., Inc. (now Western Crown Cork & Seal Corp.), also manufacture composition cork disks which are used in the manufacture of said crown bottle caps. Respondent Benjamin Kraus, trading under the name and style of Bamberger, Kraus & Co., during the time he was in business was also in the group that did not manufacture composition cork disks. Prior to July 10, 1940, Hoosier Crown Corp. engaged in the manufacture of composition cork disks, but discontinued such manufacture as of that date

because of a fire which damaged its facilities. All of the respondents that do not manufacture cork disks purchase their requirements of these commodities from other respondent manufacturers.

Pursuant to sales made in the course of their business, the afore-said respondent manufacturers regularly ship and transport their products, or cause the same to be shipped and transported, across State lines to purchasers thereof at locations outside the States in which such shipments originate. There has been, and now is, a continuous course of trade and commerce in said products between said respondents and dealers in and users of the products located throughout the several States of the United States and in the District of Columbia.

To the extent that competition has not been restrained, lessened, or destroyed as a result of the unlawful understanding, agreement, combination, or conspiracy hereinafter found to exist among and between said respondents, and the methods and practices employed in effectuating and carrying out such unlawful understanding, agreement, combination, or conspiracy, said respondents are in competition with each other in the sale and distribution of their respective products among and between the several States of the United States and in the District of Columbia.

Respondent Crown Manufacturers Association of America is not engaged in the production or in the sale or distribution of crown bottle caps or cork disks, and neither are respondent L. C. McAuliffe, E. J. Costa, Joseph C. Feagley, nor Benno Colm, as individuals, so engaged, but they and each of them have participated, aided, assisted, and cooperated with the other respondents in planning, doing, and performing the acts and practices hereinafter set forth. Before their deaths the same was true of respondents Louis B. Monfort and D. W. Hutchinson.

PAR. 6. A crown bottle cap consists of a metal shell in which is inserted a cork disk. In some cases a circular piece of glazed paper, aluminum foil, tinfoil, or other material, is placed on the surface of the cork disk, the purpose being to prevent the contents of the bottle for which the crown is used as a closure from coming in contact with the cork. Such crown bottle caps are known as "spot" crowns. Crown bottle caps not containing such a spot are known as "composition" or "nonspot" crowns. Irrespective of the source of manufacture, all such crown bottle caps, both "spot" and "composition" or "nonspot," are known as crowns. As between the "spot" crown and

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the "composition" or "nonspot" crown, the "spot" crown is sold at prices ranging from approximately 4½ cents to approximately 11½ cents per gross more than the "composition" or "nonspot" crown, depending on the material of which the spot is made.

Both "spot" and "composition" or "nonspot" crowns are further classified according to the finish or decoration applied to them. Included among the various types are those designated as plain (undecorated), two or three color decoration, single lacquered and double lacquered. Some of the "composition" or "nonspot" crowns are also decorated by having printed on the top the name of the beverage in connection with which they are to be used, as, for example, "Grape," "Strawberry," "Root Beer," etc., and crowns so decorated, but without the name of any bottler, are known as "stock" crowns. Such crowns are usually made up in advance of orders therefor and are carried by the various manufacturers in stock in such quantities as their business demands justify. Crowns, either "spot" or "composition" or "nonspot," on which the name of the bottler or user is also included, fall into the general classification of privately decorated crowns.

All crown bottle caps are substantially identical in construction and in dimensions, and thus are suitable for closing any bottle or can having a finish designed for the application of a crown bottle cap. Crown bottle caps are applied to the bottle or can by machinery, and any closing machinery on the market may be used with any crown bottle cap regardless of the source of its manufacture. The crown bottle cap is a standard article of commerce. With certain inconsequential exceptions, it is the only closure in use in the brewing and bottling industry in the United States and in practically all foreign countries.

PAR. 7. The crown bottle cap was originated by a predecessor company to respondent Crown Cork & Seal Co., Inc., and respondent Crown Cork & Seal Co., Inc., is now the largest single manufacturer of crown bottle caps in the United States. Its total volume production is approximately 50 percent of all crown bottle caps manufactured and sold in this country. The remaining 50 percent is divided among approximately 15 other manufacturers, of which Bond Crown & Cork Co. (successor to Bond Manufacturing Corp., Inc.), Armstrong Cork Co., W. H. Hutchinson & Son, Inc., and Mundet Cork Corp., all respondents herein, are the largest. The respondent manufacturers altogether produce and sell approximately 80 to 85 percent of all crown bottle caps sold.

PAR. 8. Respondent Crown Manufacturers Association of America was organized in the year 1925. The various respondent manufacturers became members of said Association on the following dates:

Arco Crown Cork & Cap Co., Inc.	September 11, 1933.
Armstrong Cork Co.	October 19, 1925.
Bond Manufacturing Corp., Inc. (now Bond Crown & Cork Co.).	July 23, 1927.
Crown Cork & Seal Co., Inc.	October 19, 1925.
Carvin Bottle Cap Corp. (now Penn Cork & Closures, Inc.)	September 11, 1933.
Consolidated Cork Corp.	October 19, 1925.
Ferdinand Gutmann & Co.	October 19, 1925. ¹
Hoosier Crown Corp.	November 1, 1936.
W. H. Hutchinson & Son, Inc.	October 19, 1925.
Bamberger, Kraus & Co. (now out of business)	October 19, 1925.
Mitchell & Smith, Inc.	August 29, 1935.
Mundet Cork Corp.	October 19, 1925.
Western Stopper Co., Inc. (now Western Crown Cork & Seal Corp.).	October 19, 1925.

In addition to annual meetings of its members, the Association has held special meetings from time to time as such meetings were deemed advisable.

Much of the Association's activity has consisted of the performance of such lawful and legitimate trade-association functions as the collection and distribution to the members of statistical information relating to the shipped sales of crown bottle caps, the circulation to the members of information respecting the legal requirements as to labeling imposed by State and Federal legislation, the dispensing to the members of advice concerning State laws and regulations relating to the use of crown bottle caps as evidence of the payment of taxes on beer and other beverages. In addition, however, the Association has been one of the media through which the respondents have sought to bring about complete uniformity as to design, appearance, prices, and terms of sale of crowns manufactured by the different respondent manufacturers. A statement of the methods employed to accomplish these results follows:

(a) One of the "Objects" of the Association, as set forth in article II of the Association's constitution, was:

(e) to adopt regulations for standardization of the commodities produced, and to induce the truthful branding of goods upon which the commodities produced are used.

¹ Ferdinand Gutmann & Co. allowed its membership in the Association to lapse and rejoined the Association on July 24, 1933.

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and early in the history of the Association there was appointed a standardization committee, composed of officers of certain of the member manufacturers, for the purpose of implementing the standardization program. This committee has held meetings from time to time, has selected and adopted designs, lettering, combinations of colors, etc., for stock crowns, and has transmitted such designs and decorations to the secretary of the association, who has caused them to be reproduced and distributed to the members. While the evidence does not show an express agreement on the part of the members to adopt and use the designs and decorations selected by the standardization committee, it is undisputed that the members have in fact adopted and used such designs and decorations, and the admitted purpose of the standardization program has been to bring about uniformity in the coloring, lettering, and appearance of stock crowns. As one of the witnesses expressed it, the idea was to so standardize crowns that when a purchaser ordered a stock crown he would receive the same article, whether he purchased it from one manufacturer or from any other.

In connection with the standardization program, a memorandum from the secretary of the Association to the membership, concerning a meeting of the Association to be held March 1 and 2, 1937, contained this statement:

There will also be discussed desirable changes in the present crown standardization program, and any other matters of importance to the industry. (Comm. Ex. 72.)

In the minutes of a meeting of the Association held on October 19, 1938, there is this statement:

The Standardization Committee made a report after discussion advising that it was advisable for all manufacturers to advise the secretary's office when proprietary crowns are shifted from a private decorated basis to a stock basis. (Comm. Ex. 4-b.)

The interest of the individual member manufacturers in this program is illustrated by the following excerpt from a letter dated June 3, 1938, from Armstrong Cork Co. to Crown Cork & Seal Co., Inc.:

In checking our decoration with the one produced by yourselves, we find that your words "Royal Crown and Cola," are somewhat heavier in nature and also the star at the top of the broken triangle is a little smaller than ours. In order that this item may be standardized, we would appreciate your advice as to which crown should be standardized. Incidentally, we understand that our shade of red is not exactly correct; and we, of course, will make the necessary arrangements to change that particular color.

If, in your opinion, your decoration is correct, will you kindly forward us one or two samples from your latest run and we shall make the necessary arrangements to change our plates accordingly. (Comm. Ex. 167.)

The result of the foregoing collective activity has been the complete elimination of all differences in design, color, decoration, and appearance in stock crowns. The evidence is undisputed that any stock crown purchased today from any one of the respondent manufacturers is identical in all respects with any stock crown purchased from any other of such manufacturers, and all possibility of a purchaser obtaining any advantage in price, or otherwise, by reason of competition among the respondent manufacturers in the realm of design, combinations of colors, or appearance of crown bottle caps is completely nonexistent.

(b) Another subject receiving the consideration of the members of the respondent Association in the early history of the Association was that of a standard or uniform form of contract, which it was felt desirable for each of the members to use in the sale of its products. The minutes of the Association covering a meeting held on July 24, 1928, contain, among other things, the following references to this subject:

The President, Mr. D. W. Hutchinson, made a report, stating that the principal reason for calling the meeting at this time was to finally decide upon the changes in the standard form of contract discussed at the Washington meeting with reference to the new method of contracting with bottlers for the sale of crowns, the new method being in substance, that the price to the buyer shall be on the basis of crowns shipped, rather than on the basis of crowns contracted for. (Comm. Ex. 1-A.)

* * * * *

The meeting then took up unfinished business, which had to do with the new form of contract.

After discussing all phases of this contract, upon motion duly made, seconded and carried, the following data was adopted, to be incorporated in the new standard form of contract. (Comm. Ex. 1-C.)

* * * * *

The expiration date of all contracts taken after October 1st in the fall of the year shall be September 30th of the year following.

All contracts shall be written with the maximum base price subject to a schedule of allowable deductions and additions to be printed in the body of the contract as follows:

STOCK CROWNS

Deduct 1¢ from base price noted on shipments of 1,000 gross of crowns or more.

Deduct 2¢ from base price noted on shipments of 5,000 gross of crowns or more.

Deduct 3¢ from base price noted on shipments of crowns made in carload lots of not less than 20,000 gross or more.

The following differentials to be printed in the body of the contract at the option of each individual member.

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PRIVATE DECORATED CROWNS

To base price add the following surcharges according to quantities produced and shipped:

200 gross-----	6¢ per gross
400 gross-----	5¢ per gross
600 gross-----	4¢ per gross
800 gross-----	2¢ per gross
1,000 to 5,000 gross-----	1¢ per gross

EXTRA CHARGES FOR EMBOSSING

1,000 gross or more-----	3½¢ per gross
2,500 gross or more-----	2½¢ per gross
5,000 gross or more-----	2¢ per gross
10,000 gross or more-----	1¢ per gross

Using the two-color decorated price as base, the price of double lacquered crowns shall be 2¢ per gross less; single lacquered, 2½¢ per gross less.

NATURAL CORK, ALUMINUM SPOTS, BLOCK TIN CENTERS

Using composition crown prices as a base

Add 10¢ per gross for high grade cork.

Add 10¢ per gross for aluminum spots.

Add 12¢ per gross for block tin centers.

PAPER BACKING

Paper backing will be standard assembly for natural cork crowns. When paper backing is specified in composition crowns there is to be an extra charge for each gross of ½¢.

PACKING CHARGES

The 200 gross case shall be the standard unit. 50 gross wooden case packing ¼¢ per gross extra, 10 gross carton packing in 50 or 100 gross cases 1¢ per gross extra.

* * * * *

It was understood that old contracts at the present time in existence upon mutual agreement between the manufacturer and the customer, should be extended until the end of the calendar year in instances where the customer did not desire to enter into a new contract until after the first of the calendar year following.

That the Secretary was instructed to work out a standard form of contract incorporating the data above referred to and send sample copies of the same to each member. (Comm. Exs. 1-D and 1-E.)

While it is not the present practice of the member manufacturers to negotiate contracts with crown purchasers, each of such manufacturers, and also respondent Chicago Crown Co. (which is not a member of the Association) does now employ, and since 1928 has

employed, the same general schedule of deductions from and additions to base prices and the same schedule of differentials as those adopted at this meeting. There is no substantial evidence, on the other hand, that the course of action mapped out in the document referred to has ever been abandoned or substantially changed. In the circumstances, it is the Commission's conclusion that the continuation of such practices by the respondent manufacturers is the result of a continuing understanding among them. Respondents point out that a number of the respondent manufacturers; namely, Arco Crown Cork & Cap Co., Inc., Carvin Bottle Cap Corp. (now Penn Cork & Closures, Inc.), Ferdinand Gutmann & Co., Hoosier Crown Corp., Mitchell & Smith, Inc., Western Stopper Co., Inc. (now Western Crown Cork & Seal Corp.), and Chicago Crown Co. were not represented at the meeting at which these schedules were worked out and adopted, but this, in the opinion of the Commission, is immaterial. Having slavishly followed the general plan adopted by the other respondent manufacturers, these respondents are equal participants in the practice with them and they cannot now escape the consequences of their participation by disclaiming responsibility for the idea originally.

(c) Other documentary evidence tending to show some of the collective activities of the respondent manufacturers undertaken through the medium of the Association is as follows. In the minutes of a meeting of the Association held on December 8, 1933, there is this statement:

There was then discussed the question of establishing standard differentials having to do with the sales of crowns based on various quantities and the difference in cost experience in the manufacture and sale of crowns on a volume basis: (Comm. Ex. 3-B.)

In the minutes of the same meeting there is also this statement:

The standard form of contract as submitted by Messrs. Costa and Feagley, members of the standard form of contract committee, was discussed paragraph by paragraph and item by item.

It was moved, seconded and carried that upon delivery to the secretary of copies of the standard form of contract as approved by this meeting, that he should forthwith forward out to the industry two copies of the same, directing the members of the industry to send one copy in to the Secretary's office as a filing of each members approved terms of sale. (Comm. Ex. 3-B and C.)

This evidence, although relating to activities occurring during the existence of the National Industrial Recovery Administration, when considered in connection with evidence relating to activities occurring both before and after the N. R. A. period, clearly indicates a continuous effort on the part of the respondents to maintain uniform prices and terms of sale for their products.

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In a letter dated June 16, 1938, from Mundet Cork Corp. to respondent Louis B. Monfort, then secretary of the Association, the following appears:

Will you please set up in your files to be taken up at the next meeting of the crown manufacturers that recent changes in the rate from Chicago to Milwaukee should change the rate charged.

As we have it now we charge $\frac{1}{4}\phi$ per gr. extra for delivering from Chicago to Milwaukee whereas the freight is actually 41ϕ and this should be increased to $\frac{1}{2}\phi$. (Comm. Ex. 132.)

On September 1, 1938, Mr. Monfort's secretary wrote to respondent L. C. McAuliffe, of Mundet Cork Corp., in part as follows:

I am enclosing to you herewith the following crowns which have been standardized:

- Five Points Imitation Orange Soda
- Five Points Imitation Strawberry Soda
- Five Points Imitation Grape Soda
- Five Points Root Beer
- Five Points Cream Soda

I am also enclosing samples of the following crowns, but I do not believe they have been standardized. If you will refer to Association memorandum of September 15, 1937, you will note that the movement of these drinks is so slow that new sketches for the crowns had not been made.

- Five Points Lime Rickey
- Five Points Lemon & Lime Soda
- Five Points Lemon Soda
- Five Points Cherry Soda
- Five Points Lime Soda

Your attention is also called to the following Association memorandums relative to the Five Points Imitation Orange Soda crown: September 23, 1937, October 29, 1937 and November 30, 1937. (Comm. Ex. 133.)

On September 2, 1938, Mr. Monfort's secretary wrote to Mr. McAuliffe in part as follows:

Referring to your letter of September 1, 1938, enclosed please find Crown Cork & Seal Company samples of the following crowns:

- Nehi Imitation Orange Soda
- Nehi Orange Soda

You will note that the orange color on these crowns is deeper than that which you are using. (Comm. Ex. 134.)

In a notice to the standardization committee dated October 21, 1938, Mr. Monfort stated:

There will be a meeting of the Standardization Committee of the Association, Monday, October 31, 1938 at 11:30 A. M. in the booth of the Mundet Cork Corporation, during the A. B. C. B. Show.

Please make arrangements to be in attendance as there are matters of considerable importance with reference to crown standardization that will be discussed at that time. (Comm. Ex. 163.)

On May 12, 1938, Mr. Jesse Gutmann, of respondent Ferdinand Gutmann & Co., wrote a letter to respondent Benno Cohn, also of respondent Gutmann, in which he said:

I attended the Crown Manufacturers Association meeting on Tuesday, the 10th. There was nothing of particular note, merely a general discussion.

It appears that all of them have a few hangovers from the old price mixup but nothing serious, and no reports of chiseling were made. Furthermore, volume has naturally been way off in April but they expect things to start picking up from May on. The total January, February, March quarter by reason of the increasing price which did thereafter go into effect showed 57% over 37. (Comm. Ex. 74.)

PAR. 9. Substantially all crown bottle caps are sold f. o. b. point of manufacture. For a number of years, however, each of the respondent manufacturers has followed the practice of equalizing freight on all of its sales with the location of the factory of any other respondent manufacturer which happens to be nearer the purchaser than the seller's factory. The locations of all such factories for the manufacture of crowns are known in the trade and are sometimes referred to in connection with the freight-equalization plan as "free points."

Under the freight-equalization plan employed by these manufacturers it is customary for a purchaser to pay the freight, but the manufacturer making the sale either credits the purchaser upon the invoice or otherwise allows him the difference between the actual freight rate to the purchaser's location from the manufacturer-seller's location and the rate to such purchaser's location from the location of the manufacturer located nearest to such purchaser. Under such a system it is obvious that if the f. o. b. factory price of the manufacturer-seller is the same as the f. o. b. factory price of the manufacturer located nearest the purchaser, the ultimate price to be paid by the purchaser will be the same regardless of which of the manufacturers makes the sale. In the crown bottle cap industry that is always true. Prior to 1938, and for varying periods of time, there were slight differences between the prices of some of the respondent manufacturers, but since the latter part of 1938 both the prices and the terms and conditions of sale of all of said manufacturers have been the same. Prior to 1938 there were a few changes in prices and terms and conditions of sale of both "spot" and "composition" or "nonspot" crowns, but such changes were always common to all of the respondent manufacturers, and since 1938 there have been no changes at all either in the prices of crowns or in terms and conditions under which they are sold. This uniformity in base prices, together with the concurrent use by all the respondent manufacturers of the freight-equalization plan, inevitably means that a purchaser at any given locality will

be required to pay exactly the same delivered price for crown bottle caps regardless of the manufacturer from which he purchases. It is undisputed that since 1938, at least, it has been impossible for any purchaser at any location to obtain crowns from any respondent manufacturer for a less price or on better terms than the prices charged or the terms imposed by any other respondent manufacturer. Even on privately decorated crowns the extra charges made by all of the respondent manufacturers have been the same.

Each of the respondent manufacturers knows that its base prices and its terms and conditions of sale for crowns are the same as those of other respondent manufacturers. Except as noted in paragraphs 10, 11, and 12 hereof, there has been no systematic exchange of base prices as among the respondent manufacturers, or, prior to 1938, of changes in those prices, but the successful operation of the system employed does not require the exchange of such information. Through customers and salesmen in the field, who carry printed price lists, and by various other means, all information relating to prices and terms of sale of any respondent manufacturer reaches the other respondent manufacturers selling crowns in the same area almost immediately. Thus every respondent manufacturer is informed at all times of both the prices and the terms of sale quoted and offered by all of the others. In addition to knowledge of the base prices of all of the other respondent manufacturers, each such respondent manufacturer knows that every other respondent manufacturer uses the plan of equalizing freight with the location of the manufacturer nearest the purchaser. It knows, too, that by the use of this plan each will be able to deliver its products to every purchaser at any given destination for exactly the same delivered price as others using the plan, and thus all users of the plan will be able to present to a prospective purchaser a condition of matched prices in which such purchaser is deprived of any choice on the basis of price.

The fact that this is the actual result was testified to by a number of witnesses, each of whom has been a purchaser of crowns for many years. This the respondents do not deny, but they contend that in so matching prices with each other at any given destination they are merely "meeting competition." In order to produce such matched prices sellers of crowns must, at numerous destinations, accept net receipts for their products varying in amount according to the freight absorbed as a result of the closer proximity to the purchaser of some other seller. Each participant in the use of the plan consciously intends that no attempt be made to exclude any seller of crowns from the natural freight-advantage territory of another, and by the use of

the plan invites other sellers to share the available business in his natural market in return for similar treatment for itself in the trade territories of all other participating sellers. The price rigidity existing in the crown bottle cap industry since 1938, and the failure of prices of crown bottle caps to respond in any way to changing conditions of supply and demand are not consistent with the existence of effective competition. The complete standardization of crowns as a result of the admitted efforts made by respondents, and other circumstances showing the overriding desire on the part of the respondents to present to a prospective customer a completely united front insofar as products, prices, and terms of sale are concerned, indicate the total absence of such competition. When, as in this industry, the price of the seller nearest the purchaser is always accepted by other sellers and there is no bargaining on any basis between buyers and sellers, fundamental requirements of a true competitive market are lacking and prices are not the result of market action in the economic sense, but are mere expressions of an artificial and monopolistic price structure.

PAR. 10. Prior to May 15, 1933, respondent Crown Cork & Seal Co., Inc., obtained a number of letters patent for inventions relating to spot crown bottle caps. Certain of these patents related to particular types and forms of spot crowns; others related to methods of and materials for the manufacture of spot crowns; and still others related to the apparatus with which spot crowns are manufactured. On May 15, 1933, Crown Cork & Seal Co., acting as patentee, entered into a written agreement with respondent Bond Manufacturing Corp., Inc. (now Bond Crown & Cork Co.) in which Bond Manufacturing Corp. was granted a license to manufacture and sell spot crowns in accordance with these patents. Crown Cork & Seal Co. thereafter entered into similar license agreements with other respondent manufacturers as follows:

Arco Crown Cork & Cap Co., Inc.....	Jan. 19, 1934.
Armstrong Cork Co.....	June 2, 1933.
Carvin Bottle Cap Corp. (now Pen Cork & Closures, Inc.)	July 7, 1933.
Consolidated Cork Corp.....	May 16, 1933.
Hoosier Crown Corp.....	July 18, 1933.
W. H. Hutchinson & Son, Inc.....	May 24, 1933.
Bamberger, Kraus & Co. (now out of business)	May 19, 1933.
Mitchell & Smith, Inc.....	Aug. 1, 1935.
Mundet Cork Corp.....	May 23, 1933.
Western Stopper Co., Inc. (now Western Crown Cork & Seal Corp.)	May 25, 1933.
Chicago Crown Co.....	Nov. 10, 1933.

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(This list does not include respondent Ferdinand Gutmann & Co., in whose favor a license agreement was also executed, but this agreement is treated separately in paragraph 11 hereof.)

Each of the aforesaid license agreements provided, among other things, substantially as follows:

LICENSOR agrees to add to said Schedules (attached to each of the license agreements was a list of the patents brought under said agreement, which was designated a schedule) any and all Letters Patent of the United States hereafter owned or controlled by it, or under which it may acquire the right to grant licenses without the payment by LICENSOR of royalties, *provided* such patents cover improvements (a) in materials for facing or spotting the cushion disks of crown seals or (b) in materials for adhesively uniting such facing materials to the cushion disks of crown seals or (c) in methods of uniting facing materials to the cushion disks of crown seals. In the event that LICENSOR acquires the right to grant licenses under patents of the aforesaid character, but must pay royalties or compensation to others for use of such patented inventions, LICENSOR shall include the same in schedule "C" as above set forth, provided LICENSEE shall pay to LICENSOR, in addition to the royalty herein specified, the amount due from LICENSOR to others because of LICENSEE'S use of such patented inventions. No such additional royalties shall be payable hereunder, however, if the said Letters Patent referred to in this Paragraph 2 be acquired, or the right to license under them be acquired, by LICENSOR from any of its officers or employees. (Comm. Ex. 5-E and 5-F)

Pursuant to these provisions of said license agreements, Crown Cork & Seal Co. from time to time notified the various licensees of additional patents which it desired to add to said license agreements, and the licensees from time to time notified Crown Cork & Seal Co. of their desire to have the additional patents added to said agreements. In all, there were included in each of the license agreements seventeen patents, including apparatus, process, and product patents.

Another provision of the aforesaid agreements was as follows:

It is a limitation and condition of this license, however, that LICENSEE is licensed and authorized, under the Letters Patent for which this license is granted, to sell the crown seals manufactured hereunder (and upon which royalty is to be paid as a consideration for this license) at prices not less than the minimum prices established by LICENSOR by current *bona fide* price quotations to its trade for corresponding crown seals. LICENSOR shall promptly from time to time advise LICENSEE of the minimum prices thus established. In case no minimum prices are so established as to any particular type, size, construction or embodiment of crown seals, the LICENSEE shall request the establishment of a minimum price therefor and if the LICENSOR fails to do so within 14 days following the receipt of such request, this license shall be without price restriction as to such particular product until the establishment of a minimum price therefor. It is agreed that the present minimum prices are those set forth in Schedule C hereto attached and made part hereof. The minimum prices set forth in Schedule C may be amended or altered from time to time upon fourteen (14) days advance written notice to LICENSEE. (Comm. Ex. 5-F and G)

Crown Cork & Seal Co. from time to time did issue price schedules and amendments thereof, and from time to time up to April 2, 1941, it furnished each of the licensees in these license agreements with copies of said price schedules. These price schedules designated the prices to apply on single shipments to one customer and specified the prices to apply to the different kinds of spots (varnish paper, aluminum, tin foil, enamel paper, panaseal, and vinylite) in the following quantity divisions:

Shipments of less than 200 gross.

Shipments of 200 gross or over.

Shipments of 400 gross or over.

Shipments of 1,000 gross or over.

Shipments of 5,000 gross or over.

Shipments of 10,000 gross or over.

Shipments of 30,000 gross or over (carload).

The schedules fixed price differentials on plain (undecorated) crowns, double lacquered crowns, one-color decorated crowns, multiple-colored crowns, crowns with plain paper backing, acid-proof paper backing, over-all waxing, and natural cork disks (including paper backing) of different grades, and crowns with aluminum or tin foil spots with plain or gold-processing varnish or lacquer coating. The schedules also provided for a surcharge for privately decorated crowns when ordered for production in different quantities. They further provided for discounts for payments within 10 days and 25 days, designated "free points" with which freight was to be equalized, and contained this provision:

The price to be charged for spot crowns included in a shipment of non-spot crowns shall be based on the total quantity of all types of crowns comprising the shipment. (Comm. Ex. 5-Z-22)

These price schedules, including the quantity-shipment price differentials, surcharges, discounts, and freight-equalization provisions, were always followed by the licensees in the several agreements.

Effective April 2, 1941, the price-fixing provisions of the original license agreements were abrogated by supplemental agreements entered into by and between Crown Cork & Seal Co., Inc., and the various licensees. By supplemental agreements also the provisions of the original agreements for the payment of a royalty of 5 percent of all net sales of crowns manufactured under the agreements was reduced to $\frac{1}{4}$ cent per gross on all crowns so manufactured, and this rate of $\frac{1}{4}$ cent per gross is the royalty rate which is now in effect. After abrogation of the price-fixing provisions of said agreements, Crown

Cork & Seal Co. did not furnish any of the licensees with copies of its price schedules or with any of the information contained therein. It is also true, however, that after the elimination of the price-fixing provisions from said agreements the base prices of crowns and the schedules of differentials, surcharges, and discounts of all of the parties to the agreements, and the use of the freight-equalization plan by all of said parties remained unchanged. Having once established uniformity among all of the parties in all of these respects, the further exchange of information among them obviously was unnecessary.

Certain of the patents involved in the license agreements related to materials, processes, and apparatus for the manufacture of unpatented crowns. Certain of the other patents covered spot crowns themselves. The pricing provisions of the license agreements, however, related to all spot crowns manufactured under all of said patents, and the inclusion of such pricing provisions in the license agreements exceeded the legitimate monopoly rights of Crown Cork & Seal Co., Inc., as owner of the patents. The Commission concludes, therefore, that these provisions were included in the license agreements for the purpose and with the effect of furthering the understanding, combination, and conspiracy already existing among the respondents, and in the circumstances shown to have existed cancellation of the provisions did not serve to remove the illegality inherent in the arrangement and affords no ground for the respondents' argument that the unlawful conspiracy was thereby terminated.

PAR. 11. Sometime prior to 1938 (the record does not show the exact date) respondent Crown Cork & Seal Co., Inc., instituted legal proceedings in the United States District Court for the Eastern District of New York against respondent Ferdinand Gutmann & Co., charging Gutmann with having infringed a number of Crown's patents. Certain of those patents related to spot crowns; others related to materials used in the production of spot crowns; and still others related to materials out of which spot crowns are manufactured. Ferdinand Gutmann & Co. was at that time also the owner of a number of patents concerning spot crowns and their manufacture, and in the proceeding instituted by Crown, Gutmann filed a counterclaim charging Crown with having infringed certain of Gutmann's patents. This litigation was in progress for a number of years, finally reaching the Supreme Court of the United States, in which a decision was rendered and a mandate issued June 9, 1938. The court's decision was in effect (1) that two of the patents in suit which were owned by Crown, one relating to a method of manufacturing crown bottle caps and the other relating to a process of producing closures, were good and valid as to

the claims involved, and that Gutmann had infringed upon Crown's rights under these patents; (2) that three of Gutmann's patents involved in the suit were invalid; and (3) that the other of Gutmann's patents, relating to a method of manufacturing spot crowns, had not been infringed by Crown Cork & Seal Co. On June 11, 1938, 2 days after issuance of the Supreme Court's mandate, respondents Crown and Gutmann entered into a number of agreements. One of the agreements provided, among other things (1) that Crown Cork & Seal Co. would waive any and all rights to recover damages, profits, costs, or royalties to which it may have become entitled by reason of respondent Gutmann's acts of infringing its (Crown's) patents; (2) for the exchange of nonexclusive licenses to make, use, and sell crowns under their respective patents, and (3) that neither Crown nor Gutmann should be under any obligation to produce spot crowns made pursuant to the patents referred to in the license agreements. Another of the agreements executed by and between Crown and Gutmann related to the form of court decree which the parties agreed to request the Court to issue terminating the litigation between them; and another of said agreements licensed each other to manufacture and sell crown bottle caps in accordance with all patents owned by each.

The aforesaid cross-licensing agreements, like the license agreements executed by Crown Cork & Seal Co. in favor of the other respondent manufacturers, provided for the addition of other patents thereafter acquired by each of the licensors, for the sale by each of the licensees of crowns manufactured under the licenses at prices to be fixed by the licensors, and for the exchange of price schedules. Just as in the case of Crown's other license agreements, the parties to these agreements from time to time added new patents to the agreements. Although neither Crown nor Gutmann was manufacturing crown bottle caps under the patents of the other, they did from time to time furnish each other with their respective price schedules. These price schedules covered all crowns produced by each of the parties and included also quantity-shipment prices, differentials, surcharges, discounts, and freight-equalization provisions. As was true in the case of Crown Cork & Seal Co.'s other licensees, Gutmann always followed the prices and terms of sale furnished it by Crown Cork & Seal Co. Such price schedules, like the price schedules issued by all of the respondent manufacturers, were patterned after and followed very closely the schedule set forth in the minutes of respondent Association covering its meeting of July 24, 1928, referred to in paragraph 8 (b) hereof.

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The cross-licensing agreements executed by respondents Crown and Gutmann carried the following provision:

Neither Crown nor Gutmann shall be under obligation to produce center spot crowns made pursuant to the patents referred to in the license agreements herein provided for. (Comm. Ex. 5-Z-2.)

As a matter of fact, neither Crown nor Gutmann ever did manufacture spot crowns pursuant to any of the patents of the other, and it is not unfair to infer from the record that it was never the intention of either to do so. On June 17, 1938, just 6 days after the date of the cross-licensing agreements, Gutmann wrote to Crown as follows:

With reference to our center spot agreements just concluded, our signed copy of which is going back to you through Mr. Darby, it was Mr. Scull's suggestion that by an interchange of letters we would state that neither party is following the method of the other, although licensed to do so and that consequently, no monthly reports would be forthcoming from either unless at some future time either party would follow the other's method.

If this is agreeable to you, would you kindly acknowledge the same and then neither of us need be bothered with reporting to the other that no goods were manufactured in that particular month. (Comm. Ex. 77.)

On June 21, 1938, Crown Cork & Seal Co. replied to this letter as follows:

I wish to acknowledge receipt of your letter of June 17th and to confirm our understanding of your letter which is to the effect that under the exchange of licenses dated June 11th, 1938, neither your company nor ours will render any monthly reports until such time as one or the other manufactures spot crowns covered by one or more of the patents embraced in the licenses under which our respective companies are operating. (Comm. Ex. 78.)

In a letter to Crown Cork & Seal Co. dated October 2, 1942, signed by respondent Benno Cohn, secretary of respondent Ferdinand Gutmann & Co., it was stated:

With reference to U. S. Patent #2,287,388 Issued June 23rd, 1942, to Messrs. McManus, Cooke and Ryan; while we have not used and do not now contemplate using this cap, we desire it to be added to Schedule "A" of our crown license agreement of June 11th, 1938, in order that we may have the right to use it should we ever want to do so. (Comm. Ex. 5-Z-29.)

Pursuant to the provisions of the license agreement, the particular patent referred to in that letter was added to those already under the agreement.

In a letter from respondent Crown Cork & Seal Co. to respondent Gutmann dated March 4, 1944, it was stated:

Pursuant to paragraphs 2 and 3 of our Crown Seal Agreement dated June 11, 1938, we hereby tender you a license under the method claims of the above-identified patent. Said claims are numbered 45 to 49, 52 to 54, 60 to 67 and 75. (Comm. Ex. 5-Z-31.)

and in reply thereto respondent Gutmann, in a letter to respondent Crown dated June 7, 1944, said:

In reply to your letter of March 4th last, while we are not and do not contemplate using either the method or apparatus covered by the above Patent, we desire to have it added to our License agreement in order that we may have the right to use it at some future date, should we so desire.

Therefore, a License is accepted for both Machine and Method claims under the above Patent. (Comm. Ex. 5-Z-33.)

Just as in the case of Crown Cork & Seal Co.'s other license agreements, the price-fixing provisions of the cross-licensing agreements between Crown and Gutmann were abrogated by supplemental agreements effective April 2, 1941. As in the case of the other license agreements, also however, the prices and terms of sale of both licensor and licensee in these agreements thereafter remained unchanged and identical. The obvious purpose of the agreements having been to establish and maintain uniformity in prices and terms of sale as between the parties to the agreements, and not to protect the rights of such parties under their respective patents, the agreements containing the price-fixing provisions were clearly unlawful. Having achieved the objectives sought and finding the pricing provisions no longer necessary to maintain uniformity of prices and terms of sale, such provisions were thereupon cancelled. The Commission is of the opinion, however, and finds that the license agreements were used originally to further the unlawful combination and conspiracy among the manufacturers of crown bottle caps to eliminate competition among themselves and that the subsequent act of discarding the unnecessary means by which a continuance of the conspiracy was guaranteed did not serve to purge the arrangement of its illegality.

PAR. 12. The record shows the existence of one other license agreement between two of the respondent manufacturers which has some bearing on the issues in this proceeding. On May 1, 1923, there was issued to respondent Bond Manufacturing Corp., Inc., (now Bond Crown & Cork Co.) letters patent covering an extrusion process of and apparatus for manufacturing articles of comminuted cork. On May 19, 1932, Bond Manufacturing Corp., Inc., and respondent Armstrong Cork Co. entered into an agreement under which Armstrong was granted a license to use the process and apparatus covered by this patent in the manufacture of composition cork material for use in crown bottle cap disks. Except for the right of Bond Manufacturing Corp., Inc., to use the invention, the license thus granted to Armstrong Cork Co. was exclusive. Paragraph 3 of this license agreement provided:

It is a limitation and condition of this license, however, that ARMSTRONG is only licensed and authorized, under said Letters Patent, to sell the composition

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cork material made by the patented process and apparatus, and upon which royalty is to be paid as a consideration for their license at prices not less than the minimum prices established by BOND by current *bona fide* price quotations to its trade for corresponding products. BOND shall promptly from time to time advise ARMSTRONG as to the minimum prices thus established. In case no minimum prices are so established, as to any particular product, this license shall be without restriction as to such product until the establishment of a minimum price therefor. (Comm. Ex. 148-B and C.)

and pursuant to this provision Bond Manufacturing Corp., Inc., did from time to time furnish Armstrong with its price lists. Such price lists included also the terms and conditions under which crown disks were sold. The patent covered by the license agreement expired May 1, 1941.

The conscious efforts of Armstrong Cork Co. to keep the prices of its cork disks the same as the prices of disks sold by other respondent manufacturers is illustrated by the following interoffice correspondence. On May 9, 1938, O. W. Pees, of Armstrong Cork Co., wrote to V. A. Game, also of Armstrong Cork Co., as follows:

We quoted Mr. O'Neil, of the subject concern, the new price, namely \$31.14 per M gross, on ten to one inch soda disks, and he tells me that while we are talking in the same terms as our competitors, our price is higher than that being quoted by some of the better competitors.

If you have any further comments on this, I would appreciate same. I am under the impression that our price would be identical to the price quoted by good firms such as Bond, C. C. & S. and any others in that category. (Comm. Ex. 159.)

In answer to this communication, Mr. Game, in a letter to Mr. Pees dated May 9, 1938, stated:

Your impression in respect to our prices being the same as reliable firms such as Bond, C. C. & S., etc., is correct. If our friend in Long Island City advises that our price is higher than quoted by some of the better competitors, then I guess you will have to use the old, old gag of "being from Missouri." (Comm. Ex. 160.)

PAR. 13. In his recommended decision the trial examiner reached the conclusion that the respondents herein have not engaged in or carried out any unlawful understanding, agreement, combination, or conspiracy and on the basis of this conclusion recommended that the complaint be dismissed. The Commission disagrees with this conclusion and rejects the recommendation.

The Commission is of the opinion that in the circumstances shown to exist an understanding or agreement under which the respondents acted and still act in concert may be inferred. The intention of the parties participating in the meeting of respondent Association, held

on July 24, 1928, for all members of the Association to sell their products at one and the same price and under identical terms and conditions is clearly evident from the minutes of that meeting. The subsequent use by all such parties of the general pricing plan then formulated, including the schedules of deductions, additions, and differentials, and the adoption of such plan by all of the other respondent manufacturers, with the resulting uniformity in prices, terms, and conditions of sale as among all such manufacturers, indicates just as clearly an intention of all of the parties to continue in effect the original understanding. In the opinion of the Commission, there is a direct connection between this understanding and the admitted efforts of the respondents to standardize their products to such an extent that a prospective purchaser would have no choice in the realm of coloring, lettering, and decorations as between the products of any two manufacturers; and the concurrent use by all of the respondent manufacturers of the freight-equalization plan serving to maintain identical delivered prices for all purchasers at any given destination, adds materially to the combination of circumstances showing a deliberate and concerted effort on the part of the respondents to completely remove effective competition as among the sellers of crown bottle caps and disks used in connection therewith. Considering, in addition, the price-fixing provisions of the various license agreements, all of which exceeded the legitimate rights of the licensors to protect themselves in the enjoyment of the fruits of their inventions, and the sum of all the other incidents referred to in the foregoing paragraphs, the Commission has no difficulty in concluding, and therefore finds, that the respondents have in fact entered into and have engaged in and carried out an understanding, agreement, combination, or conspiracy among themselves to restrain and suppress competition in the sale of their products. While the record does not show that each of said respondents has participated in all of the activities relied on to establish said understanding, or agreement, each has acted in concert and cooperation with one or more of the others in doing and carrying out some of the acts and practices herein set forth in furtherance of the understanding or agreement common to them all.

PAR. 14. The tendency, capacity, and effect of the combination and conspiracy entered into and maintained by the respondents named herein, in the manner aforesaid, and the acts and practices performed thereunder and in connection therewith, as set out herein, have been and are to substantially lessen, restrict, restrain, and suppress competition among the respondent manufacturers in the interstate sale of

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crown bottle caps and disks used in the manufacture of said crown bottle caps; to prevent price competition among and between the respondent manufacturers in the sale of said products in, among, and between the various States of the United States and in the District of Columbia; to empower and enable the respondents to control the market for crown bottle caps and cork disks used in connection with the manufacture thereof; and to create a monopoly in the respondent manufacturers in the manufacture and sale of said products in interstate commerce.

CONCLUSION

The acts and practices of the respondents as herein found are all to the prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

Commissioner Mason not participating because of absence.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answers thereto filed by the respondents, testimony and other evidence in support of and in opposition to the allegations of the complaint taken before a trial examiner of the Commission theretofore duly designated by it, the recommended decision of the trial examiner and exceptions thereto filed by counsel supporting the complaint, 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 the Federal Trade Commission Act:

It is ordered, That the corporate respondents Arco Crown Cork & Cap Co., Inc., Armstrong Cork Co., Bond Crown & Cork Co. (formerly Bond Manufacturing Corp., Inc.), Crown Cork & Seal Co., Inc., Penn Cork & Closures, Inc. (formerly Carvin Bottle Cap Corp.), Consolidated Cork Corp., Ferdinand Gutmann & Co., Hoosier Crown Corp., W. H. Hutchinson & Son, Inc., Mitchell & Smith, Inc., Mundet Cork Corp., and Western Crown Cork & Seal Corp. (formerly Western Stopper Co., Inc.), their respective officers, agents, representatives, and employees, and the individual respondent L. C. McAuliffe, E. J. Costa, Joseph C. Feagley, and Benno Cohn, and their respective agents, representatives, and employees, in or in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of crown bottle caps or

cork disks used in the manufacture of crown bottle caps, 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 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 acts or things:

1. Fixing, establishing, or maintaining prices, terms, or conditions of sale for crown bottle caps or cork disks used in the manufacture of crown bottle caps, or adhering, or promising to adhere, to any prices, terms, or conditions of sale so fixed, established, or maintained.

2. Holding or participating in any meeting, discussion, or exchange of information among themselves or under the auspices of respondent Crown Manufacturers Association of America, or any other medium or agency, concerning proposed or future prices, terms, or conditions for sale of crown bottle caps.

3. Adopting or maintaining uniform standards governing the color, decoration, or appearance of crown bottle caps for the purpose or with the effect of establishing or maintaining, or assisting in the establishing or maintaining, of uniform prices for crown bottle caps.

4. Exchanging or distributing among the corporate respondents, or any of them, price lists or schedules or other information showing current or future prices, terms, or conditions of sale, for the purpose, or which have the tendency or effect, of fixing or maintaining uniform prices or terms of sale for crown bottle caps.

5. Quoting or selling crown bottle caps at prices calculated or determined pursuant to or in accordance with any freight-equalization plan, system, or formula which results in uniform delivered prices at any given destination, or which deprives purchasers of an opportunity to obtain some advantage in price or more favorable terms or conditions from one of the corporate respondents than from another.

6. Using or maintaining respondent Crown Manufacturers Association of America, or any other central agency, as an instrument or medium for promoting, aiding, or rendering more effective any cooperative or concerted efforts to suppress or eliminate competition by or through any of the means or methods set forth in the immediately preceding paragraphs numbered 1 to 5, inclusive, of this order.

It is further ordered, That respondent Crown Manufacturers Association of America, an unincorporated trade association, and its officers, agents, representatives, and employees, do forthwith cease and desist from knowingly advising, assisting, participating, or coop-

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erating with the aforesaid respondents, or any of them, in doing any of the things forbidden in the paragraphs numbered 1 to 5, inclusive, of this order.

It is further ordered, For reasons appearing in the findings as to the facts in this proceeding, that the complaint herein be, and it hereby is, dismissed as to the respondents D. W. Hutchinson, Louis B. Monfort, Benjamin Kraus, formerly trading under the name and style of Bamberger Kraus & Co., and Chicago Crown Co.

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

Commissioner Mason not participating because of absence.

Syllabus

IN THE MATTER OF

GEORGE N. BOUTHILLETTE DOING BUSINESS UNDER
THE TRADE NAMES OF EVERETT FOOT CUSHION LAB-
ORATORIES AND EVERETT FOOT CUSHION COMPANY

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

Docket 5258. Complaint, Dec. 7, 1944—Decision, Aug. 11, 1948

Where an individual engaged in the manufacture and interstate sale of a device formerly advertised and marketed under the trade name "Arch-Aidant" but later known as "Re-Zil-Arch"—

(a) Falsely represented, in advertisements in newspapers, periodicals, circulars, letters and other advertising media, that his device stopped foot troubles and pains; conformed to the shape and needs of the arch and strengthened the foot structure; was scientifically constructed, massaged the foot and exercised every muscle; and relieved fallen arches, callouses, corns, cramped toes, tender heels, perspiration, leg pains, backache, poor circulation and metatarsal troubles;

(b) Falsely represented that one engaged in the sale of his device might reasonably expect to earn the sum of \$8.00 or more daily under normal conditions, through such statements in advertisements and form letters as "MEN, WOMEN, EARN \$8.00 DAILY, TAKE ORDERS for Famous Cushion Combination 'Arch-Aidant'. Relieves Foot Troubles. Steady Demand. HERE'S YOUR CHANCE TO POCKET QUICKLY \$8.00 DAILY AND MORE UNDER OUR PROVEN TAKING PLAN. It is not difficult to sell 50 pairs per week. EVERYBODY IS A PROSPECT!!!";

(c) Falsely represented through use of the word "Laboratories" in one of his trade names, that he owned, operated, or controlled a laboratory equipped for study and research in connection with foot disabilities and the use of his device therefor; and

(d) Falsely represented through use of the trade name "Arch-Aidant" for his device that it would be of aid to the arch of the foot, generally;
With tendency and capacity to mislead and deceive a substantial portion of the purchasing public, and thereby induce it to purchase his said product and to engage in the sale thereof:

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

As respects the question in said proceeding as to whether or not respondent had misrepresented the earnings which his agents and distributors might reasonably expect daily under normal conditions and circumstances, said matter was one peculiarly within the knowledge of respondent, and respondent's counsel having stipulated upon the record, during the hearing in the matter, that it had no record showing that any of respondent's salesmen had in fact earned as much as eight dollars per day in selling the device, as