

IN THE MATTER OF
**ELEANOR SCHULTZ BADEN ET AL. TRADING AS E. G.
SALES & MANUFACTURING CO.**

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

Docket 5563. Complaint, May 28, 1948—Decision, Apr. 18, 1951

Where two individuals engaged as partners in the manufacture and interstate sale of certain mechanical devices for use on internal-combustion motors with battery ignition, which they sold prior to 1946 under the trade designations of "E. G. Supercharger" and "Ignition Supercharger" and thereafter as "E. G. Super-Ignitioniter" and "Super-Ignitioner," in advertising in newspapers and periodicals of general circulation and in circulars, letters, and other printed matter, including that on the shipping cartons—

- (a) Falsely represented that their said products would cause motors, regardless of age or condition, to operate better or at less expense, insure quick starting, and afford motors, irrespective of condition, more mileage, power, acceleration, and pickup;

The facts being that only in those rare circumstances where one or more plugs were fouled within certain limits by carbon, would their said devices have a temporary favorable influence in starting or operation, until the normal progression of the fouling process, due to the operational defect which caused such fouling in the first instance, within a short time rendered the ignition system ineffective;

- (b) Falsely represented that said products would prolong the life of spark plugs and points, and extend motor life three or four times longer than if said devices were not attached;
- (c) Falsely represented that said products would cause the spark to jump across spark plug points and cause sparks to occur irrespective of the degree to which the points might be fouled with oil and grease;

The facts being their said devices would not cause a spark to occur when plugs were badly fouled, and were not an effective substitute for cleaning the plugs or correcting the causes of fouling;

- (d) Falsely represented that said products would reduce or prevent carbon;
- (e) Falsely and misleadingly represented that said device afforded "atomic starting," and caused motors performing improperly to run quietly and smoothly;
- (f) Falsely represented through the statement on the carton containers thereof "Tested and approved by Automotive Test Laboratories of America," that their products had been tested and approved by a laboratory or other organization possessing trained personnel and scientific facilities for the performance of automotive tests and experiments concerning commercial products;

The facts being that it had been the practice of the said "Automotive Test Laboratories," which had no laboratory or scientific equipment nor trained personnel, to accept without investigation of the truth or falsity thereof, suggestions and claims made by various manufacturers for their products, as the basis for so-called certificates or seals of approval or merit;

With tendency and capacity to mislead a substantial portion of the purchasing public into the mistaken belief that such statements were true and thereby induce its purchase of their said products:

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

In said proceeding the Commission took official notice of certain facts found by the Commission on April 29, 1938, in the matter of Morris E. Newman, trading as Automotive Test Laboratories of America, Docket 3328, 26 F. T. C. 1234, and on April 28, 1938, in the matter of Ralph C. Curtiss et al., Docket 3329, 26 F. T. C. 1209, namely, that said Automotive Test Laboratories of America, at the time such purported approval was extended to respondents' products, had no laboratory or scientific equipment for conducting tests and experiments and employed no trained personnel for the purpose of performing tests on commercial products, but, instead, followed the practice of accepting the suggestions and claims made by various manufacturers as the basis for so-called certificates or seals of approval or merit, which were thereafter issued by it without investigation of the truth or falsity of the manufacturers' statements.

In said proceeding in which one of said respondents in the course of objections to the Commission's tentative decision, contended that the testimony of an automobile mechanic who testified that he installed one of respondents' devices during the period when the instant proceeding was pending and upon the basis of its use expressed the opinion that faster starting, smoother operation and greater gasoline economy were afforded—which tended to corroborate the testimony of said respondent—outweighed the testimony of various other witnesses in the proceeding, it appeared that the testimony of two automotive engineers, identified with the National Bureau of Standards—which was also generally in accord with the opinions expressed by another scientist connected with said Bureau—was to the effect hereinabove noted, and the Commission was of the opinion that the conclusions in question as set forth by it were in accord with the greater weight of the evidence adduced in the proceeding.

As regards respondents' assertion that a statement appeared in the tentative decision to the effect that their 1950 motor device did not improve engine performance, it appearing that the reception of evidence was completed on September 22, 1949, the Commission's findings in the instant matter related to the value and efficacy of the auxiliary spark gaps being sold under the representations challenged in the complaint, and the Commission's order required cessation of certain of said challenged representations in connection with the offer, etc., of the device to which such representations originally related or of other products substantially similar thereto, but without any determination, however, in the absence of an adequate basis in the record therefor, as to the inherent nature of such devices as are presently being marketed by respondents.

As regards respondents' objection to the statement that their product was not submitted to the aforesaid Automotive Test Laboratory of America, no statement to said effect appears in the tentative decision of the Commission or the findings as to the facts in the instant matter.

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With respect to respondents' challenged use of the words, "Supercharger," "Super-Ignitioniter" and "Super-Ignitioner" to designate their products, the complaint alleging that the term "Supercharger" is misleading in that a super-charger signifies a device which increases the pressure as the explosive charge is supplied to the motor cylinder—a function which respondents' products will not perform, it appeared that respondents discontinued the use of said expression more than 2 years prior to the institution of the instant proceeding, and that there was no reason to believe that use of such or similar terms or words would be resumed, and the Commission was of the opinion that no further corrective action in respect to said matter was required in the public interest at this time, and said charges of the complaint were accordingly dismissed without prejudice.

As regards charges relating to the designations "Super-Ignitioniter" and "Super-Ignitioner," use of which was alleged to be misleading because the device, would not increase or improve the functions of the ignition system except in transitory instances as above noted, no evidence was introduced expressly directed to showing what consumer impressions might be engendered by the use of said expressions, and the Commission, under the circumstances was of the opinion that the evidence in the record was insufficient for an informed determination of the issues raised by such allegations, and said charges were therefore also dismissed without prejudice.

Before *Mr. Henry P. Alden*, trial examiner.

Mr. Clark Nichols for the Commission.

Arnstein & Schwartz, of New York City, for respondents.

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 Eleanor Schultz Baden, also known as Eleanor Schultz, and George Baden, as individuals, and as copartners trading as E. G. Sales & Manufacturing Co., hereinafter referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Eleanor Schultz Baden also known as Eleanor Schultz, and George Baden, as individuals and as copartners are trading as E. G. Sales & Manufacturing Co. with their principal place of business located at 355 East One Hundred Forty-ninth Street, New York, N. Y.

Said respondents are now, and for several years last past have been, engaged in the manufacture, sale, and distribution of certain devices for use on internal combustion motors, with battery ignition, in commerce as "commerce" is defined in the Federal Trade Commission Act. Prior to January 1946, said devices were sold under the trade name

of "E. G. Supercharger" and since January 1946 as "E. G. Super-Ignitioniter" and "E. G. Super-Ignitioner." Said devices, although sold under the above different names, are of substantially the same construction and possess substantially the same properties.

PAR. 2. Respondents cause, and have caused, said devices, when sold to be transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and at all times herein maintain and have maintained a course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia. Respondents' volume of business in said devices in such commerce is and has been substantial.

PAR. 3. In the course and conduct of their said business and for the purpose of inducing the sale of their said devices in commerce, respondents have made false and misleading statements and representations with respect to the value, usefulness, and functions of said devices in newspapers and periodicals of general circulation and in circulars, letters, and printed matter appearing on cartons in which said devices are packaged. Among and typical of the statements and representations appearing in said advertisements are the following:

RELATIVE TO THE DEVICE UNDER THE NAME SUPERCHARGER

1945 IGNITION Supercharger. \$4.00. Pep,
Mileage, Fast Starting. EG Mfg. Co.

**MAKES ALL ENGINES DO MORE AT LESS EXPENSE.
EXTENDS LIFE OF ENGINE 3 to 4 TIMES LONGER
WITH GREATER SAVING AND EFFICIENCY.**

E. G. Supercharger . . .
Quick starting wet or cold
Increases cylinder Power
More Mileage and Pep—
Reduces carbon and Quiets
Engine Performance—

Makes New and Old Engines Perform Better.

How would you like it if your engines would always start easy, wet or cold? Better mileage—Running idle you will notice the difference. The accelerator does not have to be pressed as far as before, the engine revolves faster. And on the road you will notice a faster pick-up, more power on hills—and higher speeds will feel like 10 miles less. Makes cheaper gas—and the best gas perform better—Less carbon and smoother operation. YES, that is the improvement and saving others tell us they got and you can get it, too—NEW & OLD engines better—Simply rush in money, money order or checks for all the Superchargers you can use. Spark plugs and points last longer at higher firing.

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E. G. Ssupercharger has 7 distinct features:

1. QUICK STARTING—engine wet or cold.
2. MORE MILEAGE.
3. MORE PEP AND POWER.
4. RAPID ACCELERATION AND PICKUP.
5. FIRES THROUGH OIL AND GREASE.
6. REDUCES CARBON.
7. Quiets and Smooths Engine Performance.

Makes NEW and OLD engines BETTER

Tested and approved by Automotive Test Laboratories of America.

RELATIVE TO THE DEVICE UNDER THE NAME SUPER-IGNITIONITER
OR SUPER-IGNITIONER

SUPER IGNITIONER \$4.50

Faster starting, pep, mileage.

Our new 1946 model E. G. SUPER IGNITIONITER increases the tension, or pressure, at the spark plug point gaps, thus assuring a fast, hot spark at each and every cycle, under the highest compression, producing multiple combustion of the fuel charge.

Installing our new 1946 E. G. SUPER-IGNITIONITER is simplicity itself: Simply pull the wire out of the center hole of your distributor, and insert the male end of the Super-Ignitioniter into this middle hole of the distributor. Next insert the terminal of the wire you disconnected from the distributor middle hole into the female end of the Super-Ignitioniter. That's all there is to it. Now step on the starter and note the difference as your motor springs instantly into a new, surging power.

If your motor then idles too fast, close the throttle by unscrewing the idling screw on the carburetor until you get the desired idling speed, and you are ready to go. Check the increased efficiency, pep, power and gasoline mileage your motor now produces, with the aid of our E. G. SUPER-IGNITIONITER. Note the extra power on steep hills and in tough spots of mud or snow.

Order your new 1946 model E. G. SUPER-IGNITIONITER today so you can begin enjoying the new, amazing efficiency of your motor with its dazzling performance and power.

Quicker starting wet or cold.

Atomic starting, pep, mileage.

Makes all cars, trucks, motor boats, airplanes, or stationary engines with battery ignition step out and go with economy.

Helps some cases of carbon and oil shooting.

PAR. 4. Through the use of the advertisements containing the statements and representations hereinabove set forth, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication:

That their said devices when attached to any motor, regardless of age or condition, will make said motor operate better at less expense; that they will extend the life of motors three or four times longer than if said devices were not attached, with less expense and more efficiency for the longer period; that they will insure quicker starting in motors, having battery ignition, when wet or cold; that they will give on all

such motors, regardless of condition, more mileage, cylinder power, rapid acceleration and pickup than is produced by regular equipment used in such motors by their manufacturers; that they prolong the life of spark plugs and points; that they will cause a spark to jump across spark plug points that are clogged with oil and grease, when the stock coil will not so do; that they will reduce and prevent carbon in such motors; that they produce "atomic starting" in such motors; that they quiet and smooth such motors not performing properly for any reason; that they make new or old cars perform better under all conditions; that they have been tested and approved for all of the above claims of merit by the Automotive Testing Laboratories of America, implying that said testing laboratories are equipped with personnel and apparatus, qualified and sufficient to make the necessary tests for said claims of merit.

PAR. 5. The said representations are false and misleading. In truth and in fact respondents' said devices when attached to motors having battery ignition will not make such motors operate better or at less expense and will not extend the life of such motors any length of time over its usual life, but tend to shorten the normal life of the motor's ignition coil. They will not insure quicker starting of such motor when it is wet or cold. They will not insure quicker starting, more mileage, cylinder power, rapid acceleration or pickup except in transitory instances confined to a condition where a plug is slightly fouled and will be no aid in the starting or operation of such motors if a spark plug is not fouled or is badly fouled. They will not cause a spark to jump across spark plug points that are clogged with oil and grease as well as the spark from the stock ignition coil of such motor. They will not prolong the life of spark plugs or points. They will have no effect on preventing the formation of carbon or of removing formed carbon in such motors. The use of the words "atomic starting" is confusing, exaggerated, and misleading as respondents' devices have no possible connection with the word "atomic" as it is commonly understood. They do not quiet or smooth motor operation nor make new or old cars perform better, except in the transitory instances above mentioned. The Automotive Testing Laboratories of America had no laboratory or testing equipment and had no engineers or experts employed or associated with it at the time of any so-called test of said devices.

PAR. 6. The use by the respondents of the trade names "Super-charger" and "Super-Ignitioniter" or "Super-Ignitioner" are false and misleading in that a supercharger, when descriptive of an attachment to internal combustion motors, means a device which increases the pressure as the explosive charge is supplied to the motor cylinder,

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which the respondents' device does not do. The use of the words "Super-Ignitioniter" or "Super-Ignitioner" is misleading for the reason that the devices will not increase or improve the functions of the ignition system of a motor except in the limited manner and under the limited condition described in paragraph 5 hereof.

PAR. 7. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 28, 1948, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereinabove charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. After the issuance of said complaint and the filing by respondents of their joint answer thereto, hearings were held at which 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 such testimony and other evidence were duly recorded and filed in the office of the Commission. On July 7, 1950, the trial examiner filed his initial decision.

The Commission, having reason to believe that the initial decision did not constitute an adequate disposition of the matter, on August 14, 1950, issued and thereafter served upon the parties its order placing this case on the Commission's own docket for review and affording the respondents an opportunity to show cause why said initial decision should not be altered in the manner and to the extent shown in the tentative decision of the Commission attached to said order. Thereafter, this proceeding regularly came on for final consideration by the Commission upon the record herein on review, including the memorandum of objections filed on August 28, 1950, by respondent George Baden; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the trial examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondents, Eleanor Schultz Baden and George Baden, are and have been engaged since several years prior to 1946,

as copartners doing business as E. G. Sales & Manufacturing Co., 355 East One Hundred Forty-ninth Street, New York, N. Y., in the manufacture and sale of certain mechanical devices, for use on internal-combustion motors having battery ignition.

PAR. 2. Prior to January 1946, respondents' devices were sold under the trade designations of "E. G. Supercharger" and "Ignition Supercharger," and since 1946 as "E. G. Super-Ignitioniter" and as "Super-Ignitioner," which devices, although sold under the above different names, are functionally identical in operating principle and similar in construction. Respondents cause and have caused their devices when sold to be transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and at all times herein referred to have maintained a course of trade in said products in commerce, as aforesaid, in connection with which respondents' volume of business has been substantial.

PAR. 3. For the purpose of inducing the sale of their products in commerce, the respondents in newspapers and periodicals of general circulation and in circulars, letters, and other printed matter, including the carton containers in which said products are shipped, have represented that the use of their devices causes motors, regardless of age or condition, to operate better at less expense and insures quick starting; that such use affords motors, regardless of condition, more mileage, cylinder power, rapid acceleration and pickup, prolongs the life of spark plugs and points, and extends motor life three or four times longer than if said devices were not attached; and that such use causes the spark to jump across plug points that are clogged with oil or grease when a stock coil will not do so, reduces and prevents carbon, affords "atomic starting," and causes motors performing improperly to run quietly and smoothly. Through use on carton containers for said devices of the statement "Tested and approved by Automotive Test Laboratories of America," respondents also have represented that their products have been tested and approved by a laboratory or other organization possessing trained personnel and scientific facilities for the performance of authoritative tests and experiments concerning commercial products.

PAR. 4. In the ignition system regularly used on automobiles, the battery supplies the current and the current goes through a pair of contacts called breaker points which are opened by a cam. The timing of that opening is caused by the positioning of the crank shaft of the automobile. When the breaker points are closed, current flows through the remainder of the low tension circuit, the primary of the ignition coil, and back to the battery. With the breaker points open, that current is interrupted.

The high tension of the ignition coil passes through the secondary coil which is wrapped around the same core as the primary, and through a distributor which selects the cylinder to which the next spark shall go—through cable to the spark plug and through the engine back to ground and then to the point of origin. In operation, when the breaker points close, current flows through the primary and builds what is known as a magnetic field in the coil. When that current is interrupted, the field collapses, causing a rapid rise of potential in the secondary circuit. The extent to which this potential rises is determined by the possibility of breaking through resistance and causing the current to flow. This happens in an automobile ignition system whenever the potential gets high enough to jump across the spark plug gap, or any additional gaps also in the circuit.

The ignition coil changes the 6- or 12-volt current of the primary to current at a very much higher voltage in the order of 10,000 volts. The insulation of the ignition system in general and of the coil is intended to protect against normal stress.

When any of respondents' devices are used in the ignition system, installation is made in the line between the ignition coil and the distributor so that the device constitutes an additional series gap on all of the spark plugs, because it occurs before the distributor which connects successively to the different spark plugs. Accordingly, the electrical charge comes first through the ignition coil and passes through respondents' device and then into the spark plugs.

PAR. 5. The introduction of an additional spark gap as provided by respondents' devices into the ignition system serves to build up the voltage but thereby increases the stress and the insulation of the ignition coil and tends to hasten the breakdown of the coil. Respondents' devices will be of no benefit when starting failure or improper operation is due to a weak coil. When the spark plugs and the ignition coil in a car are in good condition, the use of respondents' devices will have no influence upon the combustion process of fuel in the cylinders.

The representations of the advertising as referred to in paragraph 3 hereof are false and misleading. Respondents' products will not cause motors, regardless of age or condition, to operate better or at less expense or insure quick starting, or irrespective of motor condition, afford more mileage, power, acceleration, or pick-up. Under no conditions of use will respondents' devices significantly increase the life of spark plugs and points, nor will they extend motor life three or four times longer, or for any period longer, than if said devices are not attached. Respondents' products will not be effective in causing sparks to jump across spark plug points and in causing sparks to

occur irrespective of the degree to which such spark plugs may be fouled with oil and grease, nor will such devices make all motors not performing properly, operate quietly and smoothly. They will not serve to reduce or prevent carbon.

On the basis of the evidence, it appears, however, that respondents' devices may have a favorable influence in starting or operation in those rare circumstances where one or more plugs are fouled within certain limits by carbon. A stock coil will cause spark to occur up to a certain stage of fouling but above such limits or values of shunting resistance, as referred to scientifically, the spark plug will miss firing and the motor will fail to start. Within narrow limits above this value, an auxiliary series gap may permit spark to occur. The value of an additional spark gap in these circumstances is temporary, however, inasmuch as normal continuation or progression of the fouling process due to the operational defect causing such fouling in the first instance, will render the ignition system ineffective within a short period of time. Respondents' devices will not cause a spark to occur when plugs are badly fouled and they are not an effective substitute for cleaning of the plugs or correcting the basic operational causes of fouling.

Atomic energy is the result of nuclear action and the operational principles of respondents' devices have no connection therewith. The use of the words "atomic starting" by respondents is confusing and misleading.

When respondents' business was instituted, the specifications for their products and samples thereof were sent by them to a concern known as Automotive Test Laboratories and a certificate or seal of approval was thereafter received by respondents from this source. Such statement has been the basis for the representations formerly appearing on respondents' cartons that their products had been "Tested and approved by Automotive Test Laboratories of America." Findings as to the facts, conclusion, and orders to cease and desist were issued by the Commission respectively on April 29, 1938, and April 28, 1938, in the matters of Morris E. Newman, trading as Automotive Test Laboratories of America, Docket Number 3328, and Ralph C. Curtiss, et al., Docket Number 3329. Official notice has been taken herein of certain facts therein found by the Commission, namely, that Automotive Test Laboratories of America, at the time such purported approval of respondents' products was extended to respondents, had no laboratory or scientific equipment for conducting tests and experiments and employed no trained personnel for the purpose of performing tests on commercial products. Instead, the proprietor of such concern followed the practice of accepting the

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suggestions and claims made by various manufacturers as the basis for so-called certificates or seals of approval or merit which thereafter were issued by Automotive Test Laboratories of America without investigation of the truth or falsity of the manufacturers' statements. It does not appear that respondents were aware of all the circumstances under which the operations of Automotive Test Laboratories were conducted. In the circumstances, however, the Commission is of the view that the implications of respondents' advertising to the effect that its products have been scientifically tested and thereafter approved by a laboratory or organization possessing adequate personnel and scientific facilities for the performance of tests and experiments concerning commercial products are erroneous and misleading.

PAR. 6. In the memorandum filed by respondent George Baden containing objections to the tentative decision heretofore issued by the Commission, respondents contend that the opinions expressed by the witness Hunt, an automobile mechanic whose testimony was introduced into the record by respondents, outweighs the testimony of various other witnesses whose testimony was received in this proceeding. The witness Hunt testified that he installed one of respondents' devices procured by him during the period when this proceeding was pending, and, upon the basis of its use, expressed the opinion that faster starting, smoother operation, and greater gasoline economy were afforded. This testimony tends to corroborate the testimony of the respondent George Baden. Called by counsel supporting the complaint, however, were other witnesses including two automotive engineers each of whom has been identified with the National Bureau of Standards. Upon the basis of his examination of both of respondents' devices which were received as exhibits herein, one testified that the effect of such devices on the ignition system and motor was limited in the respects noted in paragraph 5 hereof. The other testified similarly with respect to the device designated "E. G. Ssupercharger," which was offered for sale prior to 1946. The opinions expressed by another scientist also connected with the Bureau of Standards are generally in accord. The Commission is of the opinion that the conclusions set forth in paragraph 5 hereof are in accord with the greater weight of the evidence adduced in this proceeding.

Respondents assert also that a statement appears in the tentative decision that their 1950 model device does not improve engine performance. The reception of evidence was completed in this proceeding on September 22, 1949. The Commission has made no findings herein which expressly relate to the device presently offered for sale by respondents. The findings of the Commission relate to the value and efficacy of the auxiliary spark gaps being sold under the repre-

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sentations challenged in the complaint. Two representative types of such devices, the only ones offered in evidence, were received into the record, and, according to the greater weight of the evidence, they are functionally identical and similarly limited in value. The order now issuing requires cessation of certain of the representations challenged in the complaint in connection with the offering for sale, sale or distribution of the devices to which such representations originally related or of other products substantially similar thereto. Because no adequate basis is afforded therefor in the record, no determination has been made by the Commission as to the inherent nature of such devices as presently are being marketed by respondents.

Respondents assert also that they are objecting to such statement as has been made that their product was not submitted to the Automotive Test Laboratories of America. No statement to this effect appears in the tentative decision of the Commission or the foregoing findings as to the facts.

PAR. 7. The use by respondents of the aforesaid statements and representations has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements are true and to induce such portion of the purchasing public because of the mistaken and erroneous belief so engendered to purchase respondents' products.

CONCLUSION

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

Additional allegations of the complaint pertain to respondents' use of the words "Ssupercharger," "Super-Ignitioniter," and "Super-Ignitioner" to designate their products, it being alleged in such connection that the term "Ssupercharger" is misleading in that a supercharger signifies a device which increases the pressure as the explosive charge is supplied to the motor cylinder, a function which respondents' products will not perform. The evidence adduced in this proceeding, as stated hereinbefore, indicates that use of the expression "Ssupercharger" was discontinued by respondents in January 1946, more than two years prior to the institution of this proceeding. In view of such discontinuance and there being no reason to believe that use of the term "Ssupercharger" or other words of similar import will be resumed, the Commission is of the opinion that no further corrective action in respect thereto is required in the public interest at this time,

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and the charges of the complaint in respect thereto are accordingly being dismissed without prejudice.

With respect to other charges relating to the designations "Super-Ignitioniter" and "Super-Ignitioner," it is alleged that their use in the advertising is misleading for the reason that such devices will not increase or improve the functions of the ignition system except in transitory instances confined to a condition of slight fouling of the spark plug. Such temporary improvements in starting or operation as may be afforded by use of respondents' devices in comparatively rare instances have been discussed hereinbefore, and reference has been made also to certain adverse effects on the ignition coil which tend to result from use of one of respondents' devices. No evidence was introduced in this proceeding expressly directed to showing what consumer impressions may be engendered by the use of the expressions "Super-Ignitioniter" and "Super-Ignitioner." In the circumstances here, the Commission is of the opinion that the evidence contained in the record is insufficient for an informed determination of the issues raised by such allegations, and these charges are therefore being dismissed without prejudice in the order hereinafter set forth.

ORDER

It is ordered, That the respondents Eleanor Schultz Bader and George Baden, individually and trading as E. G. Sales & Manufacturing Co., or trading under any other name, and their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' mechanical devices designated "E. G. Ssupercharger," "Ignition Supercharger," "E. G. Super-Ignitioniter," and "E. G. Super-Ignitioner," or any substantially similar devices whether sold under the same name or any other name, do forthwith cease and desist from representing directly or by implication:

(1) That said products will cause motors, under all conditions, to operate better or more economically, will insure quick starting, or, under all conditions, afford increased mileage, power, acceleration, or pickup;

(2) That said products will prolong motor life or increase the life of plugs or points;

(3) That said products will reduce or prevent carbon;

(4) That said products will afford "atomic starting";

(5) That said products will have any value in improving motor starting or operation, or in causing a spark to be produced when

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plugs are fouled by oil or grease unless said statements be expressly limited to such temporary value as may be afforded when starting failure, or impaired operation, is caused by failure of the spark to occur due to fouling of one or more spark plugs by carbon within those rarely encountered and narrow limits of fouling in which an auxiliary spark gap may be of assistance in causing a spark to occur;

(6) That said products have been tested or approved by a laboratory or other organization equipped with trained personnel and scientific facilities for the performance of authoritative tests and experiments on commercial products when such is not the case.

It is further ordered, That those additional charges of the complaint pertaining to respondents' use of the terms "Supercharger," "Super-Ignitioniter" and "Super-Ignitioner," be, and the same hereby are, dismissed without prejudice to the right of the Commission to take such further or other action in the future as may be warranted by the then existing circumstances.

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

IN THE MATTER OF
**THE MIAMI MARGARINE CO. AND THE RALPH H.
JONES CO.**

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

Docket 5353. Complaint, July 7, 1945—Decision, Apr. 19, 1951

Where a corporation engaged in the manufacture and competitive interstate sale and distribution of margarine under the trade name or brand "Nu-Maid," and an advertising agency; in advertising in newspapers and periodicals and by radio announcements—

- (a) Represented that their said margarine was the only one adapted for table use, and that all margarines sold by competitors were inferior thereto for such use;

The facts being that said product, like margarines sold by competitors, contained no ingredients other than those set out in the regulations as to standards of identity of oleomargarines, promulgated by the Food and Drug Administration on June 6, 1941; all margarine products manufactured in accordance with these regulations are adapted for table use; and its said false representation unfairly disparaged the products of its competitors;

- (b) Represented that their said product when consumed in the ordinary manner at the table would provide pep because of its vitamin A content, and that vitamin A was properly characterized as the "Pep-Up" vitamin;

The facts being that it would not thus provide "pep" as the word is commonly understood, i. e., activity, vitality, vigor, strength, and endurance, and there is no scientific basis for the claim that Vitamin A is the "pep-up" vitamin; and,

- (c) Falsely represented that their said margarine when consumed in the ordinary manner at the table had therapeutic value in the treatment of digestive troubles;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were true, and thereby into the purchase of said margarine, and to divert unfairly to said manufacturer from its competitors substantial trade in commerce:

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

As respects the charge in the complaint that respondents disseminated the false representation that said margarine had been graded or classified as a kind or quality of margarine expressly adapted for table use: the Commission was of the opinion and found that the allegations of the complaint with respect to such charge had not been sustained by the greater weight of the evidence.

Before *Mr. Andrew B. Duvall*, *Mr. John P. Bramhall*, and *Mr. Clyde M. Hadley*, trial examiners.

Mr. Clark Nichols for the Commission.

Graydon, Head & Ritchey, of Cincinnati, Ohio, for respondents.

Complaint

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 Miami Margarine Co., a corporation, and The Ralph H. Jones Co., a corporation, hereinafter referred to as the respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, The Miami Margarine Co., is a corporation, organized and existing under the laws of the State of Ohio with its principal office and place of business located at 107 East Pearl Street, Cincinnati, Ohio, and respondent, The Ralph H. Jones Co., is a corporation organized and existing under the laws of the State of Ohio, with its principal office and place of business located at 3100 Carew Tower, Cincinnati, Ohio.

PAR. 2. Respondent, The Miami Margarine Co., is now, and for more than 3 years last past has been, engaged in the sale and distribution of margarine under the trade name of Nu-Maid. Said respondent causes its said margarine, when sold, to be transported from its place of business in the State of Ohio to the purchasers thereof located in various other States of the United States and in the District of Columbia.

Said respondent maintains, and at all times mentioned herein has maintained, a course of trade in its said product, in commerce, among and between the various States of the United States and in the District of Columbia.

PAR. 3. This respondent has been, and is now, and at all times mentioned herein, has been, in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture, sale, and distribution of margarine for the same use and purpose as the product advertised, sold, and distributed by this respondent.

PAR. 4. The respondent, The Ralph H. Jones Co., is a corporation conducting an advertising agency from its place of business, as aforesaid, and as such is engaged in formulating, editing, and selling advertising matter and advising its clients with regard thereto. Said respondent prepared and placed for respondent, The Miami Margarine Co., the advertising matter hereinafter mentioned and set forth.

PAR. 5. The respondents act in conjunction and cooperation with each other in the performance of the acts and practices hereinafter alleged.

PAR. 6. In the course and conduct of their aforesaid businesses, said respondents have disseminated and are now disseminating, and have caused and are now causing the dissemination of, false advertisements concerning the aforesaid Nu-Maid margarine by the United States mails and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act; and the respondents, as aforesaid, have also disseminated and are now disseminating, and have caused and are now causing the dissemination of, false advertisements concerning the aforesaid product, by various means for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of the aforesaid product, in commerce, as commerce is defined in the Federal Trade Commission Act.

Among and typical of the false, misleading, and deceptive statements and representations contained in said false advertisements, disseminated and caused to be disseminated, as hereinabove set forth, by the United States mails, by advertisements inserted in newspapers and periodicals, by radio continuities and by circulars, leaflets, pamphlets, and other advertising literature, are the following:

Table Grade NU-MAID is 97% digestible and is rich in Vitamin "A" (The Pep-Up Vitamin). It is a high energy food.

Though NU-MAID is the *only* margarine plainly labeled "Table Grade," it costs so little you can use it freely.

Table-Grade NU-MAID is a high-energy food (3300 calories per LB.) enriched with 9,000 USP units of the "Pep-up Vitamin 'A'."

NU-MAID, the only margarine certified by its makers to be "Table Grade."

At your table, use NU-MAID, the only margarine certified by its makers to be "Table Grade" margarine.

Pure, Sweet, Wholesome, NU-MAID, only. The "Table Grade" margarine.

I said NU-MAID—is *table grade* margarine, made especially for use on the TABLE.

Though NU-MAID is the *only* margarine plainly labeled "Table Grade" * * *

NU-MAID The Table-Grade margarine.

Serve only margarine that's labeled "Table Grade."

Doctors some time tell patients suffering with digestive troubles to eat a fine margarine such as NU-MAID.

PAR. 7. Through the use of the aforesaid statements and representations, and others of the same import but not specifically set out herein, respondents represent, directly and by implication, that Nu-Maid margarine, when consumed in the ordinary manner at the table, will provide pep because of its vitamin A content and has therapeutic value in the treatment of digestion troubles; that vitamin A is properly characterized as the "Pep-Up" vitamin; that said product has been graded or classified as a kind or quality of margarine especially adapted for table use; that it is the only margarine adapted for that purpose and that all margarines sold by competitors are inferior to said product for table use.

PAR. 8. The aforesaid statements and representations are false, misleading, and deceptive and those representing or implying that all margarines sold by the competitors of respondent, The Miami Margarine Co., are inferior to and less desirable than said respondent's product, unfairly disparage the products of its competitors.

In truth and in fact, the vitamin A contained in the product, Nu-Maid margarine, when said product is consumed in the ordinary manner at the table will not provide "pep" in the sense that this word is commonly understood, that is, activity, vitality, vigor, strength, and endurance. The consumption of this product has no therapeutic value in the treatment of digestive troubles. There is no scientific basis for the claim that vitamin A is the "pep-up" vitamin. Nu-Maid margarine is not processed, graded, or classified in any manner which renders it especially adaptable for table use and many competitive brands of margarine are not inferior to said product, for table use.

PAR. 9. The use by the respondents of the aforesaid statements and representations in connection with the offering for sale and sale of said product, in commerce, has the tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous belief that said statements, representations, and implications are true, and causes such members of the purchasing public to purchase substantial quantities of said product as a result of such erroneous belief, with the result that trade in commerce has been unfairly diverted to the respondent, The Miami Margarine Co., from its competitors. In consequence thereof, substantial injury has been and is being done to said respondent's competitors in commerce.

PAR. 10. The aforesaid 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 and unfair and deceptive acts and practices, in commerce, within the intent and meaning 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 July 7, 1945, issued and subsequently served its complaint in this proceeding upon the respondents, The Miami Margarine Co., a corporation, and The Ralph H. Jones Co., a corporation, charging said respondents with the use of unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of the provisions of that Act. After the filing of respondents' answer, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before trial examiners of the Commission theretofore

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duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the aforesaid complaint, the respondents' answer thereto, the testimony and other evidence, and the recommended decision of a substitute trial examiner duly designated by the Commission for the purpose of preparing and submitting his recommended findings and conclusion upon all of the material issues of fact, law, or discretion presented on the record, the trial examiner previously designated to take testimony and receive evidence herein being unavailable (briefs having been waived and oral argument not having been requested); 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, The Miami Margarine Co., is an Ohio corporation, with its principal office and place of business located at 107 East Pearl Street, Cincinnati, Ohio. Respondent, The Ralph H. Jones Co., is an Ohio corporation with its principal office and place of business located at 3100 Carew Tower, Cincinnati, Ohio.

PAR. 2. Respondent, The Miami Margarine Co., is now and for some years last past has been engaged in the manufacture, sale and distribution of margarine under the trade name or brand of Nu-Maid. The said respondent causes, and at all times mentioned herein has caused, its said product, when sold by it, to be transported from its place of business in the State of Ohio to purchasers in various other States of the United States and in the District of Columbia. Said respondent maintains and at all times mentioned herein has maintained a course of trade in said product in commerce between and among the various States of the United States and in the District of Columbia. Said respondent is now and at all times mentioned herein has been in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the sale and distribution of margarine for the same use and purpose as the products advertised and sold and distributed by the said respondent.

PAR. 3. Respondent, The Ralph H. Jones Co., is an advertising agency engaged in formulating, editing, and selling advertising matter and advising its clients with regard thereto. Said respondent prepared and placed for The Miami Margarine Co. the advertising matter hereinafter set forth. Respondents have cooperated with each other in performing the acts and practices hereinafter described.

PAR. 4. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of the product designated Nu-Maid margarine, respondents have disseminated, and have caused the dissemination, by the United States mails, and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, of many advertisements concerning said product, and they have also disseminated, and have caused the dissemination, by various means, of many advertisements for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in said advertisements, disseminated and caused to be disseminated as hereinabove set forth, principally by insertions in newspapers and periodicals and by radio announcements, have been the following:

At your table, use only margarine that's plainly labeled "Table-Grade."

NU-MAID is the only margarine certified by its maker to be a "Table-Grade" margarine.

Pure, Sweet, Wholesome

only

NU-MAID

buy it now!

The "Table-Grade" Margarine.

Serve *only* margarine that's labeled "*Table-Grade*."

"Table-Grade" NU-MAID is 97% digestible and is rich in Vitamin "A" (The "Pep-Up" Vitamin). It is a high energy food.

"Table-Grade" NU-MAID is a high-energy food (3,300 calories per LB.), enriched with 9,000 USP units of the "Pep-Up" Vitamin "A."

Doctors sometimes tell patients suffering from digestive troubles to eat a fine margarine such as NU-MAID.

PAR. 5. Through the use of the foregoing statements and representations, and others of similar import, the respondents have represented, directly or by implication: (a) that Nu-Maid margarine is the only margarine adapted for table use and that all margarines sold by competitors are inferior to said product for table use; (b) that Nu-Maid margarine, when consumed in the ordinary manner at the table, will provide pep because of its vitamin A content; (c) that vitamin A is properly characterized as the "pep-up" vitamin, and (d) that Nu-Maid margarine, when consumed in the ordinary manner at the table, has therapeutic value in the treatment of digestive troubles.

PAR. 6. (a) Respondents' Nu-Maid margarine, as well as margarines sold by their competitors, contains no ingredients other than those set out in the regulations as to standards of identity of oleo-margarines promulgated by the Food and Drug Administration on June 6, 1941. All margarine products manufactured in accordance with this regulation are adapted for table use. Respondents' representation that Nu-Maid margarine is the only margarine adapted

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for table use was false and misleading and unfairly disparaged the margarine products of its competitors.

(b) Nu-Maid margarine, when consumed in the ordinary manner at the table, will not, because of its vitamin A content, provide "pep" in the sense that this word is commonly understood, that is, activity, vitality, vigor, strength and endurance, and that respondents' representations to the contrary were untrue.

(c) There is no scientific basis for the claim that vitamin A is the "pep-up" vitamin, and respondents' advertisements wherein such claim was made constituted false advertisements.

(d) Nu-Maid margarine, when consumed in the ordinary manner at the table, has no therapeutic value in the treatment of digestive troubles, and respondents' representations to the contrary were untrue.

PAR. 7. The complaint in this proceeding also charged that respondents disseminated the false representation that Nu-Maid margarine has been graded or classified as a kind or quality of margarine especially adapted for table use. The Commission is of the opinion, and finds, that the allegations of the complaint with respect to the falsity of these representations have not been sustained by the greater weight of the evidence.

PAR. 8. The use by the respondents of the false, misleading, and deceptive statements and representations referred to in paragraphs 4 to 6, inclusive, disseminated as aforesaid, has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were true and into the purchase of Nu-Maid margarine as a result of such erroneous and mistaken belief. By reason of the erroneous and mistaken belief so engendered such statements and representations have also had the tendency and capacity to unfairly divert to the respondent, The Miami Margarine Co., from its competitors, substantial trade in commerce between and among the various States of the United States and in the District of Columbia.

CONCLUSION

The acts and practices of the respondents as herein found (excluding those referred to in paragraph 7) are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission the respondents' answer thereto, testimony and other evidence in support of and in oppo-

sition to the allegations of the complaint introduced before trial examiners of the Commission theretofore duly designated by it, the recommended decision of a substitute trial examiner duly designated by the Commission for the purpose of preparing and submitting his recommended decision upon the record, the trial examiner previously designated being unavailable (briefs having been waived and oral argument not having been requested), and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act:

It is ordered That the respondent, The Miami Margarine Co., a corporation, and The Ralph H. Jones Co., a corporation, and their respective officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of Nu-Maid margarine, or any other product of substantially similar composition or possessing substantially similar properties whether sold under the same name or under any other name, do forthwith cease and desist from:

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

(a) That the said product is the only margarine product suitable for table use.

(b) That a margarine product is not suitable for table use unless it is labeled "Table-Grade."

(c) That the said product, because of its vitamin A content, provides the user thereof with increased pep, energy, vitality, vigor, strength, or endurance.

(d) That vitamin A is properly characterized as the "pep-up" vitamin, or that vitamin A provides the user thereof with increased pep, energy, vitality, vigor, strength, or endurance.

(e) That the said product has any therapeutic value in the treatment of digestive troubles.

2. Disseminating, or causing to be disseminated, any advertisement, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of such product, which advertisement contains any of the representations prohibited in the preceding paragraph 1 (a), (b), (c), (d), and (e).

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

IN THE MATTER OF
CLAY PRODUCTS ASSOCIATION, INC., ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SUBSEC. (a) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914 AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5483. Complaint, Feb. 14, 1947—Decision, Apr. 19, 1951¹

Where an association of manufacturers of vitrified clay sewer pipe, the delivered costs of which are composed in substantial part of freight costs; and 13 members and a former member, with some 20 plants in Montana, Colorado, Nebraska, Texas, Missouri, Kansas, Iowa, Illinois, Indiana, Kentucky, Minnesota, and Michigan, engaged in the interstate sale and distribution of said products in competition with one another except as below set forth—

- (a) Cooperated in a common course of action, whereby competition in the sale and distribution of said pipe and fittings was substantially suppressed and prevented; and in furtherance thereof—
- (1) Fixed, established, and maintained prices for said products through dividing their trade area into delivered price zones and agreeing upon and jointly publishing a master price list (known generally in the trade as the western price list), which set forth a basic price for each type of product together with discount rates applicable to the several delivered price zones, according to an agreed-upon schedule of freight rate differentials, and did not reflect, in delivered prices in any given zone, actual freight rates, but reflected rather freight rate averages to each zone from the Ohio basing area;
- (2) Established and maintained a common course of action regarding dealers, which included the designation of dealers, the terms and conditions of sale including the discount or commission to be allowed to dealers, and the allocation of sales between respondent members and dealers;
- (3) Established and maintained a list of jobbers, and terms and conditions of sale to jobbers, and agreed upon the allocation of sales between jobbers and themselves; and
- (4) Made use of their said association as a medium for establishing and agreeing upon prices, pricing methods, preparation of price sheets for publication, delivered price zones and prices therein, defining and classifying dealers and jobbers, establishing uniform terms and conditions of sale, and otherwise suppressing competition among themselves in the sale and distribution of said products; and

Where each of said members, and said former member—

- (b) Contributed to the accomplishment and effectiveness of the foregoing acts, practices, and results through using a zoning method of computing, formulating, and using delivered price quotations when other members simultaneously did the same, whereby it was enabled to and did match its quotations on a delivered basis with those of other members; and
- (c) Contributed, as aforesaid, through discriminating among its customers by charging and receiving higher net prices from customers located near its plant than from those more distant, for goods of like grade, quality, and quantity, whereby it was enabled to and did match its quotations on a delivered basis, with those of other members;

¹ See footnote on p. 1272.

Inherent and necessary effects of which acts, practices and methods, under the circumstances set forth, were—

(1) A substantial lessening of competition in the sale of said products as among the members of said association; and

(2) Unfair and oppressive discrimination against purchasers of vitrified clay sewer pipe and fittings in large areas of the United States, by depriving them of advantages in cost which would otherwise accrue to them as a result of their proximity to the factories of the members, and the imposition upon them of higher net prices than they would have to pay if such net prices had been fixed by competition among the members:

Held, That such combination, and the acts and practices pursued in connection therewith, as above set forth, constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

As respects four respondent concerns against which the allegations of the complaint had not been established and with respect to which no findings had been made as regards their participation in the unlawful acts and practices described, it appearing that three were respondents in the Commission's proceeding against Clay Sewer Pipe Association, Inc., et al., docket 5484, which involved substantially similar charges, and that each of said three had filed therein an answer admitting all of the material allegations of fact set forth in that complaint:

The Commission was of the opinion that the public interest did not require an expenditure of the time and money necessary to prosecute further the instant proceeding against said three respondents, that the unlawful acts and practices alleged to have been engaged in by the respondents might be effectively stopped without the necessity of further proceedings against said fourth respondent, and that as to all four, the complaint should be dismissed without prejudice to the right of the Commission to institute a new proceeding against them if ever the public interest should so require.

As regards the charge in count two of the complaint that respondent members had discriminated in price in the sale of said pipe and fittings by selling to some purchasers at a price higher than that to others, in violation of subsection (a) of section 2 of the Clayton Act as amended: the Commission was of the opinion that the allegations did not clearly show that the alleged unlawful discriminations occurred as a result of differences made in the actual price at which the respondents' products were sold, and that, therefore, said count should be dismissed as to all of the respondents.

Mr. Lynn C. Paulson and *Mr. Rice E. Schrimsher* for the Commission.

Kirkland, Fleming, Green, Martin & Ellis, of Chicago, Ill., for Clay Products Association, Inc., Blackmer & Post Pipe Co., Cannelton Sewer Pipe Co., Red Wing Sewer Pipe Corp., What Cheer Clay Products Co., White Hall Sewer Pipe & Stoneware Co., Streater Drain Tile Co., Standard Fire Brick Co., Lovell Clay Products Co., and along with—

Froelich, Grossman, Teton & Tabin, of Chicago, Ill., for Lehigh Sewer Pipe & Tile Co.;

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Winger, Barker & Winger, of Kansas City, Mo., for W. S. Dickey Clay Manufacturing Co.;

Cobbs, Logan, Roos & Armstrong, of St. Louis, Mo., for Laclede Christy Clay Products Co.;

Strock, Woods & Dyer, of Des Moines, Iowa, for Iowa Pipe & Tile Co.;

Mr. C. T. Greenlee, of Uhrichsville, Ohio, for Clay City Pipe Co.; and

Hughes & Dorsey, of Denver, Colo., for Denver Sewer Pipe & Clay Co.

Thompson, Hine & Flory, Cleveland, Ohio, for American Vitrified Products Co.

Slabaugh, Guinther, Jeter & Pflueger, of Akron, Ohio, for The Robinson Clay Products Co.

Mr. Oscar E. Buder and *Mr. Eugene H. Buder*, of St. Louis, Mo., for Evens & Howard Sewer Pipe Co.

COMPLAINT

This complaint is filed to obtain relief from respondents' activities because of their violations, jointly and severally, as hereinafter alleged in Count I herein, of section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," commonly referred to as the Federal Trade Commission Act, as approved September 26, 1914, and amended March 21, 1938 (38 Stat. 717; 15 U. S. C. A. sec. 41; 52 Stat. 111), and because of their violations, as alleged in Count II herein, of section 2 (a) of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly referred to as the Clayton Act, as approved October 15, 1914, and amended June 19, 1936 (38 Stat. 730; 15 U. S. C. A. sec. 12, 49 Stat. 1526; 15 U. S. C. A. sec. 13, as amended).

COUNT I

THE CHARGE UNDER THE FEDERAL TRADE COMMISSION ACT

PARAGRAPH 1. Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of section 5 of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

DESCRIPTION OF RESPONDENTS

PAR. 2. Respondent Clay Products Association, Inc., is an Illinois corporation, with its offices at 111 West Washington Street, Chicago, Ill.

Respondent American Vitrified Products Co. is a corporation organized and existing under the laws of the State of New Jersey with its main office at Cleveland, Ohio.

Respondent Blackmer & Post Pipe Co., is a corporation organized and existing under the laws of the State of Missouri, with its principal office located in St. Louis, Mo.

Respondent Cannelton Sewer Pipe Co. is a corporation organized and existing under the laws of the State of Indiana, with its main office at Cannelton, Ind.

Respondent Lehigh Sewer Pipe & Tile Co. is a corporation organized and existing under the laws of the State of Iowa, with its main office at Fort Dodge, Iowa.

Respondent Red Wing Sewer Pipe Corp. is a corporation organized and existing under the laws of the State of Minnesota, with its main office at Red Wing, Minn.

Respondent The Robinson Clay Products Co. is a corporation organized and existing under the laws of the State of Maine, with its main office at Akron, Ohio.

Respondent What Cheer Clay Products Co. is a corporation organized and existing under the laws of the State of Maine, with its main office at What Cheer, Iowa.

Respondent White Hall Sewer Pipe & Stoneware Co. is a corporation organized and existing under the laws of the State of Illinois, with its main office at White Hall, Ill.

Respondent Streator Drain Tile Co. is a corporation organized and existing under the laws of the State of Illinois, with its main office at Streator, Ill.

Respondent W. S. Dickey Clay Manufacturing Co. is a corporation organized and existing under the laws of the State of Delaware with its main office at Kansas City, Mo.

Respondent Laclede Christy Clay Products Co. is a corporation organized and existing under the laws of the State of Missouri, with its main office at St. Louis, Mo.

Respondent Evens & Howard Sewer Pipe Co. is a corporation organized and existing under the laws of the State of Missouri, with its main office at St. Louis, Mo.

Respondent Iowa Pipe & Tile Co. is a corporation organized and existing under the laws of the State of Iowa, with its main office at Des Moines, Iowa.

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Respondent Clay City Pipe Co. is a corporation organized and existing under the laws of the State of Ohio, with its main office at Uhrichsville, Ohio.

Respondent Denver Sewer Pipe & Clay Co. is a corporation organized and existing under the laws of the State of Colorado, with its main office at Denver, Colo.

Respondent Standard Fire Brick Co. is a corporation organized and existing under the laws of the State of Colorado, with its main office at Pueblo, Colo.

Respondent Lovell Clay Products Co. is believed to be a corporation. The state of incorporation is unknown. Its main office is at Lovell, Wyo.

Respondent Agate Sewer Pipe Co. is believed to be a corporation. The state of incorporation is unknown. Its main office is at Louisville, Ky.

Each of the aforesaid respondents is a member of respondent association. They are sometimes hereinafter referred to as respondent members.

PAR. 3. Respondent Clay Products Association, Inc. (sometimes hereafter referred to as respondent association), was organized in 1932. It has a staff of officers consisting of a president, vice president, treasurer and secretary, and a board of directors. Its bylaws provide that the object of the corporation is to "advance or promote the use of clay products * * *; aid in the standardization of * * * clay products; carry on educational, experimental and research work * * *; maintain a traffic committee or bureau to furnish traffic information * * *"; etc. All of the respondents are members.

The bylaws of respondent association provide for regular and special meetings of the members as well as for regular and special meetings of the board of directions. In addition to performing the functions set forth in the bylaws, respondent association serves the members as a medium for joint and collusive action on prices and terms and conditions of sale of respondents' products, participates in the establishment and maintenance of the combination and conspiracy hereinafter alleged, and cooperates with respondent members in carrying out the alleged unlawful acts, methods, policies, and practices with which they are herein charged.

DESCRIPTION OF INDUSTRY AND BUSINESS OF RESPONDENTS

PAR. 4. Respondents are engaged in the manufacture and sale of vitrified sewer pipe and other clay products. Vitrified sewer pipe is a clay product commonly used for all types of sewers. It is an im-

portant item in modern building construction and community development. It is a heavy commodity so that freight costs are a substantial part of delivered costs. Respondents operate a total of approximately 20 plants in the States of Montana, Colorado, Nebraska, Texas, Missouri, Kansas, Iowa, Illinois, Indiana, Kentucky, Minnesota, and Michigan. The vitrified sewer pipe industry in the United States is composed of manufacturers located in 23 States, operating a total of 75 plants.

PAR. 5. Respondents, with the exception of the respondent association, are all doing business in interstate commerce. In the course and conduct of their respective businesses, each respondent member sells and distributes vitrified clay sewer pipe manufactured by it to the purchasers thereof located in the various States of the United States, and in connection with and as a part of said sales, transports, or causes to be transported, said product to said purchasers thereof located in the various States of the United States other than the States, and in connection with and as a part of said rules, transports, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Each of the respondent members has been and is in competition with one or more of the other respondent members in making or seeking to make sales in commerce between and among the various States of the United States of vitrified sewer pipe which they manufacture, except insofar as said competition has been hindered, lessened, restricted, or suppressed as hereinafter alleged.

OFFENSES CHARGED

PAR. 7. For more than 5 years last past respondents have done and performed, and are now doing and performing, unfair acts and practices, have engaged in and are now engaging in unfair methods of competition in violation of section 5 of the Federal Trade Commission Act in that they have acted, and are still acting, wrongfully and unlawfully by cooperating between and among themselves in establishing, adopting, and continuing a common course of action, concert of action and agreement, resulting in substantial hindrance, frustration, restraint, suppression, and prevention of competition in the sale and distribution of vitrified sewer pipe in trade and commerce, as "commerce" is defined in the Federal Trade Commission Act.

Pursuant to, in furtherance of, and in order to effectuate the purposes and objectives of the aforesaid cooperation and common course of action, and as a part of their said cooperation, common course of action and agreement, respondents have formulated, adopted, performed, and put into effect, among others, the overt acts and used the methods, systems, practices and policies listed, described, and set

forth in the immediately succeeding subparagraphs numbered 1 to 4, inclusive, of this Paragraph 7:

1. Respondents have fixed, established, and maintained prices for vitrified sewer pipe in most of the trade area in which they do business. A method used in that connection is that of dividing the trade area into delivered price zones and agreeing upon and jointly publishing a master price list known generally in the trade as the western price list, which said price list sets forth a basic price for each type of product for sale, together with discount rates which are applicable to the several delivered price zones, according to an agreed-upon schedule of freight rate differentials. The delivered prices in any given zone do not reflect the true and actual freight rates to all destinations in the zone, but are averages of freight rates to the zone from the basing area, which is Uhrichsville, Ohio.

2. Respondents have established and maintained a common course of action regarding dealers which includes the designation of dealers, the terms and conditions of sale, including the discount or commission to be allowed to dealers; and the allocation of sales between themselves and dealers.

3. Respondents have established and maintained a list of jobbers, terms and conditions of sale to jobbers, and agreed upon the allocation of sales between jobbers and themselves.

4. Respondents have made use of respondent Clay Products Association as a medium for establishing and agreeing upon prices, pricing methods, preparation of price sheets for publication, delivered price zones, prices in delivered price zones, defining and classifying dealers and jobbers, establishing uniform terms and conditions of sale and otherwise lessening, restricting, and suppressing competition between and among themselves in the sale and distribution of vitrified clay sewer pipe.

PAR. 8. Each of the respondent members has contributed to the accomplishment and effectiveness of the acts, things, and results alleged in the immediately preceding Paragraph 7 hereof through its—

(1) Use of a zoning method of computing, formulating, and using delivered price quotations when other respondent members simultaneously do likewise and by which it is enabled to, and does, match its quotations on a delivered basis with the quotations of other respondent members; and

(2) Discrimination between and among its customers through its demanding, charging, accepting, and receiving higher net prices from its customers located near its plant than from its customers more

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distantly located for goods of like grade, quality, and quantity, and thereby is enabled to and does match its quotations on a delivered basis with the quotations of other respondent members.

EFFECTS AND RESULTS OF RESPONDENTS' ACTS AND PRACTICES

PAR. 9. The inherent effects of the adoption and maintenance by the respondent members of the methods and practices described and alleged in Paragraphs 7 and 8 herein include all and singularly the following, to wit:

(1) Substantial lessening of competition among respondent members; and

(2) Unfair and oppressive discrimination against portions of the purchasing public in large areas by depriving such purchasers of the advantage which would otherwise accrue to them as a result of their proximity to the factories of respondent members, and by requiring such purchasers to pay increases over what the net prices to such purchasers would have been if such net prices had been fixed by competition among respondents.

CONCLUSION

PAR. 10. The combination, agreements, and understandings of the respondents and the acts, practices, pricing methods, systems, devices, and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public; deprive the public of the benefit of competition; promote discrimination against some buyers and users of respondents' products; have a dangerous tendency and capacity to restrain unreasonably competition in the sale of such products in commerce; have actually hindered, frustrated, restrained, suppressed, and prevented competition in such products in commerce; and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the meaning of section 5 of the Federal Trade Commission Act, as amended.

COUNT II

THE CHARGE UNDER THE CLAYTON ACT

PARAGRAPH 1. Pursuant to the provisions of section 2 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, as amended by an Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, the Commission, having reason to believe that

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the parties hereinafter named and described as respondents in this Count II have violated and are violating the provisions of said Act of Congress as so amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating its charges in such respect as follows:

DESCRIPTION OF RESPONDENTS; DEFINITIONS AND EXPLANATIONS OF TERMS;
DESCRIPTION AND HISTORY OF INDUSTRY AND THE COMMERCE OF
RESPONDENTS

PARS. 2, 3, 4, 5, and 6. As and for paragraphs 2, 3, 4, 5, and 6 of this Count II, the Commission incorporates (except the first unnumbered subparagraph of paragraph 2, regarding respondent Clay Products Association, and the definition of "commerce" as contained in paragraph 5) paragraphs 2, 3, 4, 5, and 6 of Count I of this complaint to precisely the same extent and effect as if each and all of them were set forth in full and repeated verbatim in this Count II. The definition of "commerce" as hereinafter used in this Count II means "commerce" as defined and set forth in the Clayton Act.

OFFENSES CHARGED

PAR. 7. For more than 5 years last past, and while engaged as aforesaid in commerce among the several States of the United States and in the District of Columbia, each of the respondents American Vitrified Products Co., Blackmer & Post Pipe Co., Cannelton Sewer Pipe Co., Lehigh Sewer Pipe & Tile Co., Red Wing Sewer Pipe Corp., The Robinson Clay Products Co., What Cheer Clay Products Co., White Hall Sewer Pipe & Stoneware Co., Streator Drain Tile Co., W. S. Dickey Clay Manufacturing Co., Laclede Christy Clay Products Co., Evens & Howard Sewer Pipe Co., Iowa Pipe & Tile Co., Clay City Pipe Co., Denver Sewer Pipe & Clay Co., Standard Fire Brick Co., Lovell Clay Products Co., and Agate Sewer Pipe Co., has been and is now in the course of such commerce discriminating in price between purchasers of said commodities of like grade and quality sold for use, consumption, or resale within the several States of the United States and the District of Columbia in that each of the respondents has been and is now systematically selling such commodities to many purchasers at a price higher than the price at which commodities of like grade and quality are sold by it to other purchasers and users.

PAR. 8. Each of the respondents uses a delivered pricing system and practice for determining, calculating, making up, using, an-

nouncing, publishing, and distributing its quotations and offers to its respective customers in selling vitrified clay sewer pipe and other clay products in commerce. Each of the respondents in using its said delivered pricing system for quoting its delivered prices, and in making sales of its products in commerce in accordance and in connection therewith, discriminates as between its customers in net prices realized on its products of like grade and quality. The discriminations by each said respondent thus effected are systematic and result in part because of its failure to "make only due allowance for differing methods or quantities in which such commodities are to such purchasers sold or delivered," and are discriminatory to such an extent that the net prices paid by customers located at or near its factory door in many instances amount to much more than the net prices realized by such respondent on its products of like grade and quantity sold to its customers located hundred of miles away. The systematic discriminations in net prices thus effected by each of the respondents against nearby customers and in favor of its more distantly located customers are inherent in the use of the aforesaid delivered pricing system of each of the respondents. There are also involved in said system **MATCHED** delivered price quotations so that such customer in considering or accepting any of such offers is denied the opportunity ordinarily afforded under price competition to bargain with one respondent against another.

PAR. 9. Each of the said respondents practices the aforesaid systematic discriminations in price for the purpose and with the effect of enabling all the respondents to exactly **MATCH** their delivered price offers to sell its products of like grade and quantity in commerce to any given prospective purchaser at any given destination and to maintain such matched offers.

EFFECTS OF PRICE DISCRIMINATIONS PRACTICED BY RESPONDENTS

PAR. 10. The inherent and necessary effect of the practice by the respondents of the discriminations described and alleged in this Count II includes all and singularly the following, to wit:

- (1) The elimination of price competition between respondents; and
- (2) The maintenance of monopolistic, unfair, and oppressive discrimination against purchasers of vitrified clay sewer pipe and other clay products in large areas of the United States by depriving such purchasers of the advantage in cost which would otherwise accrue to them from their proximity to the factories of respondents.

PAR. 11. Further effects of the said discriminations in price by said respondents, as alleged and described in this Count II herein, may be substantially to lessen competition between the buyers of respondents'

products from respondents receiving said lower discriminatory prices and other buyers from respondents competitively engaged with such favored buyers who do not receive such favorable prices; tend to create a monopoly in the lines of commerce in which buyers from respondents are engaged; and to injure, destroy, and prevent competition in the lines of commerce in which those who purchase from respondents are engaged between the said beneficiaries of said discriminatory prices and said buyers who do not and have not received such beneficial prices as well as to lessen competition in the lines of commerce in which respondents are engaged.

CONCLUSION

PAR. 12. The aforesaid acts of each of the said respondents constitute violations of the provisions of subsection (a) of section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (49 Stat. 1526; 15 U. S. C. A. sec. 13, as amended).

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936, the Federal Trade Commission on February 14, 1947, issued and subsequently served upon the respondents named in the caption hereof its complaint in this proceeding, charging said respondents with the use of unfair methods of competition in commerce and unfair and receptive acts and practices in commerce in violation of the provisions of section 5 of the Federal Trade Commission Act and with having discriminated in price in the sale of vitrified sewer pipe and fittings in violation of the provisions of subsection (a) of section 2 of the said Clayton Act, as amended.

After the issuance of the complaint and the filing of the respondents' answers thereto (by all of said respondents except Agate Sewer Pipe Co.) denying in substantial part the allegations of the complaint, motions were filed on behalf of all of the respondents, except American Vitrified Products Company (erroneously named in the complaint as American Vitrified Products Co.), Robinson Clay Products Company (erroneously named in the complaint as The Robinson Clay Products Co.), Clay City Pipe Company (erroneously named in the complaint as Clay City Pipe Co.) and Agate Sewer Pipe Co., for permission to withdraw the original answers of said respondents and to file in lieu thereof substitute answers admitting, for the purposes of this proceeding, all of the material allegations of fact set forth in the

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complaint and waiving all intervening procedure and further hearings as to said facts, but reserving to the respondents the right to file briefs and present oral argument before the Commission as to what order, if any, should be issued upon the facts admitted, which motions were granted, and the substitute answers were accordingly received and filed.

Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the aforesaid substitute answers, certain memoranda of counsel in support of the complaint and of counsel for the respondents (except American Vitrified Products Company, Robinson Clay Product Company, Clay City Pipe Company and Agate Sewer Pipe Co.) filed as, for, and in lieu of, briefs, attached to which memoranda of counsel in support of the complaint was a proposed form of order to cease and desist which was recommended by counsel in support of the complaint and by counsel for the respondents as the form of order to be issued by the Commission in disposition of the proceeding, and in which memoranda of counsel for the respondents the presentation of oral argument before the Commission as to what order, if any, should be issued was expressly waived.

The proposed form of order having been altered by the Commission to the extent and for the reasons shown by the tentative order entered October 16, 1950 (as revised by the order entered February 6, 1951, pursuant to suggestions made by counsel for the respondents), the respondents were afforded opportunity to show cause why said tentative order as so revised should not be entered herein as an order to cease and desist. The respondents not having appeared in response to the leave to show cause, the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. (a) Respondent Clay Products Association, Inc., is an Illinois corporation, with its office at 111 West Washington Street, in the city of Chicago, State of Illinois. Said respondent sometimes hereinafter referred to as "respondent association," was organized in 1932. It has a staff of officers consisting of a president, a vice president, a treasurer, and secretary, and a board of directors. Its bylaws provide that the object of the corporation is to "advance or promote the use of clay products . . . ; aid in the standardization of . . . clay products; carry on educational, experimental, and research work . . . ; maintain a traffic committee or bureau to furnish

traffic information . . . ;" etc. Its bylaws further provide for regular and special meetings of the members, as well as for regular and special meetings of the board of directors.

In addition to performing the functions set forth in its bylaws, respondent association serves its members as a medium for joint and collusive action on prices and on terms and conditions of sale of the product of its members, participates in the establishment and maintenance of the combination and conspiracy hereinafter found, and cooperates with its members in carrying out the unlawful acts, practices, methods, and policies hereinafter described.

(b) Respondent Blackmer & Post Pipe Co. is a corporation organized and existing under the laws of the State of Missouri, with its principal office in the city of St. Louis, State of Missouri.

Respondent Cannelton Sewer Pipe Company (erroneously named in the complaint as Cannelton Sewer Pipe Co.) is a corporation organized and existing under the laws of the State of Indiana, with its main office in the city of Cannelton, State of Indiana.

Respondent Lehigh Sewer Pipe & Tile Co. is a corporation organized and existing under the laws of the State of Iowa, with its main office in the city of Fort Dodge, State of Iowa.

Respondent Red Wing Sewer Pipe Corp. is a corporation organized and existing under the laws of the State of Minnesota, with its main office in the city of Red Wing, State of Minnesota.

Respondent What Cheer Clay Products Company (erroneously named in the complaint as What Cheer Clay Products Co.) is a corporation organized and existing under the laws of the State of Maine, with its main office in the city of What Cheer, State of Iowa.

Respondent White Hall Sewer Pipe & Stoneware Co. is a corporation organized and existing under the laws of the State of Illinois, with its main office in the city of White Hall, State of Illinois.

Respondent Streator Drain Tile Co. is a corporation organized and existing under the laws of the State of Illinois, with its main office in the city of Streator, State of Illinois.

Respondent W. S. Dickey Clay Manufacturing Company (erroneously named in the complaint as W. S. Dickey Clay Manufacturing Co.) is a corporation organized and existing under the laws of the State of Delaware, with its main office in the city of Kansas City, State of Missouri.

Respondent Laclede-Christy Clay Products Company (erroneously named in the complaint as Laclede Christy Clay Products Co.) is a corporation organized and existing under the laws of the State of Missouri, with its main office in the city of St. Louis, State of Missouri.

Respondent Evens & Howard Sewer Pipe Company (erroneously

named in the complaint as Evens & Howard Sewer Pipe Co.) is a corporation organized and existing under the laws of the State of Missouri, with its main office in the city of St. Louis, State of Missouri.

Respondent Iowa Pipe & Tile Company (erroneously named in the complaint as Iowa Pipe & Tile Co.) is a corporation organized and existing under the laws of the State of Iowa, with its main office in the city of Des Moines, State of Iowa.

Respondent The Denver Sewer Pipe & Clay Company (erroneously named in the complaint as Denver Sewer Pipe & Clay Co.) is a corporation organized and existing under the laws of the State of Colorado, with its main office in the city of Denver, State of Colorado.

Respondent The Standard Fire Brick Company (erroneously named in the complaint as Standard Fire Brick Co.) is a corporation organized and existing under the laws of the State of Colorado, with its main office in the city of Pueblo, State of Colorado.

Respondent The Lovell Clay Products Company (erroneously named in the complaint as Lovell Clay Products Co.) is a corporation organized and existing under the laws of the State of Wyoming, with its main office in the city of Lovell, State of Wyoming.

(c) Each of the respondents named in paragraph 1 (b) above, except respondent Evens & Howard Sewer Pipe Company, is a member of the respondent Clay Products Association, Inc. The record shows that respondent Evens & Howard Sewer Pipe Company also was formerly a member of the association, but that it resigned from membership therein on or about July 27, 1946. As used hereinafter, the term "respondent members" shall be deemed to include all of said respondents, including respondent Evens & Howard Sewer Pipe Company.

PAR. 2. Respondent members of respondent association are engaged in the manufacture and in the sale of vitrified clay sewer pipe and other clay products. Vitrified clay sewer pipe is a clay product commonly used for all types of sewers. It is an important item in modern building construction and community development. It is a heavy commodity so that freight costs are a substantial part of delivered costs. Respondent members operate a total of approximately 20 plants in the States of Montana, Colorado, Nebraska, Texas, Missouri, Kansas, Iowa, Illinois, Indiana, Kentucky, Minnesota, and Michigan. The vitrified clay sewer pipe industry in the United States is composed of manufacturers located in 23 States operating a total of 75 plants.

PAR. 3. Respondent members are all doing business in interstate commerce. In the course and conduct of their respective businesses, each of them sells and distributes vitrified clay sewer pipe and fittings

manufactured by it to the purchasers thereof located in the various States of the United States, and in connection with and as a part of its sales each of said respondent members transports or causes to be transported its products to said purchasers located in the various States of the United States other than the States of origin. The respondent members are, therefore, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. To the extent that competition has not been hindered, lessened, restricted, or suppressed as hereinafter set forth, each of the respondent members has been and is in competition with one or more of the other respondent members in making or seeking to make sales in commerce between and among the various States of the United States of vitrified clay sewer pipe and fittings which it manufactures.

PAR. 5. For more than 5 years last past and while engaged as aforesaid in commerce, the respondents have engaged, and are now engaging, in unfair methods of competition, and have performed, and are now performing, unfair acts and practices in violation of section 5 of the Federal Trade Commission Act in that they have acted, and are still acting, wrongfully and unlawfully by cooperating between and among themselves in establishing, adopting, and continuing a common course of action, concert of action and agreement, resulting in substantial hindrance, frustration, restraint, suppression, and prevention of competition in the sale and distribution of vitrified clay sewer pipe and fittings in trade and commerce, as "commerce" is defined in the Federal Trade Commission Act.

Pursuant to, in furtherance of, and as a part of the aforesaid cooperation and common course of action, and in order to effectuate the purposes and objectives thereof, the respondents have formulated, adopted, performed, and put into effect, among others, the overt acts, and have used the methods, systems, practices and policies, as follows:

1. They have fixed, established, and maintained prices for vitrified sewer pipe and fittings in most of the trade area in which respondent members do business. A method used in that connection is that of dividing the trade area into delivered price zones and agreeing upon and jointly publishing a master price list known generally in the trade as the western price list, which said price list sets forth a basic price for each type of product for sale, together with discount rates which are applicable to the several delivered price zones, according to an agreed-upon schedule of freight rate differentials. The delivered prices in any given zone do not reflect the true and actual freight rates to all destinations in the zone, but are averages of freight rates to the zone from the basing area, which is Uhrichsville, Ohio.

2. They have established and maintained a common course of action

regarding dealers which includes the designation of dealers, the terms and conditions of sale, including the discount or commission to be allowed to dealers; and the allocation of sales between respondent members and dealers.

3. They have established and maintained a list of jobbers, terms and conditions of sale to jobbers, and respondent members have agreed upon the allocation of sales between jobbers and themselves.

4. Respondent members of respondent association have made use of respondent Clay Products Association, Inc., as a medium for establishing and agreeing upon prices, pricing methods, preparation of price sheets for publication, delivered price zones, prices in delivered price zones, defining and classifying dealers and jobbers, establishing uniform terms and conditions of sale and otherwise lessening, restricting, and suppressing competition between and among themselves in the sale and distribution of vitrified clay sewer pipe and fittings.

PAR. 6. Each of the respondent members has contributed to the accomplishment and effectiveness of the foregoing acts, practices, and results (1) through its use of a zoning method of computing, formulating, and using delivered price quotations when other respondent members simultaneously did likewise and by which it was enabled to and did match its quotations on a delivered basis with the quotations of other respondent members, and (2) through its practice of discriminating between and among its customers by demanding, charging, accepting, and receiving higher net prices from its customers located near its plant than from its customers more distantly located for goods of like grade, quality, and quantity, by which it was enabled to and did match its quotations on a delivered basis with the quotations of other respondent members.

PAR. 7. In the circumstances of this case, the inherent and necessary effects of the use by the respondents of the acts, practices, and methods hereinabove described have been the following:

(1) A substantial lessening of competition in the sale of vitrified clay sewer pipe and fittings as among the respondent members of respondent association; and

(2) The maintainance of unfair and oppressive discriminations against purchasers of vitrified clay sewer pipe and fittings in large areas of the United States by depriving such purchasers of the advantages in the cost of such products which would otherwise accrue to them as a result of their proximity to the factories of the respondent members and the imposition upon such purchasers of larger net prices than they would have to pay if such net prices had been fixed by competition among the respondent members.

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CONCLUSION

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

As noted in the preamble of the findings, the allegations of the complaint have not been established as against four of the respondents, namely, American Vitriified Products Company, Robinson Clay Product Company, Clay City Pipe Company, and Agate Sewer Pipe Co., and no findings have been made with respect to the participation of any of these respondents in the unlawful acts and practices herein described. It appears, moreover, that American Vitriified Products Company, Robinson Clay Product Company and Clay City Pipe Company are all respondents in the Commission's proceeding against Clay Sewer Pipe Association, Inc., et al., known as docket No. 5484, involving charges substantially similar to the charges in this proceeding, and in the circumstances the Commission is of the opinion that the public interest does not require an expenditure of the time and money necessary to further prosecute this proceeding against these three respondents. The Commission is of the further opinion that the unlawful acts and practices alleged to have been engaged in by the respondents may be effectively stopped without the necessity of further proceedings against Agate Sewer Pipe Co. and that as to all four of the respondents named in this paragraph the complaint should be dismissed, without prejudice, however, to the right of the Commission to institute a new proceeding against said respondents if at any time in the future the public interest should so require.¹

As further noted in the preamble, Count II of the complaint purported to charge the respondent members of the respondent association with having discriminated in price in the sale of vitrified sewer pipe and fittings by selling such products to some purchasers thereof at a

¹ Said paragraph is published as modified by an order of the Commission dated June 26, 1951, which reads as follows, omitting the paragraph in question as above published:

It appearing to the Commission that the "Conclusion" appended to the Findings as to the Facts issued in this proceeding on April 19, 1951, recites, among other things, that the respondents, American Vitriified Products Company, Robinson Clay Product Company and Clay City Pipe Company, who are all parties respondent in the Commission's proceeding against Clay Sewer Pipe Association, Inc., et al., known as docket No. 5484, have filed in that proceeding an answer admitting all of the material allegations of fact set forth in the complaint therein; and

It further appearing that the substitute answer of said respondents in docket No. 5484, wherein all of the material allegations of fact set forth in the complaint were admitted for the purposes of that proceeding, was filed with the undersanding that if said proceeding were not disposed of by the issuance of an order to cease and desist in the form submitted in connection with said substitute answer the respondents reserved the right to

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price higher than the price at which their products of like grade and quality were sold to other purchasers, all in violation of subsection (a) of section 2 of the Clayton Act, as amended. The Commission is of the opinion, however, that the allegations with respect to this charge do not clearly show that the alleged unlawful discriminations occurred as a result of differences made in the actual prices at which the respondents' products were sold, and that, therefore, Count II of the complaint should be dismissed as to all of the respondents.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, substitute answers thereto filed by the respondents (except American Vitrified Products Company, Robinson Clay Product Company, Clay City Pipe Company, and Agate Sewer Pipe Co.), admitting for the purposes of this proceeding all of the material allegations of fact set forth in the complaint and waiving all intervening procedure and further hearings as to said facts, and certain memoranda of counsel in support of the complaint and of counsel for the respondents (except American Vitrified Products Company, Robinson Clay Product Company, Clay City Pipe Company, and Agate Sewer Pipe Co.), attached to which memoranda was a proposed form of order to cease and desist; and the Commission having declined to dispose of the proceeding by the entry of an order to cease and desist in the form recommended, but having served upon the respondents an order in a form proposed by the Commission for entry as its order to cease and desist and granting the respondents leave to file any objections they might have to the entry of such order (the respondents having filed no objections thereto); and the Commission having made its findings as to the facts and its conclusion that the respondents (except American Vitrified Products Company, Robinson Clay Product Company, Clay City Pipe Company, and Agate Sewer Pipe Co.) have violated the provisions of section 5 of the Federal Trade Commission Act:

withdraw the substitute admission answer and to refile their original answers to the complaint; and

It further appearing that the Commission declined to dispose of docket No. 5484 by the issuance of an order in the form proposed and that the respondents in said proceeding, including American Vitrified Products Company, Robinson Clay Product Company and Clay City Pipe Company, subsequently withdrew their substitute admission answer in said proceeding and refiled their original answers; and

It further appearing that by reason of this development the aforesaid recitation in the "Conclusion" appended to the Findings as to the Facts in this proceeding is inaccurate:

It is therefore ordered, That the second paragraph of the "Conclusion" appended to the Findings as to the Facts issued in this proceeding on April 19, 1951, be, and it hereby is, modified to read as follows: [Setting forth the paragraph in question as above published.]

It is further ordered, That a copy of this order be served upon each of the parties upon which copies of the Findings as to the Facts, Conclusion and Order to Cease and Desist issued on April 19, 1951, were served.

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It is ordered, That the respondents, Blackmer & Post Pipe Co., Cannelton Sewer Pipe Company, Lehigh Sewer Pipe & Tile Co., Red Wing Sewer Pipe Corporation, What Cheer Clay Products Company, White Hall Sewer Pipe & Stoneware Co., Streater Drain Tile Co., W. S. Dickey Clay Manufacturing Company, Laclede-Christy Clay Products Company, Evens & Howard Sewer Pipe Company, Iowa Pipe & Tile Company, The Denver Sewer Pipe & Clay Company, The Standard Fire Brick Company, and The Lovell Clay Products Company, and their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution in commerce between and among the several States of the United States and in the District of Columbia of vitrified clay sewer pipe or fittings, 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 or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts, practices or things:

1. Fixing or maintaining prices for vitrified clay sewer pipe, or fittings.

2. Composing or announcing prices for vitrified clay sewer pipe, or fittings, for any destination at which the respondents quote prices or sell their products, through the use of or in accordance with a basic price list, or percentage discounts therefrom, for the purpose or with the effect of systematically matching or making the same delivered price quotations at any such destination by any two or more respondents.

3. Using in common any freight rate compilation as a factor in fixing or announcing prices of vitrified clay sewer pipe, or fittings, which results in uniform delivered prices at any given destination as between any two or more of the respondents.

4. Using in common a zoning method of computing or formulating delivered price quotations for any such products by which any respondent is enabled to, and does, match its quotations on a delivered basis with the quotations of other respondents.

5. Engaging in any practice of discriminating in price as between different purchasers of such products of like grade, quality and quantity, for the purpose or with the effect of matching the price quotations of other respondents.

6. Establishing or maintaining uniform terms or conditions of sale to dealers, or allocating sales between and among the respondents or dealers.

7. Establishing or maintaining a list of jobbers, the terms and con-

ditions of sale to jobbers, or allocating sales between and among the respondents or jobbers.

It is further ordered, That the respondents, Blackmer & Post Pipe Co., Cannelton Sewer Pipe Company, Lehigh Sewer Pipe & Tile Co., Red Wing Sewer Pipe Corporation, What Cheer Clay Products Company, White Hall Sewer Pipe & Stoneware Co., Streator Drain Tile Co., W. S. Dickey Clay Manufacturing Company, Laclede-Christy Clay Products Company, Evens & Howard Sewer Pipe Company, Iowa Pipe & Tile Company, The Denver Sewer Pipe & Clay Company, The Standard Fire Brick Company, and The Lovell Clay Products Company, and their respective officers, agents, representatives and employees, do forthwith cease and desist from collectively, concertedly, or by combination of two or more of said respondents, using or maintaining the Clay Products Association, Inc., as a medium for promoting, aiding, or rendering more effective any cooperative or concerted efforts to suppress or eliminate competition in the sale of vitrified clay sewer pipe, or fittings, in any of the respects set forth in the immediately preceding preamble and subparagraphs 1 to 7, inclusive, of this order as set forth above.

It is further ordered, That each of the respondents, Clay Products Association, Inc., Blackmer & Post Pipe Co., Cannelton Sewer Pipe Company, Lehigh Sewer Pipe & Tile Co., Red Wing Sewer Pipe Corporation, What Cheer Clay Products Company, White Hall Sewer Pipe & Stoneware Co., Streator Drain Tile Co., W. S. Dickey Clay Manufacturing Company, Laclede-Christy Clay Products Company, Evens & Howard Sewer Pipe Company, Iowa Pipe & Tile Company, The Denver Sewer Pipe & Clay Company, The Standard Fire Brick Company, and The Lovell Clay Products Company, and their respective officers, agents, representatives and employees, do forthwith cease and desist from knowingly contributing to the accomplishment of any of the acts, practices or things prohibited in the preamble and subparagraphs 1 to 7, inclusive, of this order as set forth above.

It is further ordered, That nothing contained in this order shall be construed as prohibiting the establishment or maintenance of any lawful bona fide agreements, discussions or other action solely between any corporate respondent and its directors, officers and employees, or between any corporate respondent and any of its subsidiaries or affiliates, and relating solely to the carrying on of the business of such corporation and its subsidiaries or affiliates, when not for the purpose or with the effect of restricting competition.

It is further ordered, For reasons appearing in the Commission's findings as to the facts in this proceeding, that the allegations of Count I of the complaint herein be, and they hereby are, dismissed as

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to American Vitrified Products Company, Robinson Clay Product Company, Clay City Pipe Company, and Agate Sewer Pipe Co., without prejudice, however, to the right of the Commission to take such further action against these respondents in respect to said allegations at any time in the future as may be warranted by the then existing circumstances.

It is further ordered, That the allegations of Count II of the complaint be, and they hereby are, dismissed as to all of the respondents.

It is further ordered, That the respondents (except American Vitrified Products Company, Robinson Clay Product Company, Clay City Pipe Company, and Agate Sewer Pipe Co.) shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Complaint

IN THE MATTER OF

CONTINENTAL RADIO TUBE CO. ET AL.

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

Docket 5725. Complaint, Dec. 20, 1949—Decision, Apr. 19, 1951

Many radio repairmen and service dealers are prejudiced against the purchase of war surplus tubes, and have a preference for the current commercial tubes.

Where a corporation and its four officers, engaged in the interstate sale and distribution of radio tubes—

- (a) Removed from radio tubes purchased by them the identification number or symbols placed thereon by the manufacturers or others, substituted in lieu thereof other numbers or symbols, and delivered said tubes in commerce as and for the tubes which are commonly identified in the trade by the substituted numbers and symbols;
- (b) Buffed away the service numbers of symbols on war surplus tubes which they had purchased, substituted therefor commercial numbers or symbols, and caused said tubes to be delivered to their customers as the tubes commonly identified by such commercial markings; and
- (c) Falsely represented that they held a license from Radio Corp. of America and that they were master builders of radio tubes, through statements to such effect on cartons packaging their tubes;

With capacity and tendency to mislead and deceive the trade and public in said respects; and with the effect of placing in the hands of purchasers of their tubes for resale, a means whereby they might and did pass on to the ultimate users thereof incorrectly marked and delusively identified products:

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

Before *Mr. Clyde M. Hadley*, trial examiner.

Mr. Randolph W. Branch for the Commission.

Kia Miller, Baar & Morris, of Chicago, Ill., for respondents.

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 Continental Radio Tube Co., a corporation, P. D. Jackson, Jacob L. Gaber, Erwin F. Rempert, and Martin Gaber, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest,