UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter :
of : Docket No. 5253
NATIONAL LEAD COMPANY et al. :

1947

PROPOSED FINDINGS, CONCLUSIONS AND REASONS THEREFOR

COMES NOW the respondent, INTERNATIONAL SMELTING AND REFINING COMPANY, by its attorneys, CHADBOURNE, WALLACE, PARKE & WHITESIDE, and submits the following proposed findings and conclusions, together with its reasons therefor:

1. The International Smelting and Refining Company (hereinafter referred to as "International") is a Montana corporation, with its principal office located at 25 Broadway, New York 4, New York. (Paragraph "THREE" of Amended Complaint and Paragraph "THREE" of Amended Answer thereto.)

REASON: Alleged in complaint and admitted in answer.

2. International is a wholly owned subsidiary of respondent, Anaconda Copper Mining Company (hereinafter referred

to as "Anaconda.") (Paragraph "THREE" of Amended Complaint and Paragraph "THREE" of Amended Answer thereto.)

REASON: Alleged in complaint and admitted in answer.

3. International manufactured and sold the lead pigments which it produced, namely dry white lead and white lead-in-oil, from October 31, 1936 until the latter part of July, 1946. (Com. Ex. 836A-B; pp. 3489-3510)

4. The plant at which International produced the lead pigments which it manufactured was located at East Chicago, Indiana. (Com. Ex. 836A-B; p. 3489)

5. Anaconda Lead Products, a Delaware corporation, in 1920 commenced regular production and sales of dry white lead at East Chicago, Indiana, and continued such production and sale until said plant was acquired by International on October 31, 1936. (Com. Ex. 836A; pp. 3489-3490)

6. Anaconda Lead Products Company first began to manufacture white lead-in-oil in 1931 at the plant at East Chicago, Indiana, and continued such production and sale until said plant was acquired by International in 1936. (Com. Ex. 836A)

7. In 1920, Anaconda owned 75% of the stock of the Anaconda Lead Products Company, the remaining 25% being acquired in 1936 prior to its dissolution. (Com. Ex. 836A; p. 3489)

8. On June 1, 1946, International advised the trade that it had been decided to permanently discontinue production of dry white lead. Production of dry white lead was stopped on June 16, 1946, and no further orders were accepted for that material after August 1, 1946, and all such materials on hand were shipped to customers by the end of that month. (Com. Ex. 836B; Affidavit of Frederick Laist, Vice President of International, in support of motion to dismiss amended complaint; pp. 2075-2077; 3541-3542)

9. On June 20, 1946, International advised the trade that it had been decided to permanently suspend operations at the East Chicago plant of International and discontinue the business. Production of white lead-in-oil was stopped on July 23, 1946, and no further orders were accepted for that material after August 1, 1946, and all such materials on hand were shipped to customers by the end of that month. (Com. Ex. 836B; Affidavit of Frederick Laist, Vice President of International, in support of motion to dismiss amended complaint; pp. 2075-2077; 3532-3543)

10. The plant at which International and previously the Anaconda Lead Products Company had manufactured lead pigments at East Chicago, Indiana, and the only plant at which these materials were ever manufactured by either of those companies, was sold to The Eagle-Picher Company on Octo-

ber 1, 1946. (pp. 3542-3543)

11. In order for International to resume the production of dry white lead or white lead-in-oil, it would be necessary to purchase or construct a plant for that purpose. (p. 3543)

REASON: International does not own or control any of the machinery, equipment or plant facilities essential for the production of such lead pigments and none of the properties it does own or control could be readily converted to the production of these materials.

12. There is no reason to believe that International will ever reenter the business of the manufacture and sale of lead pigments. (Affidavit of Frederick Laist, Vice President of International, in support of motion to dismiss amended complaint; pp. 2075-2077; 3543)

REASON: There has been no change in the conditions which resulted in International's decision to go out of the business of manufacturing lead pigments nor is any such change reasonably forseeable. Not only did International sell the only property it had for the manufacture of lead pigments but, with the exception of two individuals, none of the personnel engaged in the production and sale of those materials are still employed by the Company.

13. When the Anaconda Lead Products Company first entered the business of selling dry white lead, which was in 1920, it sold this material f.o.b. East Chicago, Indiana, freight allowed to any point in the United States. (Com. Ex. 826A; p. 3497)

14. Anaconda Lead Products Company in 1935 adopted the two (2) zone system employed by its competitors for the sale of dry white lead. (Com. Ex. 836-I)

15. International when it entered the dry white lead business continued to sell by this system whereby the United States was divided into what was known as a par zone and the Pacific Coast zone. (Com. Ex. 836-I; pp. 3497-3498)

REASON: International, being only a small factor in this business, found it necessary to adapt and conform its sales policy to those of its major competitors. (Com. Ex. 836J; p. 3498)

16. International sold its dry white lead at the prices established by the market leaders, which it learned of through its customers and prospective customers.

REASON: International was a small factor in the dry white lead business. This product could not be sold for a premium and, the margin of profit being narrow, International generally tried to secure the same price realized by its competitors. (Com. Ex. 836J; p. 3498)

17. International never sold dry white lead under a consignment agreement. (Com. Ex. 836D-E; pp. 3533-3535)

18. During the years that International was engaged in the manufacture and sale of dry white lead, namely from 1937 through 1945, its position with relation to the total percent of dry white lead sold annually by the industry ranged from a low of 10.49% to a high of 19.43% in 1937. (Com. Ex. 836J)

19. In 1931 the Anaconda Lead Products Company commenced the production of white lead-in-oil. (Com. Ex. 836A; p. 3510)

REASON: Competition in the dry white lead business had become so keen that it was necessary to enter this field in order to provide a sufficient outlet for the dry white lead produced by the Anaconda Lead Products Company so that this operation could be conducted at a profit. (p. 3507)

20. The initial sales policy of the Anaconda Lead Products Company for its white lead-in-oil was simply to secure the most it could for what was a new product that was in competition with well established and nationally known materials. (p. 3511)

21. A policy was subsequently adopted by the Anaconda Lead Products Company of selling its white lead-in-oil at 1/4¢ per pound under the price secured by its principal competitors for their products, which policy was followed by International during the time that it produced this material. (p. 3512)

REASON: The white lead-in-oil manufactured by Anaconda Lead Products Company and later by International was unknown to the trade and could not command the same price. This differential was one that enabled Anaconda Lead Products and later International to secure a maximum amount for its product and still provide sufficient inducement to the trade to buy this material over those of its competitors that were more widely known and more intensely advertised. (p. 3515)

22. Commencing on or about January 1, 1937, and until it went out of the business, International adopted substantially the same zone system for the sale of its white

lead-in-oil as was used by its principal competitors. The nature of this zone system was determined through contacts with customers and prospective customers. (Com. Ex. 836E; pp. 3515-3517)

<u>REASON:</u> The major producers of white lead-in-oil were selling on a zone system and it was necessary, in order for International to compete with them, to sell on the same basis. (pp. 3515-3516)

23. International, in pricing its white lead-in-oil, ascertained through its customers, prospective customers and salesmen the prices at which its competitors were selling this material and generally undersold them by 1/4¢ per pound. (pp. 3513-3514)

<u>REASON:</u> International could not secure the same price for its white lead-in-oil as its competitors could for their well established products. To have sold International's material for more than 1/4¢ per pound less than competition would have raised a doubt as to its quality, resulting in a loss of sales and also in a loss of return that would have otherwiese been available. (pp. 3513-3515)

24. International never sold white lead-in-oil by

consignment contract except in the State of Wisconsin where this means was adopted to protect it under the state law covering the insolvency of vendors. (Com. Ex. 836D-E; pp. 3533-3537)

25. International supplied its dealers with price cards containing a suggested resale price for its white lead-in-oil but did not require them to follow these, nor was there any action taken against those dealers who did not follow these suggested prices. (pp. 3536-3537)

26. During the years that International manufactured and sold white lead-in-oil, namely from 1937 through 1945, its position with relation to the lead-in-oil sold annually by the industry ranged from a low of 3.08% in 1943 to a high of 4.03% in 1940. (Com. Ex. 836H-I)

27. International's prices within each zone in which it sold dry white lead and white lead-in-oil were uniform for each product to the same class of customers in the same quantity bracket. (Com. Ex. 836C-J)

28. International never agreed with any of the respondents herein, or any other competitors, to a system of delivered price quotations for the sale of lead pigments. (pp. 3508-3539)

REASON: There is no evidence in the record of any agreement and there is uncontroverted testimony that International was never a party to such an agreement. (pp. 3508, 3539)

29. International never was a party to any agreement with any of the respondents herein, or with any other competitor, regarding a plan whereby the United States was divided into zones for the purpose of selling lead pigments. (pp. 3508-3539)

<u>REASON:</u> There is no evidence in the record of any such agreement or negotiations and there is uncontroverted testimony that International never was a party to any such undertaking. (pp. 3508, 3539)

30. International never used the office of the Lead Industries Association, or its officers, employees and agents of the same, for the purpose of exchanging price factors and information concerning price factors to be used at times by International and any of the respondents herein, or any other competitor, in calculating, determining and announcing price factors to be used at times in selling lead pigments. (pp. 3509, 3539-3540)

<u>REASON:</u> There is no evidence in the record of any such use of the Lead Industries Association and there

is uncontroverted testimony that International was never a party to such use. (pp. 3509, 3539-3540)

31. International never agreed to adopt or adopted or maintained and used terms and conditions of sale employed in the so-called "consignment" or "agency" agreements under the leadership of respondent, National Lead, for the purpose of preventing dealers from selling white lead and from making offers to sell such products at levels lower than the offers made by the respective respondent producers whose names were affixed to such consignment or agency agreements. (pp. 3509, 3540)

REASON: There is no evidence in the record of any such agreement or negotiations and there is uncontroverted testimony that International never was a party to any such undertaking. (pp. 3509, 3540)

32. International never agreed with any of the respondents herein, or any other competitor, to fix or fixed and included in offers to sell, the prices, terms and conditions at which said dry white lead was sold or offered in sale for commerce. (pp. 3509-10, 3540-41)

REASON: There is no evidence in the record of any such agreement and there is uncontroverted testimony that International never was a party to any such undertaking. (pp. 3509-10, 3540-3541)

CONCLUSIONS OF LAW

1. This proceeding is subject to the provisions of the Administrative Procedure Act.

2. International has not combined or conspired or cooperated with any of the respondents for the purpose or with the effect of restraining, hindering, suppressing or eliminating competition in prices or terms of sales of lead pigments in commerce.

3. International has not engaged in any unfair, oppressive or discriminatory acts, methods or practices in connection with the sale or offers to sell lead pigments in commerce.

4. International has not discriminated in prices between purchasers of lead pigments of like grade and quality sold for use, consumption or resale within the several states of the United States and the District of Columbia, or has not systematically sold such commodities to any 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.

5. None of the material allegations of the amended complaint as to the respondent, International, is supported by any evidence which has been produced at the hearings in this matter.

6. International has not violated and is not violating the provisions of Section 5 of the Federal Trade Commission Act.

7. International has not violated and is not violating the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

8. The Federal Trade Commission should enter an order herein, dismissing the amended complaint as to the respondent, International.

CHADBOURNE, WALLACE, PARKE & WHITESIDE

By H. E. Gardiner

Office and Post Office Address,
No. 25 Broadway,
Borough of Manhattan,
City of New York, 4

Attorneys for Respondent, INTERNATIONAL SMELTING AND REFINING COMPANY