

ORIGINAL

United States of America
Before the Federal Trade Commission

Docket No. 5253.

In the Matter of

NATIONAL LEAD COMPANY, a corporation,
EAGLE-PICHER LEAD COMPANY, a corporation,
EAGLE-PICHER SALES COMPANY, a corporation,
ANACONDA COPPER MINING COMPANY, a corporation,
INTERNATIONAL SMELTING & REFINING COMPANY, a corporation,
THE SHERWIN-WILLIAMS COMPANY, a corporation, and
THE GLIDDEN COMPANY, a corporation.



**EXCEPTIONS ON BEHALF OF THE GLIDDEN COMPANY TO THE
TRIAL EXAMINER'S RECOMMENDED DECISION AND TO THE
TRIAL EXAMINER'S FAILURE TO INCLUDE FINDINGS AND
CONCLUSIONS PROPOSED AND REQUESTED BY THE GLIDDEN
COMPANY.**

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REPRODUCED AT THE NATIONAL ARCHIVES

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Comes now the respondent, The Glidden Company, by its attorneys, Roger Hinds and John A. Duncan, and, pursuant to Rule XXIII of the Commission's Rules of Practice, submits the following exceptions to the Trial Examiner's Recommended Decision herein, and to the failure of said Trial Examiner to include therein the proposed findings and conclusions heretofore requested by this respondent under Rule XXI of said Rules of Practice.

**A. In so far as Section II, entitled "PLEADINGS AND ISSUES",
of the Trial Examiner's Recommended Decision is concerned,
Glidden takes the following exceptions:**

1. Glidden excepts to item "5(d)" on page 4 of the Recommended Decision (PARAGRAPH NINE B of the Amended Complaint).
2. Glidden excepts to item "5(e)" on page 4 of the Recommended Decision (PARAGRAPH NINE C of the Amended Complaint).
3. Glidden excepts to the third full paragraph on page 5 of the Recommended Decision as not constituting a complete and

accurate summary of its Answer (Glidden's Answer to Amended Complaint).

4. Glidden excepts to the Trial Examiner's failure to include in said Section II of the Recommended Decision a summary of its special defenses (Glidden's Answer to Amended Complaint, pages 12-15).

5. Glidden excepts to that portion of Section II of the Trial Examiner's Recommended Decision entitled "the Issues," in its entirety. (Compare Trial Examiner's statement with Amended Complaint and Glidden's Answer thereto.)

6. Glidden excepts to the Trial Examiner's failure to include in that portion of Section II of the Recommended Decision, entitled "The Issues," any statement relative to the issues raised by Glidden in its special defenses. (Compare Trial Examiner's statement with Glidden's Answer to Amended Complaint, pages 12-15.)

7. Glidden excepts to the first three full sentences appearing at the top of page 7 of the Recommended Decision, for the reasons that they lack "important portions" of the evidence; have ignored much reliable and substantial evidence; and disregard the greater weight of the evidence herein.

B. In so far as Section III, entitled "REPORT UPON THE EVIDENCE" and Section IV, entitled "RECOMMENDED FINDINGS AND CONCLUSIONS", are concerned, Glidden takes the following exceptions:

8. Glidden excepts to the first paragraph under the heading "Count One" on page 7 of that portion of Section III of the Recommended Decision, upon the ground that the facts of organization, location, control, interstate commerce and business of each respondent are not shown by the record to be substantially as set out in the Amended Complaint.

9. Glidden excepts to the second and third paragraphs under the heading "Count One" of the "REPORT UPON THE EVIDENCE" appearing at page 7 and at the top of page 8 of the Recommended Decision (except the last sentence thereof, which appears as the first full sentence at the top of page 8 of the

Recommended Decision), in so far as the same do not correspond to paragraphs 2 through 5, inclusive, of the proposed Findings of Fact heretofore submitted by National Lead and adopted by Glidden in its proposed Findings of Fact, and the record citations contained in said proposals as herein incorporated by reference.

10. Glidden excepts to the correctness of the last sentence in the second paragraph of that portion of Section III of the Recommended Decision, entitled "Count One" on page 7, for the reason that the record fails to establish that it purchases or has purchased lead pigments from others for the purpose stated.

11. Glidden excepts to the Trial Examiner's failure to report in that portion of Section III of the Recommended Decision, entitled "Count One," the following paragraphs which were in Glidden's proposed Findings of Fact, and which were allowed *without qualification* by the Trial Examiner:

"21. Prior to 1921, Glidden had, as jobber, sold to the trade at market prices white lead and white-lead-in-oil made by National and Eagle-Picher, and also, at lower prices because of below standard quality, a brand made by Glidden.

"22. In 1924, Glidden acquired Euston Lead Company and continued the latter's production and sale of white lead and white-lead-in-oil at prices below those of its leading competitors. The Euston product had been inferior and the business unprofitable.

"23. Though Glidden improved the quality of its Euston white lead and Euston white-lead-in-oil, its lack of recognition and acceptance by the trade and by painters made it necessary for Glidden, until 1936, to accept from paint manufacturers a price below the market price, but thereafter, by stressing quality, Glidden was able to sell a certain amount of white lead and white-lead-in-oil in competition with National and Eagle-Picher at approximately the market price, but has never been able to sell the entire capacity of its plant.

"24. Glidden manufactures and sells numerous products, of which lead pigments are an inconsiderable fraction, and its policy is to diversify its production and to protect its supply of certain of its manufactured raw materials by its own production thereof.

"25. Glidden is a large producer of paints, and consumes a minor portion of its own production of lead pigments in its production of ready-mixed paints and other paint products,

and consequently Glidden was at all times obliged to maintain a strictly competitive position in the sale of lead pigments.

* * * * *

"29. Glidden has never occupied a sufficiently important position in the lead pigments industry to be able, by any act or inaction on its part, consistent with its profitable production, to affect substantially either the market price or the competitive practices in pricing or selling lead pigments."

Glidden also excepts to the Trial Examiner's failure to include in PARAGRAPH 1-F of Section IV of the Recommended Decision a finding to the foregoing effect.

12. Glidden excepts (a) to the sentence in "(1-e)" of Section III, and also in PARAGRAPH 1-J of Section IV of the Recommended Decision, which immediately precedes the second tabulation therein; and (b) to the Examiner's failure to report therein that basic sulphate is used to a substantial extent by Eagle, and to some extent by National, as an alternative product to basic carbonate for sale to paint manufacturers for use in manufacturing paint and to report, in so far as the record discloses, the extent of such alternative use by Eagle and National and the effect thereof in increasing the respective percentages of production of those respondents (Tr. 1560-1561, 3344-3352, 3354-3357 and 4129).

13. Glidden excepts to the correctness of the second tabulation in "(1-e)" of Section III, and also in PARAGRAPH 1-J of Section IV of the Recommended Decision (CX 669; Tr. 1560-61, 2193, 3344-3352, 3354-3357 and 4129).

14. Glidden excepts to the statement in "(1-e)" of Section III on page 9 of the Recommended Decision, purporting to set forth the "combined" production of Glidden and Sherwin, of white lead, dry and in oil, as being inaccurate; and upon the further ground that there is no warrant in the record to "combine" the production of Glidden and Sherwin; and also for the failure of the Examiner to state

(1) that Glidden never succeeded in securing more than about 8.2 per cent of the white lead-in-oil business during any one year (Tr. 2525); and

(2) that the lead pigment business of Glidden is relatively small, both in weight or tonnage and in dollars, compared to

many of the other respondent's products. However, the purpose of Glidden in acquiring these lead-pigment producing units arose first from its policy of developing a diversified chemical business, and, secondly, from its policy of desiring to protect its position in respect to the principal raw materials used in its paint manufacture, since paint was one of the large phases of Glidden's business. The result was that while Euston was a small producer of white lead and Metals Refining a small producer of lead oxides, yet Glidden had to maintain a satisfactory consumer acceptance, and Glidden had to sell the preponderating proportion of its production in the open competitive market, and Glidden was not sustained in any way in those operations by the requirements taken by Glidden itself. By far the preponderating proportion which Glidden had to sell was in the open market in competition with the trade (Tr. 2553-2554).

15. Glidden excepts to the correctness of that portion of "(1-e)" of Section III, and also PARAGRAPH 1-J of Section IV of the Recommended Decision, wherein the Examiner states that National's and Eagle-Picher's combined production for the years 1938 through 1941 was only 68.825 per cent of the domestic output (Tr. 1560-1561, 3344-3352, 3354-3357 and 4129).

16. Glidden excepts to the first two sentences in the last subparagraph in "(1-e)" of Section III, and in the last subparagraph of PARAGRAPH 1-J of Section IV of the Recommended Decision, except the statement to the effect that National became a predominant factor in the industry. (The citations urged in connection with exception 18 are relied upon in support of the foregoing exception.)

17. Glidden excepts to the correctness of the last sentence in "(2-a)" of Section III, and in PARAGRAPH 2-A of Section IV of the Recommended Decision (Tr. 1327-1328, 2065-2066).

18. Glidden excepts to "(4-a)" of Section III and to PARAGRAPH 4-A of Section IV of the Recommended Decision in that the first sentence thereof erroneously indicates, by use of the term "the other respondents," that Glidden followed the salient features of the zone pricing system therein described, and in that the description of the system and the Examiner's citations set

forth on pages 14, 15 and 16 (which description and maps are incorporated in PARAGRAPH 4-A by reference) do not accurately reflect in substantial particulars, Glidden's pricing and freight practices as established by the record. Glidden also excepts to the Examiner's failure to include in Section III an accurate statement of its pricing practices, and to include in Section IV a recommended finding based thereon (Tr. 894-895, 2460-2469, 2474-2491, 2493-2513, 2525-2531, 2532-2535, 2537, 2540-2554, 2556, 2558-2566, 2579-2582, 2591, 2596 and 2774; CX 593, CX 650 A-C, CX 651, RX 141 to 145, inc.; Answers of Glidden, Sherwin and International to Amended Complaint). For an accurate summary of Glidden's pricing and freight practices, see proposed Findings submitted by Glidden, especially paragraphs 5 to 11, inc., 13 to 14, inc., and 25 (which was allowed by the Examiner *without qualification* and which reads as follows:

"25. Glidden is a large producer of paints, and consumes a minor portion of its own production of lead pigments in its production of ready-mixed paints and other paint products, and, consequently, *Glidden was at all times obliged to maintain a strictly competitive position in the sale of lead pigments.*" Emphasis ours);

also Glidden's Supplement to its proposed Findings, especially paragraphs 38 to 41, inc.

19. Glidden excepts also to that part of "(4-a)" of Section III on page 14 of the Recommended Decision as containing inferences and conclusions unsupported by the record. (See National's proposed Findings, 49 to 65, inclusive, thereof, adopted by Glidden in its proposed Finding 1, together with record references therein contained.)

20. Glidden excepts to the word "plan" in the third sentence of "(4-a)" of Section III on page 15 of the Recommended Decision, as being unsupported by the record.

21. Glidden excepts to the outline on page 15 of the Recommended Decision, purporting to set forth the method by which white lead-in-oil and keg products are sold. (See National's proposed Findings 51 to 58, inc., thereof, and record references therein made, adopted by Glidden in its first paragraph of proposed Findings.)

22. Glidden excepts to the paragraph beginning on the fourth line of page 15 of the Recommended Decision, beginning with the words "*White lead-in-oil and keg products*" (Clayton Act, Section 2[a]; also Glidden's Supplement to Findings [setting forth reasons on pages 2 and 3, in support of Glidden's proposed Findings] which the Examiner admitted to be "well taken").

23. Glidden excepts to the paragraph beginning on line 37 on page 15 of the Recommended Decision with the words "*Dry white lead and lead sulphate*" (RX 159-A; Tr. 1576, 2624, 2625 and 3497; Clayton Act, Section 2[a]).

24. Glidden excepts to the entire latter portion of "(4-a)" of Section III, beginning with the paragraph at the bottom of page 15 of the Recommended Decision and the words "*Dry red lead, litharge and other pigments,*" and continuing with the remainder of that paragraph on page 16 of the Recommended Decision, and the other paragraphs in said "(4-a)" on page 16 of the Recommended Decision, down to "(4-b)" on page 16 of the Recommended Decision, for the reason that reference is again made to "delivered cost." (See National's proposed Findings, 6 to 9 and 63 to 67, inc., thereof and the record references therein contained, adopted by Glidden in paragraph 1 of its proposed Findings, and the record references therein contained (Clayton Act, Section 2[a]).)

25. Glidden excepts to the correctness of the first two sentences of the second subparagraph of "(4-b)" of Section III, and to the first two sentences of PARAGRAPH 4-b of Section IV, of the Recommended Decision. (RX 6 A-I, 7 A-C, 8 AB, 9 A-F, 12, 13 A-D, 50 KLO, 77 A-F, 81 AB, 83 A-Z3, 85 A-Z13, 92 AB, 127 A-G, 134 A-E, 135 AB, 136 AB, 137 AB, 138 AB, 159 D, 198 A-H; CX 501 A-D, 502 AC, 504 AB, 505 AB, 507 A-M, 508 C, 518 AB, 594 AB, 654, 652 A-K, 659 C-P, 662 CDGHST, 705 A-D, 706 A-D, 776, 799, 800 A-C, 801 AB, 802 AB, 803, 805 A-C, 809; Tr. 1312, 1316-1318, 2153-2154, 2170, 2175, 2228-2230, 2238-2245, 2308, 2397-2398, 3697, 3699-3700, 3715-3716, 3759-3760, 3767-3768, 3838-3840, 3846, 3850; in addition, the citations urged in connection with exception 18 are also relied upon in support of the foregoing exceptions.)

26. Glidden excepts to the correctness of "(4-c)" of Section III, and of PARAGRAPH 4-C of Section IV, of the Recommended

Decision. (CX 504 B, CX 507 A-M, CX 517 A, CX 518 AB, CX 523, CX 803, and Examiner's citations.)

27. Glidden excepts to the third from the last sentence and the last sentence of "(4-d)" of Section III, and also to the third from the last sentence and the last sentence of PARAGRAPH 4-D of Section IV, of the Recommended Decision. (Citations relied upon for the foregoing exceptions are the same as those urged in connection with exceptions 18 and 25.)

28. Glidden excepts to the correctness of the latter part of the second from the last sentence of "(4-d)" of Section III, and also to the latter part of the second from the last sentence of PARAGRAPH 4-D of Section IV of the Recommended Decision where the Examiner states that Glidden "appears to have used the differentials in quoting and selling outside of the par zone," as being contrary to the record (Tr. 2593).

29. Glidden excepts to the correctness of the second sentence of "(5)" of Section III of the Recommended Decision, for the reason that the record establishes substantial variance between the practices employed by it individually as compared to practices employed by the other respondents herein. (Citations relied upon for the foregoing exception are the same as those urged in connection with exceptions 18 and 25.)

30. For brevity and in order to avoid duplication in so far as "(5-a1)", "(5-a2)", "(5-a3)", "(5-a4)", "(5-a5)" and "(5-a6)" of Section III, and PARAGRAPHS 5-A1, 5-A2, 5-A3 and 5-A4 of Section IV, of the Recommended Decision are concerned, Glidden adopts and incorporates herein by reference the exceptions taken to said paragraphs by respondent National and relies upon the same citations, together with the citations appearing herein in connection with exception 25, as support for such exceptions.

31. Glidden excepts to "(5-a1)", "(5-a2)", "(5-a3)", "(5-a4)", "(5-a5)" and "(5-a6)" of Section III, and to PARAGRAPHS 5-A1, 5-A2, 5-A3 and 5-A4 of Section IV, of the Recommended Decision in so far as such paragraphs may infer that Glidden actually agreed to employ the provisions of Schedule "A", except if and when said Schedule "A" became an effective part of the N.R.A. Code for the Industry (which it did not), or that Glidden actually

employed the provisions of said Schedule "A" as a result of any agreement to do so or otherwise. (Tr. 2353-2355, 2556, 2561-2563, 2584-2586, 2590, 2594-2598; in addition, the citations urged in connection with exceptions 18 and 34 are relied upon in support of the foregoing exceptions.)

32. Glidden excepts to the last sentence in "(5-b5)", of Section III, and to the last sentence in PARAGRAPH 5-B5 of Section IV of the Recommended Decision for the reason that it is not evidence of agreement or conspiracy but merely evidence that Glidden is a price follower.

33. Glidden excepts to "(5-b6)" of Section III, and to PARAGRAPH 5-B6 of Section IV, of the Recommended Decision, except for the recognition that there were "variations by Glidden". (Tr. 774-777, 869-870, 3700-3701, 3696-3697; RX 229-305; CX 506 E, CX 539, CX 576 A-E, CX 594 AB, CX 652 A-L, CX 662 CDGHLST, CX 662 Z5-Z26, CX 663 A-K, CX 684-685, CX 772 A-Z-31, CX 776 A-L; in addition, the citations urged in connection with exception 18 are relied upon in support of the foregoing exceptions.)

34. Glidden excepts to "(5-c1)" of Section III, and to PARAGRAPH 5-C1 of Section IV, of the Recommended Decision, for the reason that neither the record references therein cited nor the record as a whole supports the statements therein made. (Tr. 1313-1314, 1324-1328, 1331-1332, 1648, 1650, 2065-2066, 2556-2567, 2584-2591, 3746, 3874-3882, 4070, 4093; CX 823 A-G, CX 782 C; RX 209; in addition, the citations urged in connection with exceptions 18 and 25 are relied upon in support of the foregoing exceptions.)

35. Glidden excepts to the first sentence of "(5-c2)" of Section III, and of PARAGRAPH 5-C2 of Section IV, of the Recommended Decision, in so far as such sentence implies an unlawful purpose to the avoidance of reference to particular prices in Schedule "A", as such inference is entirely unwarranted by the record therein. (Tr. 2218-2234, 2402-2403, 2596; RX 6 I, 8 AB, 9 A-F, 78 BC; CX 504 B, 507 A-M, 517 A, 523.)

36. Glidden excepts to the third, fourth and fifth sentences of "(5-c2)" of Section III, and of PARAGRAPH 5-C2 of Section IV, of the Recommended Decision as not being supported either by the

record citations therein given nor by the record as a whole. (Tr. 1326-1328, 2065-2066, and citations by Examiner.)

37. Glidden excepts to the entire second subparagraph of "(5-c2)" of Section III, and of PARAGRAPH 5-C2 of Section IV, of the Recommended Decision, for the reason that the statements made in such subparagraph are not sustained by the record citations therein given nor by the record as a whole. (Citations relied upon for the foregoing exceptions are the same as those urged in connection with exceptions 18, 25, and 34.)

38. Glidden excepts to the statement in the fourth sentence of "(5-c4)" of Section III, and of PARAGRAPH 5-C4 of Section IV, of the Recommended Decision that "sometimes it (Glidden) charged dealers 5¢ more per 100 lbs. than National and others charged" (CX 662-Z-17-Z-18, 663-H, 659-Z-28); and also excepts to the correctness of the fifth sentence of said paragraphs, for the reason that the statement contained therein is not supported by the citations given nor by the record as a whole. (Citations relied upon for the foregoing exceptions are the same as those urged in connection with exceptions 18, 25 and 34.)

39. Glidden excepts to the second sentence of "(5-c5)" of Section III, and of PARAGRAPH 5-C5 of Section IV, of the Recommended Decision for the reason that such sentence erroneously states that the table (page 29) shows "parallel" quotations and refers (1) to white lead-in-oil and *other keg products*, and (2) involves 100 pounds or *larger* containers. (The citations relied upon in support of these exceptions are those given by the Examiner in the table immediately following this sentence.)

40. Glidden excepts to the completeness and accuracy of the table set out on page 29 in "(5-c5)" of Section III, and incorporated by reference in PARAGRAPH 5-C5 of Section IV, of the Recommended Decision. (Tabulation pages 31 and 32 of Recommended Decision and exhibits there cited; Tr. 2905-2909; CX 595, CX 613 A-C, CX 506 DE, CX 712 A, CX 596 AB, CX 597, CX 598, CX 685, CX 599, CX 629 A-C; in addition, the citations urged in connection with exception 18 are relied upon in support of the foregoing exceptions.)

41. Glidden excepts to that portion of "(5-c5)" of Section III and of PARAGRAPH 5-C5 of Section IV, of the Recommended

Decision which erroneously indicates that certain shipping points were used by Glidden during the entire period reflected in the tabulation also appearing in such paragraphs. (The citations relied upon are those given by the Examiner in the tabulation.)

42. Glidden excepts to the second sentence of the last subparagraph of "(5-c5)" of Section III of the Recommended Decision in so far as the sentence refers to the freight from Glidden's shipping points to destinations which involve "small freight costs." (The citations urged in connection with exception 47 are relied upon in support of the foregoing exception.)

43. Glidden excepts to the Examiner's failure to include in PARAGRAPH 5-C5 a statement to the effect that freight costs from Glidden's shipping points to purchasers' destination would have to be ascertained and added to the quotation appearing in the table set out in full in "(5-c5)," and incorporated in PARAGRAPH 5-C5 by reference, in order to make accurate comparison as to the purchasers' relative costs in buying from the various respondents. (Citations relied upon for the foregoing exceptions are the same as those urged in connection with exceptions 18 and 40.)

44. Glidden excepts to "(5-c6)" of Section III, and PARAGRAPH 5-C6 of Section IV, of the Recommended Decision for the reason that the statements in such paragraphs are not supported by Examiner's citations. (Record references therein made; Tr. 638; CX 613 A-C, CX 629 A-C; *United States v. General Electric Co.*, 272 U. S. 476.)

45. Glidden excepts to the completeness and accuracy of the tables set out on pages 31 and 32 of Section III of the Recommended Decision. (The citations urged in connection with exception 18, including citations urged in exception 44, are relied upon in support of the foregoing exceptions.)

46. Glidden excepts to the correctness of the statement in the first sentence in "(5-c7)" of Section III, and in PARAGRAPH 5-C7 of Section IV, of the Recommended Decision, to the effect that its customers have substantially the same delivered cost as do customers of Sherwin and International. (Answers of International and Sherwin to Amended Complaint; in addition, the citations urged in connection with exception 18 are relied upon in support of the foregoing exception.)

47. Glidden excepts to the correctness of the statement in "(5-c7)" of Section III of the Recommended Decision setting forth the number of sales made by it at varying amounts under National's lowest price, and also to the correctness of the variances stated, as being unsupported by the record.

48. Glidden excepts to the statement in the last sentence in "(5-c7)" of Section III, and in PARAGRAPH 5-C7 of Section IV, of the Recommended Decision to the effect that the deviations by Glidden are subject to the subtraction of a *small* freight factor which the customer *sometimes* paid from *nearby* shipping points, as such statement does not fairly reflect the status of the record and is not supported by the greater weight of the reliable, probative and substantial evidence in the record. (CX 663 A-K; Tr. 2639-2640; in addition, the citations urged in connection with exception 18 are relied upon in support of the foregoing exceptions.)

49. Glidden excepts to the last sentence in "(5-c8)" of Section III, and in PARAGRAPH 5-C8 of Section IV, of the Recommended Decision, as not being supported by the record. (Tr. 2593; in addition, the citations urged in connection with exception 18 are relied upon in support of the foregoing exceptions.)

50. Glidden excepts to "(5-c9)" of Section III, and PARAGRAPH 5-C9 of Section IV, of the Recommended Decision, as not being supported by the citations given or by the record as a whole. (The citations relied upon for the foregoing exceptions are the same as those urged in connection with exception 18.)

51. Glidden excepts to "(5-c10)" of Section III and of PARAGRAPH 5-C10 of Section IV, of the Recommended Decision (pp. 33 and 34), as being unsupported by either the record references there made or other portions of the record.

52. Glidden excepts to the third sentence of "(5-c11)" of Section III, and of PARAGRAPH 5-C11 of Section IV, of the Recommended Decision, in so far as such sentence indicates that such instructions are now in effect or were in effect over a substantial period of time extending at least from November 6, 1936, to May, 1942, when in fact such instructions were in effect only for a much shorter period of time.

53. Glidden excepts to the fourth, fifth, sixth and seventh sentences of "(5-c11)" of Section III, and of PARAGRAPH 5-C11 of

Section IV, for the reason that such sentences do not correctly state all the facts with respect to the transactions therein referred to and do not correctly reflect the number of instances in which the respondents bid varying prices in competitive bids. (Citations in support of the foregoing exceptions are the same as those relied upon by the Examiner.)

54. Glidden also excepts to the seventh or last sentence of "(5-c11)" of Section III, and of PARAGRAPH 5-C11 of Section IV, of the Recommended Decision as not being warranted from the exhibits cited or from the record as a whole; and in addition because the Examiner allowed *without qualification* Glidden's proposed Finding 29.

55. Glidden excepts to all of "(5-d)" of Section III, and of PARAGRAPH 5-D of Section IV, of the Recommended Decision, except that portion of the last sentence of such paragraph beginning with the words "and it was shown" in the seventh line from the end thereof, for the reason that the statements contained therein are not supported by the record. (CX 659 Q-V, CX 662-W, Z3, Z5, O, CX 800 A-C, CX 823-G; Answers of all respondents to Amended Complaint.)

56. Glidden excepts to the last three sentences of "(5-e)" of Section III of the Recommended Decision, for the reason that neither the citations given by the Examiner nor the record as a whole establish that its formula for pricing oxides in carload quantities was the same as that of any other respondent or the fact that its less than carload prices for oxides was based on a formula derived from its carload price for such products.

57. Glidden excepts to "(5-f)" of Section III, and of PARAGRAPH 5-F of Section IV, of the Recommended Decision for the reason that neither the exhibits cited nor the record as a whole establishes the fact nor justifies the inference that Glidden sells 97% and 98% red lead at the added differentials stated because of provisions of Schedule "A" of the N.R.A. Code for the industry or pursuant to any agreement or understanding to do so. (Tr. 2593.)

58. Glidden excepts to the correctness of the first sentence of "(6-a)" of Section III, and of PARAGRAPH 6-A of Section IV, of the Recommended Decision for the reason that the percentage

of control stated for white lead does not include basic sulphate of lead which is used interchangeably with basic carbonate by Eagle-Picher and to some extent by National. (Citations urged in support of the foregoing exceptions are the same as those relied upon in connection with exceptions 12, 13 and 14.)

59. Glidden excepts to the second and third sentences of "(6-b)" of Section III, and to the first sentence of PARAGRAPH 6-B. of Section IV of the Recommended Decision, for the reason that the statements contained therein do not accurately or correctly describe Glidden's pricing methods. (Citations urged in support of the foregoing exceptions are the same as those relied upon in exceptions 18 and 34; see also Glidden's proposed Findings 5 to 11, inc.)

60. Glidden excepts to the second and third sentences in "(6-d)" of Section III and in PARAGRAPH 6-D of Section IV of the Recommended Decision, for the reason that the statements therein contained are unsupported by the record in so far as Glidden is concerned. (Citations urged in support of the foregoing exceptions are the same as those relied upon in exceptions 18, 34, 44, 46, 47, 48 and 49; also Glidden's proposed Finding 25, to the effect that Glidden "*was at all times obliged to maintain a strictly competitive position in the sale of lead pigments*"; said Finding having been allowed *without qualification* by the Examiner on March 31, 1948.)

61. Glidden excepts to the Examiner's failure to include in PARAGRAPH 6-D of Section IV of the Recommended Decision a finding based upon the statements contained in the last six sentences of the first subparagraph of "(6-d)" of Section III.

62. Glidden excepts to all of "(7-a3)" of Section III, except the first sentence thereof, and of PARAGRAPH 7-A3, of the Recommended Decision, for the reason that the statements contained therein are contrary to and not supported by the record. (Citations urged in support of the foregoing exceptions are the same as those relied upon in exceptions 18, 25, 33, 34, 46, 47, 48, 49 and 50.)

63. Glidden excepts to all of "(7-a4)" of Section III, and of PARAGRAPH 7-A4, of the Recommended Decision, for the reason that the statements contained therein are contrary to the reliable,

probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exceptions are the same as those relied upon in exceptions 18, 25, 30, 31 and 34.)

64. Glidden excepts to "(7-a6)" of Section III, and of PARAGRAPH 7-A6 of Section IV, of the Recommended Decision, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record and to a substantial extent directly contrary thereto. (Citations urged in support of exceptions 18, 34, 35, 36, 37, 39, 40, 41, 42, 44 and 55, whether set forth verbatim or by reference, are relied upon in support of the foregoing exception.)

65. Glidden excepts to "(7-a8)" of Section III, and to PARAGRAPH 5-A7 of Section IV, of the Recommended Decision, for the reason that the conclusion therein stated is not warranted upon consideration of the weight of the reliable, probative and substantial evidence in the record. (Citations urged in support of exceptions 53 and 54, whether set forth verbatim or incorporated by reference, are relied upon in support of the foregoing exception.)

66. Glidden excepts to "(7-a9)" of Section III, and of PARAGRAPH 7-A8 of Section IV, of the Recommended Decision, for the reason that the conclusion therein stated is not warranted upon consideration of the weight of the reliable, probative and substantial evidence in the record. (Citations urged in support of exceptions 18 and 33, are relied upon in support of the foregoing exception.)

67. Glidden excepts (a) to that part of the first paragraph of "(7-b1)" of Section III of the Recommended Decision which implies that consignments under the so-called "Agency Plan" were sales or transactions over which the Federal Trade Commission has jurisdiction; and (b) to the second sentence of the second paragraph of "(7-b1)" of Section III of the Recommended Decision in so far as such sentence states that the evidence discloses that Glidden had a mutual understanding with any of the other respondents concerning the plan described in "(7-b1)," or accepted the plan and its objectives and agreed to follow it for the reason that neither the record nor the inferences reasonably to be drawn therefrom support such statements. (Citations urged in

support of the foregoing exception are the same as those relied upon in connection with exceptions 18, 25, 34 and 35.)

68. Glidden excepts to that portion of "(7-b2)" of Section III, and of PARAGRAPH 7-B2 of Section IV, of the Recommended Decision, which states that its prices, though substantially lower than those of National and Eagle, were very close to the prices of Sherwin, for the reason that such statement is not supported by the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 18, 25, 34, 47, 48 and 49.)

69. Glidden excepts to the next to the last sentence in "(7-b2)" in Section III, and in PARAGRAPH 7-B2 of Section IV, of the Recommended Decision, in so far as such sentence states that there was an agreement between either Anaconda or National to conform to Glidden's and Sherwin's prices with a minimum of deviation, for the reason that the statement contained therein is not supported by the reliable, probative and substantial evidence contained in the record, nor by the Examiner's allowance without qualification of Glidden's proposed Finding 25. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 18, 25, 34, 47, 48 and 49.)

70. Glidden excepts to the third and fifth and sixth sentences in "(7-b3)" of Section III, and in PARAGRAPH 7-B3 of Section IV, of the Recommended Decision, except where it is admitted that Glidden gave active competition, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record, nor by Glidden's proposed Findings 25 and 29, which were allowed *without qualification* by the Trial Examiner. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 18, 25, 34, 46, 47, 48 and 49.)

71. Glidden excepts to "(7-b4)" of Section III, and to PARAGRAPH 7-B4 of Section IV, of the Recommended Decision, except that portion of the second sentences thereof which states that Glidden did not use the consignment plan for controlling resale prices, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evi-

dence contained in the record, and for the reason that consignments are not sales and do not involve resale prices and are not subjects of inquiry by the Federal Trade Commission. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with Sherwin's exceptions 18, 25, 33, 34, 47, 48, 49 and 55.)

72. Glidden excepts to "(7-c1)" of Section III, and to PARAGRAPH 7-C1 of Section IV, of the Recommended Decision, as said paragraphs are not supported by the record and are directly contrary to the reliable, probative and substantial evidence appearing in the record.

73. Glidden excepts to the first two sentences and the last sentence of "(7-c2)" of Section III, and to PARAGRAPH 7-C2 of Section IV, of the Recommended Decision, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 18, 25, 33, 34, 47, 48, 49 and 55.)

74. Glidden excepts to "(7-c4)" and "(7-c5)" of Section III, and to PARAGRAPHS 7-C4 and 7-C5 of Section IV, of the Recommended Decision for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record; and for the reason that the Federal Trade Commission has no jurisdiction to determine what territories are or are not "legitimate" for any seller; and for the reason that there is no recognizable distinction between "price-matching" and "price-meeting" (the latter not being condemned but actually encouraged by the statute). (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 18, 25, 33, 34, 47, 48, 49 and 55.)

75. Glidden excepts to "(7-d1)", "(7-d2)", "(7-d4)" and "(7-d5)" of Section III, and to PARAGRAPHS 7-D1, 7-D2, 7-D4 and 7-D5 of Section IV, of the Recommended Decision for the reason that the conclusions stated in said paragraphs are either not supported by the record at all or are directly contrary to the weight of the reliable, probative and substantial evidence appearing in the record and are contrary to law. (Citations relied

upon in connection with the foregoing exception are the same as those specifically relied upon in support of each and every specific exception heretofore taken; RX's. 6 through 8, inclusive; see also: *National Industrial Recovery Act*, Section 5, 48 Stat. 195, 198; *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321, 329; *Sugar Institute v. United States*, 297 U. S. 553; *Cement Mfrs. Assn. v. United States*, 268 U. S. 488; *Maple Flooring Assn. v. United States*, 268 U. S. 563; *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 198-199; *U. S. v. U. S. Steel Corporation*, 251 U. S. 417; *U. S. v. International Harvester Co.*, 274 U. S. 693; *U. S. v. Standard Oil of N. J.*, 47 F. 2d 288; *Appalachian Coals, Inc. v. United States*, 288 U. S. 344; *U. S. v. U. S. Steel Corporation*, 233 Fed. 55, 251 U. S. 417; *U. S. v. Aluminum Co. of America*, 148 F. 2d 416, 424.)

76. Glidden excepts to the third paragraph of "COUNT TWO" (page 46) of Section III, and the third subparagraph of PARAGRAPH 8-A (page 87) of Section IV, of the Recommended Decision in so far as such paragraphs incorporate, by reference, the facts relating to zone pricing, price differences, differentials and other features bearing on the issues under "COUNT TWO", which are set out in Section III at pages 7-38, inclusive, to the same extent as if the specific exceptions heretofore taken were again restated verbatim. (The citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 8-61, inclusive.)

77. Glidden excepts to "(8-a1)" of Section III, and to PARAGRAPH 8-A1 of Section IV, of the Recommended Decision for the reason that the statements contained therein, in so far as Glidden is concerned, do not accurately portray its basic freight policy as disclosed in the record, and excepts to the Examiner's failure to correctly describe its pricing and freight policies. (Citations urged in support of the foregoing exceptions are the same as those relied upon in connection with exception 18, 25, 33, 34, 47, 48, 49 and 55); also as unwarranted by the facts or the law (see Clayton Act, Section 2[a]; *Trade Commission v. Staley Co.*, 324 U. S. 746; *Corn Products Co. v. Comm'n.*, 324 U. S. 726.)

78. Glidden excepts to "(8-a2)" of Section III, and to PARAGRAPH 8-A2 of Section IV, of the Recommended Decision, for the

reason that the freight tabulations set forth in "(8-a2)", and incorporated in PARAGRAPH 8-A2 by reference, are neither applicable to nor properly descriptive of any of Glidden's shipping or freight practices. (Citations urged in support of this exception are the same as those relied upon in connection with exception 18.)

79. Glidden excepts to "(8-a3)" of Section III, and to PARAGRAPH 8-A3 of Section IV, of the Recommended Decision, for the reason that the statements therein contained do not accurately reflect Glidden's shipping or freight practices as disclosed in the record and neither the citations to the transcript nor the citations to various Commission's Exhibits reveal in any way Glidden's freight or shipping policies, and for the reason that the statute does not condemn or concern itself with so-called "discriminations based on differences in mill-net", and that the same are not within the jurisdiction of the Federal Trade Commission. (Citations urged in support of the foregoing exception are the same as those relied upon in exception 18.)

80. Glidden excepts to "(9)" of "COUNT TWO" of Section III wherein the Examiner has incorporated the evidence set out in COUNT ONE of Section III of the Recommended Decision relative to differences in trade, regional, quantity, and quality discounts and charges through differentials between agents and dealers, between containers of different sizes, between 97% or 98% red lead over lower grades, and between carloads, 5-ton lots, and smaller quantities, into "(9)" of "COUNT TWO" of Section III, by reference. Therefore, by reference, Glidden reaffirms and incorporates herein, each and every exception it has heretofore taken to specific statements by the Trial Examiner relative to the evidence bearing upon the aforementioned subjects and relies upon the same citations which it has heretofore identified with each such specific exception.

81. Glidden excepts to the first and last sentences of "(9-b)" of Section III, and of PARAGRAPH 9-B, of the Recommended Decision as containing statements and inferences not warranted by the record (Tr. 2562-2563).

82. Glidden excepts to "(9-c)" of Section III, and of PARAGRAPH 9-C of Section IV, of the Recommended Decision, in so far as the statements therein contained imply that such quality dif-

ferentials on various grades of red lead as were utilized by Glidden were utilized as a result of any agreement or understanding with any other respondent herein, or with any one else (Tr. 2562-2563).

83. Glidden excepts to "(9-d)" of Section III, and to PARAGRAPH 9-D of Section IV, of the Recommended Decision, for the reason that the statements contained therein do not correctly and accurately reflect Glidden's pricing policy for carloads and smaller quantities of oxides, and neither the tabulation therein set forth nor the exhibits therein referred to by the Examiner are entirely applicable to Glidden's pricing or freight policies for oxides. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 18, 27, 34, 35 and 36.)

84. Glidden excepts to "(9-f)" of Section III, and to PARAGRAPH 9-F of Section IV, of the Recommended Decision, for the reason that the statements contained therein are not supported by the record as a whole in so far as Glidden's sales to dealers purchasing for resale are concerned. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 18, 27, 35 and 36.)

85. Glidden excepts to "(10-a)" of Section III, and to PARAGRAPH 10-A of Section IV, of the Recommended Decision, for the reason that the statements therein made are not supported by the record in so far as Glidden is concerned and the exhibits cited by the Examiner have no relation whatever to Glidden or its pricing practices. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 18, 27, 34 and 35.)

86. Glidden excepts to the first two sentences and to the entire latter portion of "(10-b)" of Section III and of PARAGRAPH 10-B of Section IV of the Recommended Decision, as unsupported by the record; contrary to the evidence in some instances; and not an accurate summary of the testimony and record references therein.

87. Glidden excepts to "(10-c)" and "(10-d)" of Section III, and to PARAGRAPHS 10-C and 10-D of Section IV, of the Recommended Decision for the reason that the Examiner fails to affirmatively state therein that the record does not disclose sales of dry white lead or dry red lead, the products under discussion in such

paragraphs, by Glidden to paint manufacturers generally or sales to the specific manufacturers whose testimony is outlined in such paragraphs (Tr. 2554).

88. Glidden excepts to "(10-c)" of Section III, and to PARAGRAPH 10-C of Section IV, of the Recommended Decision for the reason that such paragraphs contain many statements which are either contrary to the evidence or are incomplete statements of the evidence. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exception 18.)

89. Glidden excepts to "(10-d)" of Section III, and to PARAGRAPH 10-D of Section IV, of the Recommended Decision, for the reason that the statements contained therein do not correctly and accurately reflect price differentials in effect in the area discussed in such paragraphs. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exception 18.)

90. Glidden excepts to the first and second sentences of "(10-e)" of Section III of the Recommended Decision as being unsupported by the record; and also excepts to the last two sentences of said "(10-e)" upon the ground that the record establishes that there were *no* discriminations in prices within the meaning of Section 2(a) of the Clayton Act arising out of or in connection with the territorial differential method of selling lead pigments as employed by Glidden. (*Trade Commission v. Staley Co.*, 324 U. S. 746.)

91. Glidden excepts to "(10-f)" of Section III, and to PARAGRAPH 10-F of Section IV, of the Recommended Decision for the reason that the statements contained therein are unsupported by the record in so far as Glidden is concerned in that it has not employed zone prices and has not employed quantity, quality and container differentials as a result of any understanding or agreement with any of the other respondents herein. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 18, 25, 34, 47, 48 and 49.)

92. Glidden excepts to the first sentence of "(10-g)" of Section III, and of PARAGRAPH 10-G of Section IV, of the Recommended Decision in so far as such sentences indicate that Glidden's pricing

practices involve a delivered price which is the same to all customers in a zone, regardless of distance, as not being supported by the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 18, 25, 34, 47, 48 and 49.)

93. Glidden excepts to the last sentence of "(10-g)" of Section III, of the Recommended Decision, as not being a correct statement of the law. (Clayton Act, as amended, Sec. 2[a]; Senate Committee Report 1502, dated February 3, 1936; *Corn Products v. Comm'n.*, 324 U. S. 726; *Trade Commission vs. Staley Co.*, 324 U. S. 746.)

94. Glidden excepts to "(10-h)" of Section III, and to PARAGRAPH 10-H of Section IV, of the Recommended Decision, for the reason that in so far as Glidden is concerned, the record does not support a finding that such sales as it has made to customers differently located at different prices were discriminatory or had any competitive effect whatever. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exception 18.)

95. Glidden excepts to "(10-j)" of Section III, and to PARAGRAPH 10-J of Section IV, of the Recommended Decision for the reason that the statements therein contained do not accurately reflect Glidden's shipping or freight practices as disclosed in the record, and for the further reason that the record does not disclose that such quantity or other differentials as may have been used by Glidden in the sale of oxides were discriminatory or had any adverse competitive effect whatever between its various customers. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 18, 27, 34, and 36.)

96. Glidden excepts to the word "all" in the first line of "(10-k)" of Section III, and of PARAGRAPH 10-K of Section IV, of the Recommended Decision as unsupported by the record.

97. Glidden excepts to the first sentence of "(10-l)" of Section III, and of PARAGRAPH 10-L of Section IV, of the Recommended Decision for the reason that the statement contained therein is not supported by the record. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 18, 27, 35 and 36.)

98. Glidden excepts to the first and last sentences of "(10-m)" of Section III of the Recommended Decision in so far as the Examiner characterizes the practices described in "(10-h)" and "(10-j)" as involving discriminations for the reasons set out in connection with exceptions 94 and 95. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 18, 27, 34, 35 and 36.)

99. Glidden excepts to the third sentence of "(10-m)" of Section III of the Recommended Decision in so far as it states that Glidden has cooperatively employed discriminatory practices or other methods which produce prices which are identical with those of each of the other respondents, for the reason that such statements are unsupported by and directly contrary to the record as a whole.

100. Glidden excepts to "(11-a)" and "(11-b)" of Section III of the Recommended Decision for the reason that the statements contained therein are not supported by the record and constitute an incorrect statement of the law. (Clayton Act, as amended, Section 2[a]; Senate Committee Report 1502, dated February 3, 1946; *Commission v. Staley Co.*, 324 U. S. 746, together with all citations stated or referred to and relied upon in exceptions 76 through 98.)

101. Glidden excepts to that portion of the seventh sentence in the third subparagraph of "(11-c)" of Section III of the Recommended Decision which reads "in the absence of uneconomic or unlawful factors," for the reason that such statement is unwarranted under the law. (Clayton Act, as amended, Section 2[a]; Senate Committee Report 1502, dated February 3, 1946; *Commission v. Staley Co.*, 324 U. S. 746, together with all citations stated or referred to and relied upon in exceptions 76 through 96.)

C. In so far as Section V entitled "RECOMMENDED ORDER" of the Trial Examiner's Recommended Decision is concerned, Glidden takes the following exceptions:

102. Glidden excepts to the preamble and to paragraph "1", including sub-paragraphs "1-A", "1-B", "1-C" and "1-D", as unwarranted by the Federal Trade Commission Act and for the reason that the weight of the reliable, probative and substantial

evidence in the record does not show that Glidden has entered into, cooperated in or carried out any planned common course of action, understanding, agreement, combination or conspiracy to establish and maintain uniform prices, terms, price differentials and/or conditions of sale, or to induce resale price uniformity in connection with the sale and distribution of lead pigments.

103. Glidden excepts to paragraph "4," including sub-paragraphs "4-A" and "4-B," as unwarranted by the record herein, or by the Clayton Act as amended by the Robinson-Patman Act.

104. Glidden excepts to paragraph "5" as unwarranted by the record herein, or by the Federal Trade Commission Act, or by the Clayton Act as amended by the Robinson-Patman Act.

D. With respect to the Trial Examiner's Rulings on Proposals for Findings and Conclusions submitted by Glidden under Rule XXI of the Commission's Rules of Practice, specific exceptions are taken as follows:

105. Glidden excepts to the failure of the Trial Examiner to find in the Recommended Decision *in haec verba* as requested in paragraphs 21 through 25, inclusive, and paragraph 29, of the Proposed Findings submitted by Glidden, and in paragraphs 36, 37, 38 and 41 of Glidden's Supplement to its Proposed Findings. (Tr. 2455, 2456, 2457, 2488, 2490, 2494, 2499, 2503, 2507, 2509, 2510, 2515, 2516, 2517, 2518, 2532, 2538, 2539, 2541, 2542, 2548, 2549, 2553, 255C, 2560, 2565, 2588 and 2659.)

106. Glidden excepts to the Trial Examiner's denial of Glidden's Proposed Findings 2, 3, 4, 11, 13, 14, 15, 16, 26, 27, 28, 30, 32, 33, 34, 35, 39, 40 and 42. (Tr. 2457, 2467, 2502, 2503, 2508, 2510, 2513, 2516, 2518, 2523, 2525, 2542, 2548, 2551, 2552, 2556, 2560, 2561, 2564, 2565, 2566, 2579, 2580, 2581, 2582, 2583, 2588, 2593, 2648, 2652 and 2739 to 2745.)

107. Glidden excepts to the Trial Examiner's denial of a portion of Glidden's Proposed Findings 1, 5, 6, 7, 8, 9, 10, and 31. (RX 141, 142; Tr. 2459, 2465, 2466, 2484-2486, 2490, 2494, 2496-2498, 2501, 2504, 2505, 2509, 2511, 2513, 2525, 2542, 2544, 2546, 2556, 2558, 2559, 2639 and 2677.)

108. Glidden excepts to the Trial Examiner's denial of the Conclusions of Law requested by this respondent and numbered 2

through 8, inclusive, for the reason that the denial thereof is contrary to both the law and the evidence.

In addition, Glidden adopts as its own and incorporates herein by reference the exceptions (together with all citations in support thereof) taken by each other respondent herein to the Recommended Decision (except Section I thereof), to the extent that they are consistent with Glidden's Exceptions and applicable to this respondent.

Pursuant to the ruling of the Trial Examiner herein, Glidden reserves the right to file further proposals and further exceptions at the time of submission of its brief on the merits and the argument of the case before the Commission.

Glidden respectfully requests oral argument on the above exceptions at the time of the argument before the Commission on the merits.

Respectfully submitted,

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Dated May 19, 1948.

Of Counsel:

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