tingent claim for restitution which the Commission is requested to file must be filed by Jan. 24, 1974, if it is to be filed, the time by which respondents' answer to this request in the application must be filed shall be set at 9:00 a.m., Jan. 22, 1974. Respondents' answer to the request in the application that the complaint be amended shall, in view of the issues raised by the application, be due on Feb. 5, 1974. Therefore,

It is ordered, That respondents' request to strike the application of complaint counsel be, and it hereby is, denied.

It is further ordered, That respondents answer by 9:00 a.m., Jan. 22, 1974, complaint counsel's request that the aforementioned contingent claim be filed, and that respondents answer by Feb. 5, 1974, all other requests made in the application.

IN THE MATTER OF

FOOD FAIR STORES, INC., ET AL. D. 8786*
H. C. BOHACK CO., INC., ET AL. D. 8787
JEWEL COMPANIES, INC., ET AL. D. 8788
BORMAN FOOD STORES, INC. D. 8789*
FIRST NATIONAL STORES, INC., ET AL. D. 8790

ORDER OF DISMISSAL, ETC., IN REGARD TO THE ALLEGED VIOLATIONS OF SEC. 2(C) OF THE CLAYTON ACT

Complaints, July 10, 1969—Decisions, Jan. 22, 1974

Orders dismissing the complaints issued against 10 corporations and certain individual officers thereof, engaged in various aspects of the food industry for alleged violations of Sec. 2(c) of the Clayton Act on the basis that the evidence relied upon by complaint counsel would not support the charges that respondent had violated Sec. 2(c) of the Clayton Act, amended.

Appearances

For the Commission: *Francis C. Mayer, James C. Donoghue, Martin A. Rosen, Lewis F. Parker, Louis R. Sernoff* and *Eliot G. Disner.*

For respondents: *Shipley, Akerman, Stein & Kaps,* Wash., D.C. and *Stein & Rosen,* New York, N.Y. for Food Fair Stores, Inc. and World-Wide Produce Co., Inc. *Subin, Shams & Rosenbluth,* Orlando, Fla. for Hallee-Boy Sales, Inc. and Ivin Arost. *Collier, Shannon, Rill & Edwards,* Wash., D.C. for John P. Storm, a corporation.

COMPLAINT IN DOCKET NO. 8786

The Federal Trade Commission, having reason to believe that th

*For complaint in D. 8789 see 81 F.T.C. 201. By Commission decision dated Aug. 3, 1972, the complaint was dismis as to respondents P & R Brokerage Co. and Frank V. Condello.

parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are violating the provisions of Subsection (c) of Section 2 of the Clayton Act, as amended, (15 U.S.C. Section 13) hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Food Fair Stores, Inc., hereinafter referred to as "Food Fair," is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 3175 John F. Kennedy Boulevard, Philadelphia, Pa.

PAR. 2. Respondent World-Wide Produce Co., Inc., hereinafter referred to as "World-Wide," is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 10 Oregon Avenue, Philadelphia, Pa. Respondent World-Wide is a wholly-owned corporate subsidiary of respondent Food Fair.

PAR. 3. Respondent Food Fair has been and is now engaged primarily in the retailing of food products and other articles for personal and household use and operates a large number of retail stores, including supermarkets, discount supermarkets and department stores. Food Fair also manufactures and processes a variety of food products. In the operation of its retail food business, respondent Food Fair purchases directly and through respondent World-Wide large quantities of food products from numerous sellers located throughout the United States for resale to its customers. As of Apr. 27, 1968, Food Fair operated approximately 560 food units and 60 department stores in 16 States of the United States. Food Fair's volume of business is substantial, totalling in excess of $1.3 billion annually, as of Apr. 27, 1968.

PAR. 4. Respondent World-Wide has been and is now engaged as a purchaser of food products solely on behalf of respondent Food Fair. Food products obtained for Food Fair by World-Wide are resold to consumers through Food Fair's retail outlets. Some of the officers and directors of respondent Food Fair have been and are now officers and directors of respondent World-Wide.

PAR. 5. In the course and conduct of its business for the past several ears, respondent Food Fair has purchased, distributed and resold, and now purchasing, (both directly and through respondent World-Wide) stributing and reselling food products and other articles for personal d household use, including fresh fruits and vegetables, in commerce, "commerce" is defined in the Clayton Act, which it purchased from lers located in several States of the United States other than the nmonwealth of Pennsylvania in which respondent Food Fair is lo- d. Food Fair purchases these food products, including fresh fruits

and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Food Fair's warehouses and retail stores in the Commonwealth of Pennsylvania and various other States in the United States. Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent Food Fair.

PAR. 6. In the course and conduct of its business for the past several years, respondent World-Wide has purchased and distributed and resold through respondent Food Fair, and is now purchasing and distributing and reselling through respondent Food Fair, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the Commonwealth of Pennsylvania in which respondent World-Wide is located. World-Wide purchases these food products, including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Food Fair's warehouses and retail stores in the Commonwealth of Pennsylvania and various other States in the United States. Thus, there has been and is now a continuous course of trade in commerce in the purchase of said food products by respondent World-Wide.

PAR. 7. *Respondent Hallee-Boy Sales, hereinafter referred to as "Hallee-Boy," is a partnership, composed of respondents Ivin Arost and Harold Arost, doing business under and by virtue of the laws of the State of Florida, with their office and principal place of business located at P.O. Box 7741, Orlando, Fla. These individual respondents formulate, direct and control the acts, practices and policies of the partnership, Hallee-Boy, including the acts and practices hereinafter described.

PAR. 8. Respondent Hallee-Boy has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Hallee-Boy in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

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*On June 5, 1973, the administrative law judge amended the complaint as follows: substituting Hallee-Boy Sales, Inc., the successor corporation for Hallee-Boy Sales, a dissolved partnership, as respondent; retaining Ivin Arost individually as a respondent; dismissing Harold Arost.

PAR. 9. Respondent Hallee-Boy, in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent Hallee-Boy.

PAR. 10. Respondent John P. Storm, a corporation, hereinafter referred to as "John Storm," is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 314 East John Street, Salinas, Calif.

Respondent John P. Storm, an individual, is president of corporate respondent John Storm, and is located at the same address as said corporate respondent and owns all or substantially all of its stock. He formulates, directs and controls the acts, practices and policies of said corporate respondent, including the acts and practice hereinafter described.

PAR. 11. Respondent John Storm has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of California and purchases by buyers located in various States of the United States other than the State of California. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of John Storm in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

PAR. 12. Respondent John Storm, in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of California and purchases by buyers located in various States of the United States other than the State of California in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent John Storm.

PAR. 13. In the course and conduct of their business, respondents Food Fair and World-Wide have been and are now utilizing the services of respondent Hallee-Boy as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Hallee-Boy performs valuable services for respondents Food Fair and World-Wide and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent Hallee-Boy, in performing the services enumerated above, has been and is now acting as an agent or representative of respondents Food Fair and World-Wide and other buyers. In such capacity, Hallee-Boy is subject to and under the direct or indirect control of Food Fair, World-Wide and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Hallee-Boy has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 14. In the course and conduct of their business, respondents Food Fair and World-Wide have been and are now utilizing the services of respondent John Storm as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent John Storm performs valuable services for respondents Food Fair and World-Wide and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent John Storm, in performing the services enumerated above, has been and is now acting as an agent or representative of respondents Food Fair and World-Wide and other buyers. In such capacity, John Storm is subject to and under the direct or indirect control of Food Fair, World-Wide and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, said respondent John Storm has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 15. In addition, respondents Food Fair and World-Wide have been and are now utilizing the services of Jack Stires, Inc., a Calif. corporation located at 795 Desert Gardens Drive, El Centro, Calif. as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. In such capacity, Jack Stires, Inc. performs the

same or substantially the same services for respondents Food Fair and World-Wide, as those performed by Hallee-Boy and John Storm for respondents Food Fair and World-Wide, described above in Paragraphs Thirteen and Fourteen, while acting as an agent or representative, and subject to the direct or indirect control, of respondents Food Fair and World-Wide in transactions with sellers. In connection with such tranactions, Jack Stires, Inc. has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 16. Respondents Food Fair and World-Wide and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent John Storm without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent John Storm has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compenstation from sellers, when, in fact, it has been and is now acting for or in behalf of respondents Food Fair and World-Wide and other buyers, or has been and is now subject to the direct or indirect control of respondents Food Fair and World-Wide and other buyers.

Respondents Food Fair and World-Wide and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Hallee-Boy without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Hallee-Boy has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondents Food Fair and World-Wide and other buyers, or has been and is now subject to the direct or indirect control of respondents Food Fair and World-Wide and other buyers.

Moreover, respondents Food Fair and World-Wide have received and are now receiving valuable "ground" or "field" broker services from Jack Stires, Inc. without paying, either directly or indirectly, any brokerage, commissions or other compenstaion to said broker. At the same time, Jack Stires, Inc. has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondents Food Fair and World-Wide or has been and is now subject to the direct or indirect control of respondents Food Fair and World-Wide.

PAR. 17. The aforesaid acts and practices of respondents and each of hem in receiving and accepting, directly or indirectly, anything of value s a commission, brokerage or other compensation or any allowance or iscount in lieu thereof from sellers, are in violation of Subsection (c) of

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Commissioners Elman and Nicholson dissented and filed dissenting statements.*

Commissioners Dixon and MacIntyre filed separate statements.*

INITIAL DECISION [IN DOCKET 8786] ON RESPONDENTS' MOTION FOR SUMMARY DECISION UNDER SECTION 3.24 OF THE COMMISSION'S RULES OF PRACTICE BY RAYMOND J. LYNCH, ADMINISTRATIVE LAW JUDGE

JULY 30, 1973

PRELIMINARY STATEMENT

On July 10, 1969, the Federal Trade Commission issued a complaint [1,2,3] in the above-entitled proceeding, charging the respondents with violations of Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.[4] Answers were filed by all the respondents named herein, denying the allegations contained in the complaint. Pretrial conferences and discovery proceedings were held both on and off the record from May 22, 1972 to May 14, 1973. On June 4, 1973, respondents filed a motion for summary decision pursuant to Section 3.24 of the Commission's Rules of Practice. Counsel supporting complaint, on June 18, 1973, filed a reply thereto. In addition, respondents' requests for admissions were answered by counsel supporting the complaint, briefs were filed and a stipulation entered into between the parties.

The Complaint

The complaint, as amended in the above-entitled proceeding, alleges that the respondent Food Fair Stores, Inc. engaged in a course of commerce, as commerce is defined in the Clayton Act, by purchasing from Hallee-Boy Sales, Inc., a corporation, Ivin Arost, an individual, and John P. Storm, a corporation, specified qualities and quantities of fresh fruits and vegetables, and that as a result of the transactions between Food Fair Stores, Inc., a buyer, and the other remaining respondent brokers, acted in such a manner as to violate Subsection (c)

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* For reasons of economy, the text of the dissenting statements of Commissioners Elman and Nicholson, and the text of the separate statements of Commissioners Dixon and MacIntyre are not published herein. However, they appear at 81 F.T.C. 203–216, Docket 8789.

[1] By order of the administrative law judge, Hallee-Boy Sales, a partnership, was dismissed as a respondent and in lieu thereof, Hallee-Boy Sales, Inc., a corporation, was substituted.

[2] Harold Arost was dismissed as a respondent by order of the adminstrative law judge, based upon an agreement of the parties.

[3] John P. Storm, individually, was dismissed as a respondent on motion of respondent's counsel because of his death in Dec. 1972.

[4] This matter was pending in United States District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals from Aug. 11, 1969 to Mar. 29, 1972.

of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The nature of the transactions between the parties will be discussed more fully in the following paragraphs.

Admissions by Counsel Supporting the Complaint

Pursuant to respondents' request for admissions of complaint counsel's contentions of law and fact, counsel supporting the complaint admit that:

1. Buyer respondent does not own or have any financial or other interest in the business of any of the broker respondents, and does not in any way share in the profits or losses of any of the broker respondents.

2. No director, officer or employee of buyer respondent owns all or any part of any of the broker respondents, or has any financial or other interest in the business of any of the broker respondents or shares in any way in the profits or losses of any of the broker respondents.

3. No broker respondent is a director, officer, manager or shareholder of buyer respondent or other buyers; and no director, officer or employee of buyer respondent is a director, officer, manager or shareholder of any of the broker respondents.

4. There are no common officers, directors, shareholders, employees or other personnel between respondent brokers and respondent sellers.

5. Broker respondents have not entered into any express contract or agreement to act as an agent, representative or other intermediary of buyer respondent or other buyers or for or in behalf of, or subject to the direct or indirect control of buyer respondent or other buyers.

6. The broker respondents were independently owned and managed business entities which performed *bona fide* brokerage functions of benefit to both buyers and sellers; and were not so-called "dummy brokers." Except as to words "bona fide" and "and is not a so-called 'dummy broker'." Neither admit or deny "bona fide" and "and is not a so-called" which it modifies. Admit "is not a so-called 'dummy broker' " as that defined with specificity with respect to the words "brokerage functions" term is defined in *FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 168–169 (1960).

7. Complaint counsel expect to prove that the broker respondents acted as agent or representative for, or in behalf of or subject to the direct or indirect control of respondent buyer and other buyers by inference from the following.

(a) That respondent buyer and other buyers have "utilized" the service of the respondent brokers as "ground" or "field" brokers in the purchase of fresh fruits and vegetables and usually not the services of other "ground" or "field" brokers.

(b) That the respondent brokers perform services which are valuable to respondent buyer and other buyers by (i) furnishing information concerning market conditions; (ii) maintaining contact with various sellers; (iii) inspecting and selecting specified qualities and quantities of fresh fruits and vegetables; and (iv) negotiating purchases of specified qualities and quantities of fresh fruits and vegetables.

8. Respondent buyer and other buyers have not paid brokerage or other compensation to the broker respondents and such brokerage has been paid by sellers.

9. Complaint counsel do not contend that the buyer respondent has received or accepted any monetary payments or anything of value other than benefits complaint counsel contend arise from broker respondents' performance of the functions referred to in Paragraph 7, *supra*.

10. Complaint counsel expect to offer no evidence that the acts and practices of respondents alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition. Complaint counsel do contend that the acts and practices alleged are unfair.

Stipulation of the Parties

In addition to the agreement of the parties with respect to the respondents' request for admissions and counsel supporting the complaint's reply thereto, for the purpose of presenting the legal issue, it was agreed that a stipulation would be entered into, which follows:

A. If, as a matter of law, complaint counsel must prove any one or more of the matters set forth in Paragraphs 1 through 6, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

B. If, as a matter of law, complaint counsel must prove that buyer respondent has received or accepted any monetary payments or anything of value other than the services described in Paragraph 7(b) then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

C. If, as a matter of law, complaint counsel must prove that the acts and practices of respondents have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition, then the proposed evidence of referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

D. If, as a matter of law, the proposed evidence of complaint counsel set forth in Paragraph 7 of the admissions of complaint counsel does not establish that the broker respondents acted as agent, representative or

other intermediary for, or in behalf of, or subject to the direct or indirect control of buyers, then there is no genuine issue as to material facts in this matter.

Contention of the Parties

Counsel supporting the complaint contend that Section 2(c) should be extended to apply to any situation in which it can be concluded, after analysis of the details of a broker's business and of the businesses of the sellers and buyers with whom he has done business, that the buyer realized greater benefits from the broker's services than did the seller. Complaint counsel contend that, on the basis of such a conclusion, it can be further implied that the broker was "acting in fact for or in behalf" of the buyer within the meaning of the statute and that, therefore, unless the buyer has paid any fee charged by the broker, the statute was violated.

Respondents' counsel contend that to establish a Section 2(c) violation, complaint counsel must show that one aspect of the transactions at issue was for the respondent buyer "to receive or accept" something of value "as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof." Complaint counsel, however, do not assert that the buyer has received or accepted any allowance or discount in lieu of brokerage commission or other compensation. Rather, they simply contend that the buyer receives benefits from various brokerage functions performed by the respondent brokers.

As a matter of statutory construction, the benefits inherent in the performance of brokerage functions cannot constitute something of value as "a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof." The "thing of value" referred to in Section 2(c) means something paid as *compensation* for brokerage services, not the benefits of the performance of the brokerage function or the brokerage services themselves. If the brokerage services themselves can constitute the "thing of value," then the whole clause is a meaningless redundancy because that "thing of value" is inherent in every transaction. To adopt complaint counsel's view would be to hold that Congress wrote a meaningless clause into Section 2(c).

The Issue

There is no dispute as to the *material facts* that prevent a determination of the legal issue to wit: based upon counsel supporting the complaint's admissions with respect to respondents' actions, would respondents' conduct be in violation of the Clayton Act?

FINDINGS OF FACT

Respondent Food Fair Stores, Inc., hereinafter referred to as "Food Fair," is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 3175 John F. Kennedy Boulevard, Philadelphia, Pa.

Respondent World-Wide Produce Co., Inc., hereinafter referred to as "World-Wide," is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 10 Oregon Avenue, Philadelphia, Pa. Respondent World-Wide is a wholly-owned corporate subsidiary of respondent Food Fair.

Respondent Food Fair has been and is now engaged primarily in the retailing of food products and other articles for personal and household use and operates a large number of retail stores, including supermarkets, discount supermarkets and department stores. Food Fair also manufactures and processes a variety of food products. In the operation of its retail food business, respondent Food Fair purchases directly and through respondent World-Wide large quantities of food products from numerous sellers located throughout the United States for resale to its customers. As of Apr. 27, 1968, Food Fair operated approximately 560 food units and 60 department stores in 16 States of the United States. Food Fair's volume of business is substantial, totalling in excess of $1.3 billion annually, as of Apr. 27, 1968.

Respondent World-Wide has been and is now engaged as a purchaser of food products solely on behalf of respondent Food Fair. Food products obtained for Food Fair by World-Wide are resold to consumers through Food Fair's retail outlets. Some of the officers and directors of respondent Food Fair have been and are now officers and directors of respondent World-Wide.

In the course and conduct of its business for the past several years, respondent Food Fair has purchased, distributed and resold, and is now purchasing (both directly and through respondent World-Wide), distributing and reselling food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the Commonwealth of Pennsylvania in which respondent Food Fair is located. Food Fair purchases these food products, including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Food Fair's warehouses and retail stores in the Commonwealth of Pennsylvania and various other States in the United States.

Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent Food Fair.

In the course and conduct of its business for the past several years, respondent World-Wide has purchased and distributed and resold through respondent Food Fair, and is now purchasing and distributing and reselling through respondent Food Fair, food products and other articles for personal and household use, including fresh fruits and vegetables, in commmerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the Commonwealth of Pennsylvania in which respondent World-Wide is located. World-Wide purchases these food products, including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Food Fair's warehouses and retail stores in the Commonwealth of Pennsylvania and various other States in the United States. Thus, there has been and is now a continuous course of trade in commerce in the purchase of said food products by respondent World-Wide.

Respondents Hallee-Boy Sales, Inc., a corporation, and Ivin Arost, individually, have been doing business under and by virtue of the laws of the State of Florida, with their office and principal place of business located at P.O. Box 7741, Orlando, Fla.

Respondent Hallee-Boy Sales, Inc., has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Hallee-Boy Sales, Inc. in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

Respondent Hallee-Boy Sales, Inc., in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in

commerce in effecting purchases and sales of such products by said respondent Hallee-Boy Sales, Inc.

Respondent John P. Storm, a corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 314 East John Street, Salinas, Calif.

Respondent John P. Storm, a corporation, has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of California and purchases by buyers located in various States of the United States other than the State of California. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of John P. Storm, a corporation, in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

Respondent John P. Storm, a corporation, in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of California and purchases by buyers located in various States of the United States other than the State of California in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent John P. Storm, a corporation.

Performance of Normal Brokerage Services

From the very adoption of the section, it has been recognized that both buyers and sellers benefit from performance of normal brokerage services by independent brokers and that the existence of such benefits is no legal or factual basis for inferring the existence of a relationship of agency between the broker and a buyer receiving such benefits. As the Commission said in *Great Atlantic and Pacific Tea Co.*, 26 F.T.C. 486, 506–507 (1930):

> In the course of conducting his business a broker must and does also render services to buyers—but those services, unlike the services rendered to the respondent by its field buying agents, are not buying services. A broker is not employed by buyers. He is employed and paid by sellers as their selling agent and he represents his seller-principals only. His activities in connection with his representation of his seller-principals are controlled by them, but, paradoxically, because of the broker's anomalous position as an independent sales agent in business for himself, he does act for buyers in a sense and he is subject to a degree of control on their part.

This results from requests by buyers that brokers report complaints to their seller-principals, that brokers communicate cancellations of orders to their seller-principals, that brokers submit to their seller-principlas offers of buyers to purchase commodities at prices stipulated by buyers, that brokers endeavor to make up "pool" cars of merchandise among several buyers so that the buyers may obtain the advantage of quantity prices and carload rates of freight, that brokers obtain quotations of prices from their seller-principals for the consideration ob buyers, and, perahps, in other ways. Naturally it is to the mutual interest and advantage of brokers and sellers to maintain the good will of their common customers, and brokers generally endeavor to comply with the reasonable requests of buyers along the lines indicated. In the course of negotiating sales from seller to buyer and brining them into agreement brokers are necessarily guided somewhat by instructions from each, but in the essential particular of selling commodities and consummating sales they act for and are controlled by the latter alone, who in the absence of a contract may discharge them and substitute new brokers in their places at any time.

Complaint counsel contend that respondent buyer usually uses the services of the respondent brokers rather than the services of other brokers in the purchase of fresh fruits and vegetables. This fact, if true, hardly establishes agency. It is certainly not unusual for a buyer to do business more frequently with one supplier than another and the fact that he does so does not establish that the supplier he selects is his agent. It certainly was not the intention of the statute to require a buyer to spread his business among several brokers. In fact, in *Tillie Lewis Foods, Inc., et al.*, 65 F.T.C. 1099, 1136 (1964), the Commission expressly approved the seller's payment of brokerage to a broker, Bushey & Wright, on sales to a large buyer with whom the broker had had a "personal relationship" for many years dating back to the time when the buyer and broker were the same entity.

The "field broker" aspect of *Tillie Lewis Foods, supra*, is particularly enlightening as to the lack of probity, for the purpose of establishing agency, of the facts relied on by complaint counsel. The Commission, in holding that seller payment of brokerage did not violate Section 2(c), described the broker's activity in a discussion which shows that brokerage services which benefit both buyers and sellers do not establish a violation of Section 2(c):

* * * the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice. [65 F.T.C at 1132]

These findings as to the legitimate brokerage functions of shipping point

brokers which are not violative of Section 2(c) are sufficiently close to a number of the admitted contentions of Paragraph 7 of the admissions as to demonstrate that the contentions themselves, even if established, would not, under Commission precedents, carry the burden necessary to sustain a violation here.

In short, the facts by which complaint counsel seek to establish agency of the broker respondents for buyers are nothing more than a description of the functions necessarily and historically performed by brokers acting as independent intermediaries bringing buyer and seller together. It is the essence of the business operations of independent brokers that they negotiate sales transactions and, in the course of such negotiations, perform acts beneficial to both buyer and seller. But, in the absence of circumstances evidencing the kind of control by the buyer over the broker contemplated by Section 2(c), the factual contentions of complaint counsel set forth in Paragraph 7 of the request for admissions are totally inadequate to establish that a broker is either an agent of a buyer or in violation of Section 2(c).

Complaint counsel's approach to proof of an agency relationship which violates Section 2(c) is highly unrealistic and ignores the economic realities of the brokerage business. Because it is unrealistic, it would be impossible to apply the approach fairly and predictably. As a result, the threat of a 2(c) proceeding against any buyer or seller who deals with an independent broker would cause buyers and sellers to cease to do business with independent brokers.

Complaint counsel's approach to proof of a 2(c) violation ignores the essential economic character of brokers as intermediaries who promote trade by bringing buyers and sellers together and who act for their own interest in earning a fee and not as the representative of either party to the transaction. In some transactions, the broker may first be approached by a seller to find an outlet for the seller's goods; in others, the broker may be first approached by a buyer seeking a source of supply. In all instances, both buyers and sellers will benefit from the transaction. Both will receive information concerning conditions in the market and the availability of goods. Both will, by utilizing the services of the broker, save expense which they would otherwise have borne. The seller, for example, will have saved the expense of making his own sales calls and the buyer will have saved the expense of making his own buying calls direct to the sellers. Both will benefit from any negotiation the broker may have carried on to bring about a price favorable to both parties. Thereafter, both will benefit in the event of claims by one or the other; the broker, in the interest of protecting the fee which he has earned and of protecting his relationships with both parties for the future, will mediate and seek to resolve the controversy to the satisfac-

tion of both parties. In every aspect of the brokerage function, the point is the same; both parties benefit from the services of an independent broker, but the broker performs the services for his own purpose, which is to consummate the transaction and obtain his commission.

It is no answer to suggest that independent brokers drop the contested services. The services are intrinsic to the brokerage function. Other types of middlemen engaged in distribution provide a variety of services to benefit both buyers and sellers and thereby encourage them to do business with them. These include all of the same types of benefit complaint counsel allege in this case to be the basis for implying agency. If, because of the rule of law being proposed by complaint counsel, these broker respondents and other independent brokers could not provide such benefits, they, of course, would not be competitive with other forms of distribution such as commission merchants, wholesalers, the seller's own sales force and the like, and would, in time, disappear from the competitive arena.

CONCLUSIONS

The legislative history of Section 2(c) demonstrates conclusively that the only purpose of the statute is to prevent price discrimination among customers of the same seller which arises when the seller pays brokerage direct to a buyer or indirectly to the buyer through a dummy or nominee broker of the buyer. The effect of this legislative history upon the proper construction of the statute has, furthermore, been confirmed by the United States Supreme Court in *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166 (1960). That case involved a preferential allowance granted by a seller direct to a buyer in lieu of brokerage. The allowance was found to have resulted in a price discrimination in favor of the buyer and to be, therefore, within the prohibitive scope of Section 2(c). With respect to the proper construction of Section 2(c), the Court affirmed that:

> The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. [363 U.S. at 168]

It further affirmed with respect to Section 2(c) that:

> One of the favorite means of obtaining an indirect concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, * * * to cover * * * all other means by which brokerage could be used to effect price discrimination. [363 U.S. at 169]

A summary decision for respondents is appropriate even though

complaint counsel state in response to the request for admissions that they intend to claim that payment of brokerage by sellers in the circumstances of this case is unfair. The basis for this claim is unlcear, although apparently complaint counsel believe buyers receive greater benefits from the services of these brokers than do sellers. This belief is, in the opinion of the administrative law judge, unfounded. In any event, it is quite immaterial to this proceeding because this proceeding is brought under Section 2(c) of the Robinson-Patman Act, not under Section 5 of the Federal Trade Commission Act. Section 2(c) is not and was never intended to be a vehicle through which the Federal Trade Commission would substitute its judgments for those of the market place to determine when independent brokers should be paid and by whom. The Commission's only function under Section 2(c) is to determine whether an abuse of brokerage exists which results or is likely to result in price discrimination; there is no such result or likelihood of such a result involved in this proceeding.

To establish a Section 2(c) violation, complaint counsel must show that one aspect of the transactions at issue was for the respondent buyer "to receive or accept" something of value "as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof." Complaint counsel, however, do not assert that the buyer has received or accepted any allowance or discount in lieu of brokerage commission or other compensation. Rather, they simply contend that the buyer receives benefits from various brokerage functions performed by the respondent brokers. The "thing of value" referred to in Section 2(c) means something paid as *compensation* for brokerage services, not the benefits of the performance of the brokerage function or the brokerage services themselves. If the brokerage services themselves can constitute the "thing of value," then the whole clause is a meaningless redundancy because that "thing of value" is inherent in every transaction.

Review of the full range of cases decided under Section 2(c) reveals no support for complaint counsel's theory. For example, in *Webb-Crawford Co., et al.* v. *FTC*, 109 F.2d 268 (5th Cir. 1940), the brokerage services provided by Daniel Brokerage Company to Webb-Crawford were not the consideration as to which a violation was found; brokerage partnership distributions were the illegal considerations. In *Independent Grocers Alliance Distributing Co.* v. *FTC*, 203 F.2d 941 (7th Cir. 1953), dividends and advertising allowances were found illegal. In *Broch, supra*, of course, the illegal consideration was a cash discount. But in none of the adjudicated 2(c) cases is the brokerage service itself the illegal consideration. In the more than 37 years since the enactment of Section 2(c), the Commission has litigated hundreds of cases charging violations of that section. In none of those cases has a buyer or seller

been held to violate the section on the theory that the brokerage services themselves could be the "thing of value" received "as a commission, brokerage, or other compensation, or * * * allowance or discount in lieu thereof."

In prior Section 2(c) litigation, the Commission consistently has regarded the "thing of value" as the payment received or entitled to be received by the broker as compensation for his services and has found a violation only where that thing of value was passed on to the buyer. As complaint counsel can point to no such passing on from respondent brokers to respondent buyer of anything of value outside the legitimate brokerage function, another essential element of proof of a 2(c) violation is absent.

The Federal Trade Commission has jurisdication of and over respondents and the subject matter of this proceeding.

ORDER

It is ordered, That respondents' motion for summary decision be, and the same hereby is, granted.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed in its entirety.

Appearances

For the Commission: *Lewis F. Parker, Francis C. Mayer, James C. Donoghue, Martin A. Rosen, Louis R. Sernoff* and *Eliot G. Disner.*

For the respondents: *Simpson Thacher & Bartlett,* New York, N.Y. for H. C. Bohack Co., Inc. *Beverly & Frates,* West Palm Beach, Fla. for Henderson Distributing Co., Inc. and Vinson Henderson.

COMPLAINT IN DOCKET NO. 8787

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are violating the provisions of Subsection (c) of Section 2 of the Clayton Act, as amended, (15 U.S.C. Section 13) hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent H. C. Bohack Co., Inc., hereinafter referred to as "Bohack," is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 4825 Metropolitan Avenue, Brooklyn, N.Y.

PAR. 2. Respondent Bohack has been and is now engaged primarily in the retailing of food products and articles for personal and household use and operates a large number of retail supermarkets. As of Jan. 27, 1968,

Bohack operated approximately 166 supermarkets. Bohack's volume of business is substantial, totalling in excess of $207 million annually.

PAR. 3. Respondent Henderson Distributing Co., Inc., hereinafter referred to as "Henderson Dist.," is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at State Farmers Market, Pahokee, Fla.

Respondent Vinson Henderson, an individual, is president of corporate respondent Henderson Dist., and is located at the same address as said corporate respondent and owns all or substantially all of its stock. He formulates, directs and controls the acts, practices and policies of said corporate respondent, including the acts and practices hereinafter described.

PAR. 4. Respondent Henderson Dist. has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida, and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Henderson Dist., in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables, is substantial.

PAR. 5. Respondent Henderson Dist., in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent Henderson Dist.

PAR. 6. In the course and conduct of its business for the past several years, respondent Bohack has purchased, distributed and resold, and is now purchasing, distributing and reselling, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the State of New York in which respondent Bohack is located. Bohack purchases these food products, including fresh fruits and vegetables, and causes them to be transported from the growing

areas or packing plants of sellers located in various States of the United States to Bohack's warehouses and retail stores in the State of New York. Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent Bohack.

PAR. 7. In the course and conduct of its business, respondent Bohack has been and is now utilizing the services of respondent Henderson Dist. as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Henderson Dist. performs valuable services for respondent Bohack and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent Henderson Dist., in performing the services enumerated above, has been and is now acting as an agent or representative of respondent Bohack and other buyers. In such capacity, Henderson Dist. is subject to and under the direct or indirect control of Bohack and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Henderson Dist. has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 8. Respondent Bohack and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Henderson Dist. without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Henderson Dist. has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Bohack and other buyers, or has been and is now subject to the direct or indirect control of respondent Bohack and other buyers.

PAR. 9. The aforesaid acts and practices of respondents and each of them in receiving and accepting, directly or indirectly, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof from sellers, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Commissioners Elman and Nicholson dissented and filed dissenting statements.*

Commissioners Dixon and MacIntyre filed separate statements.*

*For reasons of economy, the text of the dissenting statements of Commissioners Elman and Nicholson and the text of the separate statements of Commissioners Dixon and MacIntyre are not published herein. However, they appear at 81 F.T.C. 203–216, Docket 8789.

INITIAL DECISION [IN DOCKET 8787] ON RESPONDENTS' MOTION FOR SUMMARY DECISION UNDER SECTION 3.24 OF THE COMMISSION'S RULES OF PRACTICE BY RAYMOND J. LYNCH, ADMINISTRATIVE LAW JUDGE

JULY 30, 1973

PRELIMINARY STATEMENT

On July 10, 1969, the Commission issued a complaint in the above-entitled proceeding, charging the respondents with violations of Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.[1] On June 26, 1972, respondents filed their answer to the complaint and denied the allegations contained therein. Pretrial conferences and discovery proceedings were held both on and off the record from May 22, 1972 to May 14, 1973. On June 4, 1973, respondents filed a motion for summary decision pursuant to Section 3.24 of the Commission's Rules of Practice. Counsel supporting the complaint, on June 18, 1973, filed a reply thereto. In addition, respondents' requests for admissions were answered by counsel supporting the complaint, briefs were filed and stipulation entered into between the parties.

The Complaint

The complaint alleges that:

In the course and conduct of its business, respondent Bohack has been and is now utilizing the services of respondent Henderson Dist. as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Henderson Dist. performs valuable services for respondent Bohack and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent Henderson Dist., in performing the services enumerated above, has been and is now acting as an agent or representative of respondent Bohack and other buyers. In such capacity, Henderson Dist. is subject to and under the direct or indirect control of Bohack and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Henderson Dist. has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

Respondent Bohack and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Henderson Dist. without paying, either directly, or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Henderson Dist. has been and is now collecting

[1] This matter was pending in United States District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals from Aug. 11, 1969 to Mar. 29, 1972.

and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Bohack and other buyers, or has been and is now subject to the direct or indirect control of respondent Bohack and other buyers, and that as a result of these business practices, respondents have violated Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Admissions by Counsel Supporting the Complaint

Pursuant to respondents' request for admissions of complaint counsel's contentions of law and fact, counsel supporting the complaint admit that:

1. Buyer respondent does not own or have any financial or other interest in the business of either of the broker respondents, and does not in any way share in the profits or losses of either of the broker respondents.

2. No director, officer or employee of buyer respondent owns all or any part of either of the broker respondents, or has any financial or other interest in the business of either of the broker respondents or shares in any way in the profits or losses of either of the broker respondents.

3. No broker respondent is a director, officer, manager or shareholder of buyer respondent or other buyers; and no director, officer or employee of buyer respondent is a director, officer, manager or shareholder of either of the broker respondents.

4. There are no common officers, directors, shareholders, employees or other personnel between respondent brokers and respondent sellers.

5. Broker respondents have not entered into any express contract or agreement to act as an agent, representative or other intermediary of buyer respondent or other buyers or for or in behalf of, or subject to the direct or indirect control of buyer respondent or other buyers.

6. The broker respondents were independently owned and managed business entities which performed *bona fide* brokerage functions of benefit to both buyers and sellers; and were not so-called "dummy brokers." Except as to words "bona fide" and "and is not a so-called 'dummy broker' ." Neither admit or deny "bona fide" because term is not defined with specificity with respect to the words "brokerage functions" which it modifies. Admit "is not a so-called 'dummy broker' " as that term is defined in *FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 168–169 (1960).

7. Complaint counsel expect to prove that the broker respondents acted as agent or representative for, or in behalf of or subject to the

direct or indirect control of respondent buyer and other buyers by inference from the following:

(a) That respondent buyer and other buyers have "utilized" the services of the respondent brokers as "ground" or "field" brokers in the purchase of fresh fruits and vegetables and usually not the services of other "ground" or "field" brokers.

(b) That the respondent brokers perform services which are valuable to respondent buyer and other buyers by (i) furnishing information concerning market conditions; (ii) maintaining contact with variuos sellers; (iii) inspecting and selecting specified qualities and quantities of fresh fruits and vegetables; and (iv) negotiating purchases of specified qualities and quantities of fresh fruits and vegetables.

8. Respondent buyer and other buyers have not paid brokerage or other compensation to the broker respondents and such brokerage has been paid by sellers.

9. Complaint counsel do not contend that the buyer respondent has received or accepted any monetary payments or anything of value other than benefits complaint counsel contend arise from broker respondents' performance of the functions referred to in Paragraph 7, *supra*.

10. Complaint counsel expect to offer no evidence that the acts and practices of respondents alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition. Complaint counsel do contend that the acts and practices alleged are unfair.

Stipulation of the Parties

In addition to the agreement of the parties with respect to the respondents' request for admissions and counsel supporting the complaint's reply thereto, for the purpose of presenting the legal issue, it was agreed that a stipulation would be entered into, which follows:

A. If, as a matter of law, complaint counsel must prove any one or more of the matters set forth in Paragraphs 1 through 6, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

B. If, as a matter of law, complaint counsel must prove that buyer respondent has received or accepted any monetary payments or anything of value other than the services described in Paragraph 7(b) then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

C. If, as a matter of law, complaint counsel must prove that the acts and practices of respondents have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly

or injure, destroy or prevent competition, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

D. If, as a matter of law, the proposed evidence of complaint counsel set forth in Paragraph 7 of the admissions of complaint counsel does not establish that the broker respondents acted as agent, representative or other intermediary for, or in behalf of, or subject to the direct or indirect control of buyers, then there is no genuine issue as to material facts in this matter.

Contention of the Parties

Counsel supporting the complaint contend that Section 2(c) should be extended to apply to any situation in which it can be concluded, after analysis of the details of a broker's business and of the businesses of the sellers and buyers with whom he has done business, that the buyer realized greater benefits from the broker's services than did the seller. Complaint counsel contend that, on the basis of such a conclusion, it can be further implied that the broker was "acting in fact for or in behalf" of the buyer within the meaning of the statute and that, therefore, unless the buyer has paid any fee charged by the broker, the statute was violated.

Respondents' counsel contend that to establish a Section 2(c) violation, complaint counsel must show that one aspect of the transactions at issue was for the respondent buyer "to receive or accept" something of value "as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof." Complaint counsel, however, do not assert that the buyer has received or accepted any allowance or discount in lieu of brokerage commission or other compensation. Rather, they simply contend that the buyer receives benefits from various brokerage functions performed by the respondent brokers.

As a matter of statutory construction, the benefits inherent in the performance of brokerage functions cannot constitute something of value as "a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof." The "thing of value" referred to in Section 2(c) means something paid as *compensation* for brokerage services, not the benefits of the performance of the brokerage function or the brokerage services themselves. If the brokerage services themselves can constitute the "thing of value," then the whole clause is a meaningless redundancy because that "thing of value" is inherent in every transaction. To adopt complaint counsel's view would be to hold that Congress wrote a meaningless clause into Section 2(c).

The Issue

There is no dispute as to the *material facts* that prevent a determina-

tion of the legal issue to wit: based upon counsel supporting the complaint's admissions with respect to respondents' actions, would respondents' conduct be in violation of the Clayton Act?

FINDINGS OF FACT

Respondent H. C. Bohack Co., Inc., hereinafter referred to as "Bohack," is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 4825 Metropolitan Avenue, Brooklyn, N.Y.

Respondent Bohack has been and is now engaged primarily in the retailing of food products and articles for personal and household use and operates a large number of retail supermarkets. As of Jan. 27, 1968, Bohack operated approximately 166 supermarkets. Bohack's volume of business is substantial, totalling in excess of $207 million annually.

Respondent Henderson Distributing Co., Inc., hereinafter referred to as "Henderson Dist.," is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at State Farmers Market, Pahokee, Fla.

Respondent Vinson Henderson, an individual, is president of corporate respondent Henderson Dist. and is located at the same address as said corporate respondent and owns all or substantially all of its stock. He formulates, directs and controls the acts, practices and policies of said corporate respondent, including the acts and practices hereinafter described.

Respondent Henderson Dist. has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida, and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Henderson Dist., in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables, is substantial.

Respondent Henderson Dist., in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the

buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent Henderson Dist.

In the course and conduct of its business for the past several years, respondent Bohack has purchased, distributed and resold, and is now purchasing, distributing and reselling, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the State of New York in which respondent Bohack is located. Bohack purchases these food products, including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Bohack's warehouses and retail stores in the State of New York. Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent Bohack.

Performance of Normal Brokerage Services

From the very adoption of the section, it has been recognized that both buyers and sellers benefit from performance of normal brokerage services by independent brokers and that the existence of such benefits is no legal or factual basis for inferring the existence of a relationship of agency between the broker and a buyer receiving such benefits. As the Commission said in *Great Atlantic and Pacific Tea Co.*, 26 F.T.C. 486, 506–507 (1930):

> In the course of conducting his business a broker must and does also render services to buyers—but those services, unlike the services rendered to the respondent by its field buying agents, are not buying services. A broker is not employed by buyers. He is employed and paid by sellers as their selling agent and he represents his seller-principals only. His activities in connection with his representation of his seller-principals are controlled by them, but, paradoxically, because of the broker's anomalous position as an independent sales agent in business for himself, he does act for buyers in a sense and he is subject to a degree of control on their part.
>
> This results from requests by buyers that brokers report complaints to their seller-principals, that brokers communicate cancellations of orders to their seller-principals, that brokers submit to their seller-principals offers of buyers to purchase commodities at prices stipulated by buyers, that brokers endeavor to make up "pool" cars of merchandise among several buyers so that the buyers may obtain the advantage of quantity prices and carload rates of freight, that brokers obtain quotations of prices from their seller-principals for the consideration of buyers, and, perhaps, in other ways. Naturally it is to the mutural interest and advantage of brokers and sellers to maintain the good will of their common customers, and brokers generally endeavor to comply with the reasonable requests of buyers along the lines indicated. In the course of negotiating sales from seller to buyer and bringing them into agreement brokers are necessarily guided somewhat by instructions from each, but in the essential particular of selling commodities and consum-

mating sales they act for and are controlled by the latter alone, who in the absence of a contract may discharge them and substitute new brokers in their places at any time.

Complaint counsel contend that respondent buyer usually uses the services of the respondent brokers rather than the services of other brokers in the purchase of fresh fruits and vegetables. This fact, if true, hardly establishes agency. It is certainly not unusual for a buyer to do business more frequently with one supplier than another and the fact that he does so does not establish that the supplier he selects is his agent. It certainly was not the intention of the statute to require a buyer to spread his business among several brokers. In fact, in *Tillie Lewis Foods, Inc., et al*, 65 F.T.C. 1099, 1136 (1964), the Commission expressly approved the seller's payment of brokerage to a broker, Bushey & Wright, on sales to a large buyer with whom the broker had had a "personal relationship" for many years dating back to the time when the buyer and broker were the same entity.

The "field broker" aspect of *Tillie Lewis Foods, supra*, is particularly enlightening as to the lack of probity, for the purpose of establishing agency, of the facts relied on by complaint counsel. The Commission, in holding that seller payment of brokerage did not violate Section 2(c), described the broker's activity in a discussion which shows that brokerage services which benefit both buyers and sellers do not establish a violation of Section 2(c):

* * * the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice. [65 F.T.C. at 1132]

These findings as to the legitimate brokerage functions of shipping point brokers which are not violative of Section 2(c) are sufficiently close to a number of the admitted contentions of Paragraph 7 of the admissions as to demonstrate that the contentions themselves, even if established, would not, under Commission precedents, carry the burden necessary to sustain a violation here.

In short, the facts by which complaint counsel seek to establish agency of the broker respondents for buyers are nothing more than a description of the functions necessarily and historically performed by brokers acting as independent intermediaries bringing buyer and seller together. It is the essence of the business operations of independent brokers that they negotiate sales transactions and, in the course of such

negotiations, perform acts beneficial to both buyer and seller. But, in the absence of circumstances evidencing the kind of control by the buyer over the broker contemplated by Section 2(c), the factual contentions of complaint counsel set forth in Paragraph 7 of the request for admissions are totally inadequate to establish that a broker is either an agent of a buyer or in violation of Section 2(c).

Complaint counsel's approach to proof of an agency relationship which violates Section 2(c) is highly unrealistic and ignores the economic realities of the brokerage business. Because it is unrealistic, it would be impossible to apply the approach fairly and predictably. As a result, the threat of a 2(c) proceeding against any buyer or seller who deals with an independent broker would cause buyers and sellers to cease to do business with independent brokers.

Complaint counsel's approach to proof of a 2(c) violation ignores the essential economic character of brokers as intermediaries who promote trade by bringing buyers and sellers together and who act for their own interest in earning a fee and not as the representative of either party to the transaction. In some transactions, the broker may first be approached by a seller to find an outlet for the seller's goods; in others, the broker may be first approached by a buyer seeking a source of supply. In all instances, both buyers and sellers will benefit from the transaction. Both will receive information concerning conditions in the market and the availability of goods. Both will, by utilizing the services of the broker, save expense which they would otherwise have borne. The seller, for example, will have saved the expense of making his own sales calls and the buyer will have saved the expense of making his own buying calls direct to the sellers. Both will benefit from any negotiation the broker may have carried on to bring about a price favorable to both parties. Thereafter, both will benefit in the event of claims by one or the other; the broker, in the interest of protecting the fee which he has earned and of protecting his relationships with both parties for the future, will mediate and seek to resolve the controversy to the satisfaction of both parties. In every aspect of the brokerage function, the point is the same; both parties benefit from the services of an independent broker, but the broker performs the services for his own purpose, which is to consummate the transaction and obtain his commission.

It is no answer to suggest that independent brokers drop the contested services. The services are intrinsic to the brokerage function. Other types of middlemen engaged in distribution provide a variety of services to benefit both buyers and sellers and thereby encourage them to do business with them. These include all of the same types of benefit complaint counsel allege in this case to be the basis for implying agency. If, because of the rule of law being proposed by complaint counsel, these

broker respondents and other independent brokers could not provide such benefits, they, of course, would not be competitive with other forms of distribution such as commission merchants, wholesalers, the seller's own sales force and the like, and would, in time, disappear from the competitive arena.

CONCLUSIONS

The legislative history of Section 2(c) demonstrates conclusively that the only purpose of the statute is to prevent price discrimination among customers of the same seller which arises when the seller pays brokerage direct to a buyer or indirectly to the buyer through a dummy or nominee broker of the buyer. The effect of this legislative history upon the proper construction of the statute has, furthermore, been confirmed by the United States Supreme Court in *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166 (1960). That case involved a preferential allowance granted by a seller direct to a buyer in lieu of brokerage. The allowance was found to have resulted in a price discrimination in favor of the buyer and to be, therefore, within the prohibitive scope of Section 2(c). With respect to the proper construction of Section 2(c), the Court affirmed that:

> The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. [363 U.S. at 168]

It further affirmed with respect to Section 2(c) that:

> One of the favorite means of obtaining an indirect concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, * * * to cover * * * all other means by which brokerage could be used to effect price discrimination. [363 U.S. at 169]

A summary decision for respondents is appropriate even though complaint counsel state in response to the request for admissions that they intend to claim that payment of brokerage by sellers in the circumstances of this case is unfair. The basis for this claim is unclear, although apparently complaint counsel believe buyers receive greater benefits from the services of these brokers than do sellers. This belief is, in the opinion of the administrative law judge, unfounded. In any event, it is quite immaterial to this proceeding because this proceeding is brought under Section 2(c) of the Robinson-Patman Act, not under Section 5 of the Federal Trade Commission Act. Section 2(c) is not and was never intended to be a vehicle through which the Federal Trade Commission would substitute its judgments for those of the market place to determine when independent brokers should be paid and by whom. The Commission's only function under Section 2(c) is to deter-

mine whether an abuse of brokerage exists which results or is likely to result in price discrimination; there is no such result or likelihood of such a result involved in this proceeding.

To establish a Section 2(c) violation, complaint counsel must show that one aspect of the transactions at issue was for the respondent buyer "to receive or accept" something of value "as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof." Complaint counsel, however, do not assert that the buyer has received or accepted any allowance or discount in lieu of brokerage commission or other compensation. Rather, they simply contend that the buyer receives benefits from various brokerage functions performed by the respondent brokers. The "thing of value" referred to in Section 2(c) means something paid as *compensation* for brokerage services, not the benefits of the performance of the brokerage function or the brokerage services themselves. If the brokerage services themselves can constitute the "thing of value," then the whole clause is a meaningless redundancy because that "thing of value" is inherent in every transaction.

Review of the full range of cases decided under Section 2(c) reveals no support for complaint counsel's theory. For example, in *Webb-Crawford Co., et al.* v. *F.T.C.*, 109 F.2d 268 (5th Cir. 1940), the brokerage services provided by Daniel Brokerage Company to Webb-Crawford were not the consideration as to which a violation was found; brokerage partnership distributions were the illegal considerations. In *Independent Grocers Alliance Distributing Co.*, 203 F.2d 941 (7th Cir. 1953), dividends and advertising allowances were found illegal. In *Broch, supra,* of course, the illegal consideration was a cash discount. But in none of the adjudicated 2(c) cases is the brokerage service itself the illegal consideration. In the more than 37 years since the enactment of Section 2(c), the Commission has litigated hundreds of cases charging violations of that section. In none of those cases has a buyer or seller been held to violate the section on the theory that the brokerage services themselves could be the "thing of value" received "as a commission, brokerage, or other compensation, or* * *allowance or discount in lieu thereof."

In prior Section 2(c) litigation, the Commission consistently has regarded the "thing of value" as the payment received or entitled to be received by the broker as compensation for his services and has found a violation only where that thing of value was passed on to the buyer. As complaint counsel can point to no such passing on from respondent brokers to respondent buyer of anything of value outside the legitimate brokerage function, another essential element of proof of a 2(c) violation is absent.

The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding.

ORDER

It is ordered, That respondents' motion for summary decision be, and the same hereby is, granted.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed in its entirety.

Appearances

For the Commission: *Louis R. Sernoff, Lewis F. Parker, Francis C. Mayer, Martin A. Rosen, James C. Donoghue* and *Eliot G. Disner.*

For the respondents: *McDermott, Will & Emery,* Chicago, Ill. for Jewel Companies, Inc. *Collier, Shannon, Rill & Edwards,* Wash., D.C. for Jack Stires, Inc. and John C. Stires II.

COMPLAINT IN DOCKET NO. 8788

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are violating the provisions of Subsection (c) of Section 2 of the Clayton Act, as amended, (15 U.S.C. Section 13) hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Jewel Companies, Inc., hereinafter referred to as "Jewel" is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 135 South LaSalle Street, Chicago, Ill.

PAR. 2. Respondent Jewel has been and is now engaged primarily in the retailing of food products and other articles for personal and household use and operates a large number of retail stores, including supermarkets, grocery stores, drugstores, department stores, retail pantries and home service routes. As of January 29, 1968, Jewel operated approximately 364 grocery stores in various States of the United States. Respondent Jewel is also engaged in the wholesale food business. Jewel's volume of business is substantial, totalling in excess of $1.2 billion annually.

PAR. 3. Respondent Jewel, in the operation of its retail and wholesale food business, purchases large quantities of fresh fruits and vegetables from numerous sellers located throughout the United States for resale to its customers. Most of these fresh fruits and vegetables are purchased by J.E. Perishables, a division of respondent Jewel, with offices located at 1955 West North Avenue, Melrose Park, Ill.

PAR. 4. Respondent Jack Stires, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State

of California with its office and principal place of business located at 795 Desert Gardens Drive, El Centro, Calif.

Respondent John C. Stires II, an individual, is president of corporate respondent Jack Stires, Inc., and is located at the same address as said corporate respondent and owns all or substantially all of its stock. He formulates, directs and controls the acts, practices and policies of said corporate respondent, including the acts and practices hereinafter described.

PAR. 5. Respondent Jack Stires, Inc. has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the States of California and Arizona, and purchases by buyers located in various States of the United States other than the States of California and Arizona. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Jack Stires, Inc. in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

PAR. 6. Respondent Jack Stires, Inc., in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the States of California and Arizona and purchases by buyers located in various States of the United States other than the States of California and Arizona in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent Jack Stires, Inc.

PAR. 7. In the course and conduct of its business for the past several years, respondent Jewel has purchased, distributed and resold, and is now purchasing, distributing and reselling, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the State of Illinois in which respondent Jewel is located. Jewel purchases fresh fruits and vegetables and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Jewel's warehouses and retail stores in the State of Illinois and various other States in the United States. Thus, there has been and is now a continuous course of

trade in commerce in the purchase and resale of said food products by respondent Jewel.

PAR. 8. In the course and conduct of its business, respondent Jewel has been and is now utilizing the services of respondent Jack Stires, Inc. as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Jack Stires, Inc. performs valuable services for respondent Jewel and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables and by negotiating purchases of said products at the most favorable prices. Respondent Jack Stires, Inc., in performing the services enumerated above, has been and is now acting as an agent or representative of respondent Jewel and other buyers. In such capacity, Jack Stires, Inc. is subject to and under the direct or indirect control of Jewel and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Jack Stires, Inc. has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

In addition, respondent Jewel has been and is now utilizing the services of John P. Storm, a California corporation, located at 314 E. John Street, Salinas, Calif., as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. In such capacity, John P. Storm performs the same or substantially the same services for respondent Jewel as those performed by Jack Stires, Inc. for respondent Jewel, described above, while acting as an agent or representative of respondent Jewel and subject to and under the direct or indirect control of respondent Jewel in transactions with sellers. In connection with such transactions, John P. Storm has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 9. Respondent Jewel and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Jack Stires, Inc. without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Jack Stires, Inc. has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Jewel and other buyers, or has been and is now subject to the direct or indirect control of respondent Jewel and other buyers.

Moreover, respondent Jewel has received and is now receiving valuable "ground" or "field" broker services from John P. Storm without

paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, John P. Storm has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Jewel or has been and is now subject to the direct or indirect control of respondent Jewel.

PAR. 10. The aforesaid acts and practices of respondents and each of them in receiving and accepting, directly or indirectly, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof from sellers, are in violation of Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Commissioners Elman and Nicholson dissented and filed dissenting statements.*

Commissioners Dixon and MacIntyre filed separate statements.*

INITIAL DECISION [IN DOCKET 8788] BY ANDREW C. GOODHOPE, ADMINISTRATIVE LAW JUDGE

AUGUST 1, 1973

PRELIMINARY STATEMENT

The complaint in this matter was issued by the Commission on July 10, 1969. Thereafter extended litigation took place both in the courts and before the Commission itself. On June 2, 1972, respondents filed answers to the complaint in which they admitted certain allegations in the complaint but denied that they had violated Section 2(c) of the Robinson-Patman Act as alleged in the complaint. The matter was assigned to the undersigned administrative law judge on Apr. 13, 1973. Extensive pretrial preparations have been made and on June 4, 1973, the respondents filed a motion for summary decision pursuant to Section 3.24 of the Rules of Practice of the Commission. This motion was predicated upon respondents' request for admissions of complaint counsel's contentions of law and fact, the response of complaint counsel to such request and a stipulation entered into between complaint counsel and counsel for the respondents, all of which are a part of the record herein. The respondents' motion for summary decision and opposition thereto have been fully briefed. Based upon the complaint, respondents' answers thereto, the request for admissions and the response thereto and the stipulation entered into between the parties, the administrative law judge makes the following findings of fact.

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*For reasons of economy, the text of the dissenting statements of Commissioners Elman and Nicholson and the text of the separate statements of Commissioners Dixon and MacIntyre are not published herein. However, they appear at 81 F.T.C. 203–216, Docket 8789.

FINDINGS OF FACT

1. Respondent Jewel Companies, Inc. (Jewel) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 135 S. LaSalle Street, Chicago, Ill.

2. Respondent Jewel is primarily engaged in the retailing of food products and other articles for personal and household use which it sells through a large number of retail stores, including supermarkets, grocery stores, drug stores, department stores, retail pantries and home service routes. As of Jan. 29, 1968, Jewel operated approximately 364 grocery stores in the United States. It is also engaged in the wholesale food business. Its volume of business is substantial, totaling in excess of one billion dollars annually.

3. Respondent Jewel purchases large quantities of fresh fruits and vegetables from numerous sellers throughout the United States for resale through its retail stores and to other retailers. Most of these purchases are made by J.E. Perishables, a division of Jewel, located in Melrose Park, Ill.

4. Respondent Jack Stires, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal place of business located at 795 Desert Gardens Drive, El Centro, Calif.

5. Respondent John C. Stires II is an individual and president of corporate respondent Jack Stires, Inc., owns substantially all of its stock and formulates, directs and controls the acts, practices and policies of Jack Stires, Inc., including the acts and practices hereinafter described.

6. Respondent Jack Stires, Inc. has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the States of California and Arizona, and purchases by buyers located in various States of the United States other than the States of California and Arizona. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Jack Stires, Inc. in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

7. Respondent Jewel and respondent Jack Stires, Inc. are both engaged in commerce as "commerce" is defined in the Clayton Act.

Admissions

As a result of respondents' request for admissions and complaint counsel's response thereto:

1. Buyer respondent does not own or have any financial or other interest in the business of either of the broker respondents, and does not in any way share in the profits or losses of either of the broker respondents.

2. No director, officer or employee of buyer respondent owns all or any part of either of the broker respondents, or has any financial or other interest in the business of either of the broker respondents or shares in any way in the profits or losses of either of the broker respondents.

3. No broker respondent is a director, officer, manager or shareholder of buyer respondent or other buyers; and no director, officer or employee of buyer respondent is a director, officer, manager or shareholder of either of the broker respondents.

4. There are no common officers, directors, shareholders, employees or other personnel between respondent brokers and respondent buyers.

5. Broker respondents have not entered into any express contract or agreement to act as an agent, representative or other intermediary of buyer respondent or other buyers or for or in behalf of, or subject to the direct or indirect control of buyer respondent or other buyers.

6. The broker respondents were independently owned and managed business entities which performed *bona fide* brokerage functions of benefit to both buyers and sellers; and were not so-called "dummy brokers."

7. Complaint counsel expect to prove that the broker respondents acted as agent or representative for, or in behalf of or subject to the direct or indirect control of respondent buyer and other buyers by inference from the following:

(a) That respondent buyer and other buyers have "utilized" the services of the respondent brokers as "ground" or "field" brokers in the purchase of fresh fruits and vegetables and usually not the services of other "ground" or "field" brokers.

(b) That respondent brokers perform services which are valuable to respondent buyer and other buyers by (i) furnishing information concerning market conditions, (ii) maintaining contact with various sellers, (iii) inspecting and selecting specified qualities and quantities of fresh fruits and vegetables and (iv) negotiating purchases of specified qualities and quantities of fresh fruits and vegetables.

8. Respondent buyers and other buyers have not paid brokerage or other compensation to the broker respondents and such brokerage has been paid by sellers.

9. Complaint counsel does not contend that the buyer respondents have received or accepted any monetary payments or anything of value other than benefits complaint counsel contend arise from broker respondents' performance of the functions referred to in Paragraph 7, *supra*.

10. Complaint counsel expect to offer no evidence that the acts and practices of respondent alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition. Complaint counsel do contend that the acts and practices alleged are unfair.

At the same time as making the admissions set forth above, complaint counsel entered into a stipulation with counsel for the respondents as follows:

A. If, as a matter of law, complaint counsel must prove any one or more of the matters set forth in Paragraphs 1 through 6, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

B. If, as a matter of law, complaint counsel must prove that buyer respondent has received or accepted any monetary payments or anything of value other than the services described in Paragraph 7(b) then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

C. If, as a matter of law, complaint counsel must prove that the acts and practices of respondents have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

D. If, as a matter of law, the proposed evidence of complaint counsel set forth in Paragraph 7 of the admissions of complaint counsel does not establish that the broker respondents acted as agent, representative or other intermediary for, or in behalf of, or subject to the direct or indirect control of sellers, then there is no genuine issue as to material facts in this matter.

Paragraphs 8 and 9 of the complaint charge the two corporate respondents and the individual respondent with violations of Section 2(c) of the Clayton Act as follows:

PARAGRAPH EIGHT: In the course and conduct of its business, respondent Jewel has been and is now utilizing the services of respondent Jack Stires, Inc. as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Jack Stires, Inc. performs valuable services for respondent Jewel and other buyers by (1) furnishing information concerning market conditions, by (2) maintaining contact with various sellers, (3) by inspecting and selecting specified qualities and quan-

tities of fresh fruits and vegetables and by (4) negotiating purchases of said products at the most favorable prices. Respondent Jack Stires, Inc., in performing the services enumerated above, has been and is now acting as an agent or representative of respondent Jewel and other buyers. In such capacity, Jack Stires, Inc. is subject to and under the direct or indirect control of Jewel and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Jack Stires, Inc. has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

In addition, respondent Jewel has been and is now utilizing the services of John P. Storm, a California corporation, located at 314 E. John Street, Salinas, California, as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. In such capacity, John P. Storm performs the same or substantially the same services for respondent Jewel as those performed by Jack Stires, Inc. for respondent Jewel, described above, while acting as an agent or representative of respondent Jewel and subject to and under the direct or indirect control of respondent Jewel in transactions with sellers. In connection with such transactions, John P. Storm has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PARAGRAPH NINE: Respondent Jewel and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Jack Stires, Inc. without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Jack Stires, Inc. has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Jewel and other buyers, or has been and is now subject to the direct or indirect control of respondent Jewel and other buyers.

Moreover, respondent Jewel has received and is now receiving valuable "ground" or "field" broker services from John P. Storm without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, John P. Storm has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Jewel or has been and is now subject to the direct or indirect control of respondent Jewel.

Discussion

Complaint counsel assert that a violation of Section 2(c) occurs whenever a broker paid by a seller performs brokerage functions of benefit to buyer as well as seller. They assert that the brokerage functions themselves as described in Paragraph 7 of the request for admissions can supply each of the necessary elements to prove a violation.

Complaint counsel have admitted that they have no proof of price discrimination or competitive injury and that there are no contractual, financial or employment ties between respondent Jewel and respondent Jack Stires, Inc.

With this as a starting point, complaint counsel apparently argue that there is some sort of a fiduciary or agency relationship between Jewel and Jack Stires, Inc. which is violated in some fashion by Jack Stires, Inc. performing certain brokerage functions which have some value to

the respondent Jewel. Complaint counsel cite no cases to support such a theory and there is nothing in the legislative history or in the actual language of Section 2(c) itself to support such a theory.

In short, complaint counsel have asserted that the performance of normal brokerage functions can itself establish that brokers are acting on behalf of buyers and that therefore the respondent Jewel should pay any fees, brokerage or salary that such brokers earn rather than the sellers of the products in question. If they do not, it is urged that Jewel and Jack Stires, Inc. both have violated Section 2(c) of the Clayton Act, as amended.

Complaint counsel rely heavily on *Rangen, Inc. et al.* v. *Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), and *Fitch* v. *Kentucky-Tennessee Light and Power Co.*, 136 F.2d 12 (6th Cir. 1943). Neither of these cases is in point since each involves commercial bribery and is decided in terms of breach of fiduciary obligation. Indeed both of these cases were decided on the basis of a particular breach of obligation which was the very form of misconduct Section 2(c) was enacted to prevent.

All of the remaining cases involving Section 2(c) are cases where it was proven or admitted that the broker was the actual agent of the buyer or was owned by the buyer or under contract to the buyer and consequently under the buyer's control. In *FTC* v. *Herzog*, 150 F.2d 450 (2d Cir. 1945), the broker there involved admitted that he was acting as an agent of buyers while receiving brokerage from sellers. Likewise, in *Biddle Purchasing Co.* v. *FTC*, 96 F.2d 687 (2d Cir. 1938), the broker there involved had entered into a written contract with the buyers to act for them as purchasing agent and to represent their best interests in all dealings with sellers.

In these proceedings, there is no allegation that the brokers are agents or employees of the buyer; rather they are admittedly independent. Furthermore, there is no intention on the part of complaint counsel to prove that brokerage was passed on to the buyer as brokerage or by any subterfuge designed to deliver brokerage to the buyer. Complaint counsel propose to offer no evidence whatsoever that the brokers acted for or in behalf of or under the control of the buyer pursuant to any prearrangement of any kind or any contract, ownership, employment or other contractual relationship between the brokers and the buyer. Instead, it is admitted by complaint counsel that the brokers are independent intermediaries, that they render services of benefit to both buyer and sellers and that the only basis for inferring either that they acted for or under the control of buyer or that brokerage was passed on to the buyer is the fact that the buyer realized certain benefits from doing business with them. Such benefits always occur

when one businessman does business with another and does not raise any factual inference either of agency or of a passing on of brokerage directly or indirectly as a subterfuge. The lack of probative value and the total legality of such benefits was recognized by the Commission as early as the *A&P* decision and as recently as *Tillie Lewis Foods*. [1]

These two cases are dispositive of the issue presented by respondents' motion for summary decision. The factual situations in both cases were virtually identical to the situation in this proceeding. In 1930, the Commission said in the *A&P* case:

> In the course of conducting his business a broker must and does also render services to buyers—but those services, unlike the services rendered to the respondent by its field buying agents, are not buying services. A broker is not employed by buyers. He is employed and paid by sellers as their selling agent and he represents his seller-principals only. His activities in connection with his representation of his seller-principals are controlled by them, but, paradoxically, because of the broker's anomalous position as an independent sales agent in business for himself, he does act for buyers in a sense and he is subject to a degree of control on their part.
>
> This results from requests by buyers that brokers report complaints to their seller-principals, that brokers communicate cancellations of orders to their seller principals, that brokers submit to their seller-principals offers of buyers to purchase commodities at prices stipulated by buyers, that brokers endeavor to make up "pool" cars of merchandise among several buyers so that the buyers may obtain the advantage of quantity prices and carload rates of freight, that brokers obtain quotations of prices from their seller-principals for the consideration of buyers, and, perhaps, in other ways. Naturally it is to the mutual interest and advantage of brokers and sellers to maintain the good will of their common customers, and brokers generally endeavor to comply with the reasonable requests of buyers along the lines indicated. In the course of negotiating sales from seller to buyer and bringing them into agreement brokers are necessarily guided somewhat by instructions from each, but in the essential particular of selling commodities and consummating sales they act for and are controlled by the latter alone, who in the absence of a contract may discharge them and substitute new brokers in their places at any time.

Again in 1964, the Commission affirmed the propriety of the activities of field brokers in the *Tillie Lewis Foods* case as follows:

> * * * the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice.

Complaint counsel's approach to proof of a Section 2(c) violation ignores the character of brokers as intermediaries who promote trade

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[1] *In the Matter of Great Atlantic and Pacific Tea Co.*, FTC Docket 3031, 26 F.T.C. 486 (1930); *In the Matter of Tillie Lewis Foods, Inc.*, FTC Docket 7226, 65 F.T.C. 1099, 1131 (1964).

by bringing buyers and sellers together and who act for their own interest in earning a fee and not as the representative of either party to the transaction. In some transactions, the broker may first be approached by a seller to find an outlet for the seller's goods; in others, the broker may be first approached by a buyer seeking a source of supply. In all instances, both buyers and sellers will benefit from the transaction. Both will receive information concerning conditions in the market and the availability of goods. Both will, by utilizing the services of the broker, save expense which they would otherwise have borne. The seller, for example, will have saved the expense of making his own buying calls direct on the buyers. Both will benefit from any negotiation the broker may have carried on to bring about a price favorable to both parties. Thereafter, both will benefit in the event of claims by one or the other. The broker, in the interest of protecting the fee which he has earned and of protecting his relationships with both parties for the future, will mediate and seek to resolve the controversy to the satisfaction of both parties. In every aspect of the brokerage function, the point is the same; both parties benefit from the services of an independent broker, but the broker performs the services for his own purpose, which is to consummate the transaction and obtain his commission.

It is no answer to suggest that independent brokers drop the contested services. The services are intrinsic to the brokerage function. Other types of middlemen engaged in distribution provide a variety of services to benefit both buyers and sellers and thereby encourage them to do business with them. These include all of the same types of benefit complaint counsel allege in this case to be the basis for implying agency. If, because of the rule of law being proposed by complaint counsel, Jack Stires, Inc. and other independent brokers could not provide such benefits, they, of course, would not be competitive with other forms of distribution such as commission merchants, wholesalers, the seller's own sales force and the like and would, in time, disappear from the competitive arena.

The contention of complaint counsel that the "thing of value" referred to in Section 2(c) includes the brokerage services which the brokers performed constitutes something as compensation which was given to the respondent must be rejected. A review of the cases decided under Section 2(c) supplies no support for this theory. In every case, the "thing of value" paid as compensation was actual cash which could be computed from the transactions there involved. In no case has the "thing of value" been equated in terms of activities inherently incidental to the performance of the brokerage function.

Furthermore, the legislative history of Section 2(c) as pointed out by the Supreme Court in *FTC* v. *Broch & Co.*, 363 U.S. 166 (1960), makes

it clear that the thrust of the section was to prevent price discrimination among customers of the same seller which arises when the seller pays brokerage direct to a buyer or indirectly to a buyer through a dummy broker or other representative of the buyer. In *Broch*, the Court stated (p. 168) that:

> The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.

And further, the Court affirmed with respect to Section 2(c) (p. 169) that:

> One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, * * * to cover * * * all other means by which brokerage could be used to effect price discrimination.

As recently as 1967, the Commission has pointed out in an opinion, *In the Matter of Modern Marketing Services, Inc.*, FTC Docket 3783, 71 F.T.C. 1676 (1685):

> As we pointed out in our brief filed as amicus curiae in *Empire Rayon Co., Inc., supra:* "The crucial question in every case brought under Section 2(c) is whether the buyer is receiving preferential treatment effected through the payment of brokerage, or other compensation, or any allowance or discount in lieu thereof."

Complaint counsel have admitted that in this case there is neither price discrimination nor competitive injury.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the respondents and over the subject matter involved in this proceeding.

2. From the above discussion, it is concluded that respondents' motion for summary decision must be granted and the complaint dismissed.

ORDER

It is ordered, That respondents' motion for summary decision be, and the same hereby is, granted.

It is further ordered, That the complaint herein be, and the same thereby is, dismissed.

It is further ordered, That request for oral argument upon this motion for summary decision be denied.

DOCKET NO. 8789—BORMAN FOOD STORES, INC.

Appearances

For the Commission: *Louis R. Sernoff, Lewis F. Parker, Francis C. Mayer, Martin A. Rosen, James C. Donoghue* and *Eloit G. Disner.*

For the respondent: *Arent, Fox, Kintner, Plotkin & Kahn,* Wash., D.C. and *Friedman, Meyers & Keyes,* Detroit Mich.

INITIAL DECISION BY ANDREW C. GOODHOPE, ADMINISTRATIVE LAW JUDGE

JULY 30, 1973

PRELIMINARY STATEMENT

The complaint in this matter was issued by the Commission on July 10, 1969. Thereafter extended litigation took place both in the courts and before the Commission itself. On June 2, 1972, respondent filed an answer to the complaint in which it admitted certain allegations in the complaint but denied that it had violated Section 2(c) of the Robinson-Patman Act as alleged in the complaint. The matter was assigned to the undersigned administrative law judge on Apr. 13, 1973. Extensive pretrial preparations have been made and on June 4, 1973, the respondent filed a motion for summary decision pursuant to Section 3.24 of the Rules of Practice of the Commission. This motion was predicated upon respondent's request for admissions of complaint counsel's contentions of law and fact, the response of complaint counsel to such request and a stipulation entered into between complaint counsel and counsel for the respondent, all of which are a part of the record herein. The respondent's motion for summary decision and opposition thereto have been fully briefed. Based upon the complaint, respondent's answer thereto, the request for admissions and the response thereto and the stipulation entered into between the parties, the administrative law judge makes the following findings of fact.

FINDINGS OF FACT

1. Respondent Borman Food Stores, Inc. (Bormans) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan with its office and principal place of business located at 12300 Mark Twain, Detroit, Mich.

2. Bormans is primarily a food retailer and sells other articles for personal and household use through a substantial number of retail stores, including supermarkets, drugstores and department stores. Its total volume of business was in excess of 300 million dollars as of Jan. 1968.

3. Bormans is engaged in commerce, as "commerce" is defined in the Clayton Act.

4. The P & R Brokerage Co. (P & R) is a California partnership located in Salinas, Calif.

5. P & R was and is now engaged in business primarily as a ground and field broker effecting sales of fresh fruits and vegetables by sellers located in California and purchased by buyers in various States of the United States. In such capacity, P & R has been paid commissions, brokerage or other compensation in connection with the effecting of purchases and sales of fresh fruits and vegetables by the sellers of such products.

Admissions

As a result of respondent's request for admissions and complaint counsel's response thereto:

1. The respondent Bormans does not own or have any financial interest in the business of P & R and does not in any way share in the profits or losses of P & R.

2. No director, officer or employee of Bormans owns all or any part of P & R, or has any financial or other interest in the business of P & R or shares in any way in the profits or losses of P & R.

3. Neither P & R nor any person associated with P & R is a director, officer, manager or shareholder of Bormans or any other buyer and no director, officer or employee of Bormans is a director, officer, manager or shareholder of P & R.

4. There are no common officers, directors, shareholders, employees or other personnel between Bormans and P & R.

5. P & R has not entered into any express contract or agreement to act as an agent, representative or other intermediary for or in behalf of, or subject to the direct or indirect control of, Bormans or any other buyer.

6. P & R is an independently owned and managed business entity which performed brokerage functions of benefit to both buyers and sellers and is not a so-called "dummy broker."

7. Complaint counsel expect to prove that P & R acted as an agent or representative for or in behalf of or subject to the direct or indirect control of Bormans and other buyers by interference from the following:

(a) That Bormans and other buyers have "utilized" the services of P & R as "ground" or "field" brokers in the purchase of fresh fruits and vegetables and usually not the services of other "ground" or "field" brokers.

(b) That P & R has performed services which are valuable to Bormans and other buyers by (i) furnishing information concerning market conditions, (ii) maintaining contact with various sellers, (iii) inspecting and selecting specified qualities and quantities of fresh fruits and vegetables and (iv) negotiating purchases of specified qualities and quantities of fresh fruits and vegetables.

8. Bormans and other buyers have not paid brokerage or other compensation of P & R and such brokerage has been paid by sellers.

9. Complaint counsel do not contend that Bormans has received or accepted any monetary payments or anything of value other than benefits complaint counsel contend arise from P & R's performance of the functions referred to in Paragraph 7(b), *supra*.

10. Complaint counsel expect to offer no evidence that the acts and practices of either Bormans or P & R alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition. Complaint counsel do contend that the acts and practices alleged are unfair.

At the same time as making the admissions set forth above, complaint counsel entered into a stipulation with counsel for the respondent as follows:

A. If, as a matter of law, complaint counsel must prove any one or more of the matters set forth in Paragraphs 1 through 6, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

B. If, as a matter of law, complaint counsel must prove that buyer respondent has received or accepted any monetary payments or anything of value other than the services described in Paragraph 7(b) then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

C. If, as a matter of law, complaint counsel must prove that the acts and practices of respondent have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

D. If, as a matter of law, the proposed evidence of complaint counsel set forth in Paragraph 7 of the admissions of complaint counsel does not establish that the broker respondent acted as agent, representative or other intermediary for, or in behalf of, or subject to the direct or indirect control of buyers, then there is no genuine issue as to material facts in this matter. [1]

Paragraph 7 of the complaint in this matter charges Bormans with violation of Section 2(c) of the Clayton Act as follows:

In the course and conduct of its business, respondent Borman has been and is now utilizing the services of P & R as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. P & R performs valuable services for

[1] On Aug. 3, 1972 the Commission dismissed the complaint in this matter as to P & R Brokerage Co. and Frank V. Condello, [81 F.T.C. 201]

respondent Borman by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, and by negotiating purchases of said porducts at the most favorable prices. P & R, in performing the services enumerated above, has been and is now acting as an agent or representative of respondent Borman. In such capacity, P & R is subject to and under the direct or indirect control of Borman of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, P & R has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

DISCUSSION

Complaint counsel assert that a violation of Section 2(c) occurs whenever a broker paid by a seller performs brokerage functions of benefit to buyer as well as seller. They assert that the brokerage functions themselves as described in Paragraph 7 of the request for admissions can supply each of the necessary elements to prove a violation.

Complaint counsel have admitted that they have no proof of price discrimination or competitive injury and that there are no contractual, financial or employment ties between respondent Bormans and the P & R Brokerage Co.

With this as a starting point, complaint counsel apparently argue that there is some sort of a fiduciary or agency relationship between the sellers and the P & R Brokerage Co. which is violated in some fashion by the P & R Brokerage Co. performing certain brokerage functions which have some value to the respondent Bormans. Complaint counsel cite no cases to support such a theory and there is nothing in the legislative history or in the actual language of Section 2(c) itself to support such a theory.

In short, complaint counsel have asserted that the performance of normal brokerage functions can itself establish that brokers are acting on behalf of buyers and that therefore the respondent Bormans should pay any fees, brokerage or salary that such brokers earn rather than the sellers of the products in question. If they do not, it is urged that Bormans has violated Section 2(c) of the Clayton Act, as amended.

Complaint counsel rely heavily on *Rangen, Inc. et al.* v. *Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), and *Fitch* v. *Kentucky-Tennessee Light and Power Co.*, 136 F.2d 12 (6th Cir. 1943). Neither of these cases is in point since each involves commercial bribery and is decided in terms of breach of fiduciary obligation. Indeed both of these cases were decided on the basis of a particular breach of obligation which was the very form of misconduct Section 2(c) was enacted to prevent.

All of the remaining cases involving Section 2(c) are cases where it

was proven or admitted that the broker was the actual agent of the buyer or was owned by the buyer or under contract to the buyer and consequently under the buyer's control. In *FTC* v. *Herzog*, 150 F.2d 450 (2d Cir. 1945), the broker there involved admitted that he was acting as an agent of buyers while receiving brokerage from sellers. Likewise, in *Biddle Purchasing Co.* v. *FTC*, 96 F.2d 687 (2d Cir. 1938), the broker there involved had entered into a written contract with the buyers to act for them as purchasing agent and to represent their best interests in all dealings with sellers.

In these proceedings, there is no allegation that the brokers are agents or employees of the buyers; rather they are admittedly independent. Furthermore, there is no intention on the part of complaint counsel to prove that brokerage was passed on to the buyers as brokerage or by any subterfuge designed to deliver brokerage to the buyers. Complaint counsel propose to offer no evidence whatsoever that the brokers acted for or in behalf of or under the control of the buyers pursuant to any prearrangement of any kind or any contract, ownership, employment or other contractual relationship between the brokers and the buyers. Instead, it is admitted by complaint counsel that the brokers are independent intermediaries, that they render services of benefit to both buyers and sellers and that the only basis for inferring either that they acted for or under the control of buyers or that brokerage was passed on to the buyers is the fact that the buyers realized certain benefits from doing business with them. Such benefits always occur when one businessman does business with another and does not raise any factual inference either of agency or of a passing on of brokerage directly or indirectly as a subterfuge. The lack of probative value and the total legality of such benefits was recognized by the Commission as early as the *A&P* decision and as recently as *Tillie Lewis Foods*.[2]

These two cases are dispositive of the issue presented by respondent's motion for summary decision. The factual situations in both cases were virtually identical to the situation in this proceeding. In 1930, the Commission said in the *A&P* case:

> In the course of conducting his business a broker must and does also render services to buyers—but those services, unlike the services rendered to the respondent by its field buying agents, are not buying services. A broker is not employed by buyers. He is employed and paid by sellers as their selling agent and he represents his seller-principals only. His activities in connection with his representation of his seller-principals are controlled by them, but, paradoxically, because of the broker's anomalous position as an independent sales agent in business for himself, he does act for buyers in a sense and he is subject to a degree of control on their part.

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[2] *In the Matter of Great Atlantic and Pacific Tea Co.*, FTC Docket 3031, 26 F.T.C. 486 (1930); *In the Matter of Tillie Lewis Foods, Inc.*, FTC Docket 7226, 65 F.T.C. 1099, 1131 (1964).

This results from requests by buyers that brokers report complaints to their seller-principals, that brokers communicate cancellations of orders to their seller-principals, that brokers submit to their seller-principals offers of buyers to purchase commodities at prices stipulated by buyers, that brokers endeavor to make up "pool" cars of merchandise among several buyers so that the buyers may obtain the advantage of quantity prices and carload rates of freight, that brokers obtain quotations of prices from their seller-principals for the consideration of buyers, and, perhaps, in other ways. Naturally it is to the mutual interest and advantage of brokers and sellers to maintain the good will of their common customers, and brokers generally endeavor to comply with the reasonable requests of buyers along the lines indicated. In the course of negotiating sales from seller to buyer and bringing them into agreement brokers are necessarily guided somewhat by instructions from each, but in the essential particular of selling commodities and consummating sales they act for and are controlled by the latter alone, who in the absence of a contract may discharge them and substitute new brokers in their places at any time.

Again in 1964, the Commission affirmed the propriety of the activities of field brokers in the *Tillie Lewis Foods* case as follows:

* * * the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice.

Complaint counsel's approach to proof of a Section 2(c) violation ignores the character of brokers as intermediaries who promote trade by bringing buyers and sellers together and who act for their own interest in earning a fee and not as the representative of either party to the transaction. In some transactions, the broker may first be approached by a seller to find an outlet for the sellers' goods; in others, the broker may be first approached by a buyer seeking a source of supply. In all instances, both buyers and sellers will benefit from the transaction. Both will receive information concerning conditions in the market and the availability of goods. Both will, by utilizing the services of the broker, save expense which they would otherwise have borne. The seller, for example, will have saved the expense of making his own buying calls direct on the buyers. Both will benefit from any negotiation the broker may have carried on to bring about a price favorable to both parties. Thereafter, both will benefit in the event of claims by one or the other. The broker, in the interest of protecting the fee which he has earned and of protecting his relationships with both parties for the future, will mediate and seek to resolve the controversy to the satisfaction of both parties. In every aspect of the brokerage function, the point

is the same; both parties benefit from the services of an independent broker, but the broker performs the services for his own purpose, which is to consummate the transaction and obtain his commission.

It is no answer to suggest that independent brokers drop the contested services. The services are intrinsic to the brokerage function. Other types of middlemen engaged in distribution provide a variety of services to benefit both buyers and sellers and thereby encourage them to do business with them. These include all of the same types of benefit complaint counsel allege in this case to be the basis for implying agency. If, because of the rule of law being proposed by complaint counsel, P & R Brokerage Co. and other independnt brokers could not provide such benefits, they, of course, would not be competitive with other forms of distribution such as commission merchants, wholesalers, the seller's own sales force and the like and would, in time, disappear from the competitive arena.

The contention of complaint counsel that the "thing of value" referred to in Section 2(c) includes the brokerage services which the broker P & R performed constitutes something as compensation which was given to the respondent must be rejected. A review of the cases decided under Section 2(c) supplies no support for this theory. In every case, the "thing of value" paid as compensation was actual cash which could be computed from the transactions there involved. In no case has the "thing of value" been equated in terms of activities inherently incidental to the performance of the brokerage function.

Furthermore, the legislative history of Section 2(c) as pointed out by the Supreme Court in *FTC* v. *Broch & Co.*, 363 U.S. 166 (1960), makes it clear that the thrust of the section was to prevent price discrimination among customers of the same seller which arises when the seller pays brokerage direct to a buyer or indirectly to a buyer through a dummy broker or other representative of the buyer. In *Broch*, the Court stated (p. 168) that:

> The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.

And further, the Court affirmed with respect to Section 2(c) (p. 169) that:

> One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of §2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased §2(c) broadly, * * * to cover * * * all other means by which brokerage could be used to effect price discrimination.

As recently as 1967, the Commission has pointed out in an opinion, *In*

the Matter of Modern Marketing Services, Inc., FTC Docket 3783, 71 F.T.C. 1676 (1685):

As we pointed out in our brief filed as amicus curiae in *Empire Rayon Co., Inc., supra:* "The crucial question in every case brought under Section 2(c) is whether the buyer is receiving preferential treatment effected through the payment of brokerage, or other compensation, or any allowance or discount in lieu thereof."

Complaint counsel have admitted that in this case there is neither price discrimination nor competitive injury.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the respondent and over the subject matter involved in this proceeding.

2. From the above discussion, it is concluded that respondent's motion for summary decision must be granted and the complaint dismissed.

ORDER

It is ordered, That respondent's motion for summary decision be, and the same hereby is, granted.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed.

It is further ordered, That request for oral argument upon this motion for summary decision be denied.

Appearances

For the Commission: *Louis R. Sernoff, Lewis F. Parker, Francis C. Mayer, Martin A. Rosen, James C. Donoghue* and *Eliot G. Disner.*

For the respondents: *Lyne, Woodworth & Evarts*, Boston, Mass. for First National Stores, Inc. *Counihan, Casey & Loomis*, Wash., D.C. for Ruby Produce Company, Inc. and Samuel Harry Rubenstein.

COMPLAINT IN DOCKET NO. 8790

The Federal Trade Commission, having reason to belive that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are violating the provisions of Subsection (c) of Section 2 of the Clayton Act, as amended, (15 U.S.C. Section 13) hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent First National Stores, Inc., hereinafter referred to as "First National," is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office and principal place of business located at 5 Middlesex Avenue, Somerville, Mass.

PAR. 2. Respondent First National has been and is now engaged primarily in the retailing of food products and other articles for personal

and household use and operates a large number of retail stores, including supermarkets. As of March 30, 1968, First National operated approximately 481 grocery stores in 8 States of the United States. First National's volume of business is substantial, totalling in excess of $640 million annually as of March 30, 1968.

PAR. 3. Respondent Ruby Produce Company, Inc., hereinafter referred to as "Ruby," is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Cherry Street, Pedricktown, N.J.

Respondent Samuel Harry Rubenstein, an individual, is president of corporate respondent Ruby and is located at the same address as said corporate respondent and owns all or substantially all of its stock. He formulates, directs, and controls the acts, practices and policies of Ruby, including the acts and practices hereinafter described.

PAR. 4. Respondent Ruby has been and is now engaged in business as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida, and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Ruby, in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

PAR. 5. Respondent Ruby, in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of Florida, and purchases by buyers located in various States of the United States other than the State of Florida in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent Ruby.

PAR. 6. In the course and conduct of its business for the past several years, respondent First National has purchased, distributed and resold, and is now purchasing, distributing and reselling, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the Commonwealth of Massachusetts in which respondent First National is located. First National purchases these food

products, including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to First National's warehouses and retail stores in the Commonwealth of Massachusetts and various other States in the United States. Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent First National.

PAR. 7. In the course and conduct of its business, respondent First National has been and is now utilizing the services of respondent Ruby as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Ruby performs valuable services for respondent First National and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent Ruby, in performing the services enumerated above, has been and is now acting as an agent or representative of respondent First National and other buyers. In such capacity, Ruby is subject to and under the direct or indirect control of First National and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Ruby has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 8. Respondent First National and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Ruby without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Ruby has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent First National and other buyers, or has been and is now subject to the direct or indirect control of respondent First National and other buyers.

PAR. 9. The aforesaid acts and practices of respondents and each of them in receiving and accepting, directly or indirectly, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof from sellers, are in violation of Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Commissioners Elman and Nicholson dissented and filed dissenting statements.*

* For reasons of economy, the text of the dissenting statements of Commissioners Elman and Nicholson are not published herein. However, they appear at 81 F.T.C. 203–214, Docket 8789.

Commissioners Dixon and MacIntyre filed separate statements.*

INITIAL DECISION [IN DOCKET 8790] BY ANDREW C. GOODHOPE, ADMINISTRATIVE LAW JUDGE

AUGUST 3, 1973

PRELIMINARY STATEMENT

The complaint in this matter was issued by the Commission on July 10, 1969. Thereafter extended litigation took place both in the courts and before the Commission itself. On June 5, 1972, respondents filed answers to the complaint in which they admitted certain allegations in the complaint but denied that they had violated Section 2(c) of the Robinson-Patman Act as alleged in the complaint. The matter was assigned to the undersigned administrative law judge on Apr. 13, 1973. Extensive pretrial preparations have been made and on June 4, 1973, the respondents filed a motion for summary decision pursuant to Section 3.24 of the rules of practice of the Commission. This motion was predicated upon respondents' request for admissions of complaint counsel's contentions of law and fact, the response of complaint counsel to such request and a stipulation entered into between complaint counsel and counsel for the respondents, all of which are a part of the record herein. The respondents' motion for summary decision and opposition thereto have been fully briefed. Based upon the complaint, respondents' answers thereto, the request for admissions and the response thereto and the stipulation entered into between the parties, the administrative law judge makes the following findings of fact.

FINDINGS OF FACT

1. Respondent First National Stores, Inc. (First National) is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office and principal place of business located at 5 Middlesex Avenue, Somerville, Mass.

2. Respondent First National has been and is now engaged primarily in the retailing of food products and other articles for personal and household use and operates a large number of retail stores, including supermarkets. As of Mar. 30, 1968, First National operated approximately 481 grocery stores in eight States of the United States. First National's volume of business is substantial, totaling in excess of 640 million dollars annually as of Mar. 30, 1968.

3. Respondent Ruby Produce Company, Inc. (Ruby) is a corporation

*For reasons of economy, the text of the separate statements of Commissioners Dixon and MacIntyre are not published herein. However, they appear at 81 F.T.C. 214–215, Docket 8789.

organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Cherry Street, Pedricktown, N.J.

4. Respondent Samuel Harry Rubenstein, an individual, is president of corporate respondent Ruby and is located at the same address as said corporate respondent and owns all or substantially all of its stock. He formulates, directs and controls the acts, practices and policies of Ruby, including the acts and practices hereinafter described.

5. Respondent Ruby has been and is now engaged in business as a "ground" and "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Ruby, in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables, is substantial.

6. Respondent First National and respondent Ruby are both engaged in commerce as "commerce" is defined in the Clayton Act.

Admissions

As a result of respondents' request for admissions and complaint counsel's response thereto:

1. Buyer respondent does not own or have any financial or other interest in the business of the broker respondent, and does not in any way share in the profits or losses of the broker respondent.

2. No director, officer or employee of buyer respondent owns all or any part of the broker respondent, or has any financial or other interest in the business of the broker respondent or shares in any way in the profits or losses of the broker respondent.

3. The broker respondent is not a director, officer, manager or shareholder of buyer respondent or other buyers; and no director, officer or employee of buyer respondent is a director, officer, manager or shareholder of the broker respondent.

4. There are no common officers, directors, shareholders, employees or other personnel between respondent broker and buyers with whom respondent broker deals.

5. Broker respondent has not entered into any express contract or agreement to act as an agent, representative or other intermediary of buyer respondent or other buyers or for or in behalf of, or subject to the direct or indirect control of buyer respondent or other buyers.

6. The broker respondent was an independently owned and managed

business entity which performed bona fide brokerage functions of benefit to both buyers and sellers; and was not a so-called "dummy broker."

7. Complaint counsel expect to prove that the broker respondent acted as agent or representative for, or in behalf of or subject to the direct or indirect control of respondent buyer and other buyers by inference from the following:

(a) That respondent buyer and other buyers have "utilized" the services of the respondent broker as a "ground" or "field" broker in the purchase of fresh fruits and vegetables and usually not the services of other "ground" or "field" brokers.

(b) That the respondent broker performs services which are valuable to respondent buyer and other buyers by (i) furnishing information concerning market conditions, (ii) maintaining contact with various sellers, (iii) inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, and (iv) negotiating purchases of specified qualities and quantities of fresh fruits and vegetables.

8. Respondent buyer and other buyers have not paid brokerage or other compensation to the broker respondent and such brokerage has been paid by sellers.

9. Complaint counsel does not contend that the buyer respondent has received or accepted any monetary payments or anything of value other than benefits complaint counsel contend arise from broker respondent's performance of the functions referred to in Paragraph 7, *supra*.

10. Complaint counsel expect to offer no evidence that the acts and practices of respondents alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition. Complaint counsel do contend that the acts and practices alleged are unfair.

At the same time as making the admissions set forth above, complaint counsel entered into a stipulation with counsel for the respondents as follows:

A. If, as a matter of law, complaint counsel must prove the contrary of any one or more of the matters set forth in Paragraphs 1 through 6, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

B. If, as a matter of law, complaint counsel must prove that buyer respondent has received or accepted any monetary payments or anything of value other than the services described in Paragraph 7(b) then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

C. If, as a matter of law, complaint counsel must prove that the acts

and practices of respondents have resulted in price discrimination or may be substantially to lessen competition, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

D. If, as a matter of law, the proposed evidence of complaint counsel set forth in Paragraph 7 of the admissions of complaint counsel does not establish that the broker respondent acted as agent, representative or other intermediary for, or in behalf of, or subject to the direct or indirect control of buyers, then there is no genuine issue as to material facts in this matter.

Paragraphs 7. and 8. of the complaint charge the two corporate respondents and the individual respondent with violations of Section 2(c) of the Clayton Act as follows:

PAR. 7. In the course and conduct of its business, respondent First National has been and is now utilizing the services of respondent Ruby as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Ruby performs valuable services for respondent First National and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent Ruby, in performing the services enumerated above, has been and is now acting as an agent or representative of respondent First National and other buyers. In such capacity, Ruby is subject to and under the direct or indirect control of First National and other buyers of fresh fruits and vegetables in tranactions with sellers. In connection with such transactions, respondent Ruby has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 8. Respondent First National and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Ruby without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Ruby has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent First National and other buyers, or has been and is now subject to the direct or indirect control of respondent First National and other buyers.

Discussion

Complaint counsel assert that a violation of Section 2(c) occurs whenever a broker paid by a seller performs brokerage functions of benefit to buyer as well as seller. They assert that the brokerage functions themselves as described in Paragraph 7 of the request for admissions can supply each of the necessary elements to prove a violation.

Complaint counsel have admitted that they have no proof of price discrimination or competitive injury and that there are no contractual, financial or employment ties between respondent First National and respondent Ruby.

With this as a starting point, complaint counsel apparently argue that there is some sort of a fiduciary or agency relationship between First National and Ruby which is violated in some fashion by Ruby performing certain brokerage functions which have some value to respondent First National. Complaint counsel cite no cases to support such a theory and there is nothing in the legislative history or in the actual language of Section 2(c) itself to support such a theory.

In short, complaint counsel have asserted that the performance of normal brokerage functions can itself establish that brokers are acting on behalf of buyers and that therefore the respondent First National should pay any fees, brokerage or salary that such brokers earn rather than the sellers of the products in question. If they do not, it is urged that First National and Ruby both have violated Section 2(c) of the Clayton Act, as amended.

Complaint counsel rely heavily on *Rangen, Inc. et al.* v. *Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), and *Fitch* v. *Kentucky-Tennessee Light and Power Co.*, 136 F.2d 12 (6th Cir. 1943). Neither of these cases is in point since each involves commercial bribery and is decided in terms of breach of fiduciary obligation. Indeed both of these cases were decided on the basis of a particular breach of obligation which was the very form of misconduct Section 2(c) was enacted to prevent.

All of the remaining cases involving Section 2(c) are cases where it was proven or admitted that the broker was the actual agent of the buyer or was owned by the buyer or under contract to the buyer and consequently under the buyer's control. In *FTC* v. *Herzog*, 150 F.2d 450 (2d Cir. 1945), the broker there involved admitted that he was acting as an agent of buyers while receiving brokerage from sellers. Likewise, in *Biddle Purchasing Co.* v. *FTC*, 96 F.2d 687 (2d Cir. 1938), the broker there involved had entered into a written contract with the buyers to act for them as purchasing agent and to represent their best interests in all dealings with sellers.

In these proceedings, there is no allegation that the brokers are agents or employees of the buyer; rather they are admittedly independent. Furthermore, there is no intention on the part of complaint counsel to prove that brokerage was passed on to the buyer as brokerage or by any subterfuge designed to deliver brokerage to the buyer. Complaint counsel propose to offer no evidence whatsoever that the brokers acted for or in behalf of or under the control of the buyer pursuant to any prearrangement of any kind or any contract, ownership, employment or other contractual relationship between the brokers and the buyer. Instead, it is admitted by complaint counsel that the brokers are independent intermediaries, that they render services of

benefit to both buyer and sellers and that the only basis for interferring either that they acted for or under the control of buyer or that brokerage was passed on to the buyer is the fact that the buyer realized certain benefits from doing business with them. Such benefits always occur when one businessman does business with another and does not raise any factual inference either of agency or of a passing on of brokerage directly or indirectly as a subterfuge. The lack of probative value and the total legality of such benefits was recognized by the Commission as early as the *A&P* decision and as recently as *Tillie Lewis Foods.*[1]

These two cases are dispositive of the issue presented by respondents' motion for summary decision. The factual situations in both cases were virtually identical to the situation in this proceeding. In 1930, the Commission said in the *A&P* case:

> In the course of conducting his business a broker must and does also render services to buyers—but those services, unlike the services rendered to the respondent by its field buying agents, are not buying services. A broker is not employed by buyers. He is employed and paid by sellers as their selling agent and he represents his seller-principals only. His activities in connection with his representation of his seller-principals are controlled by them, but, paradoxically, because of the broker's anomalous position as an independent sales agent in business for himself, he does act for buyers in a sense and he is subject to a degree of control on their part.
>
> This results from requests by buyers that brokers report complaints to their seller-principals, that brokers communicate cancellations of orders to their seller principals, that brokers submit to their seller-principals offers of buyers to purchase commodities at prices stipulated by buyers, that brokers endeavor to make up "pool" cars of merchandise among several buyers so that the buyers may obtain the advantage of quantity prices and carload rates of freight, that brokers obtain quotations of prices from their seller-principals for the consideration of buyers, and, perhaps, in other ways. Naturally it is to the mutual interest and advantage of brokers and sellers to maintain the good will of their common customers, and brokers generally endeavor to comply with the reasonable requests of buyers along the lines indicated. In the course of negotiating sales from seller to buyer and bringing them into agreement brokers are necessarily guided somewhat by instructions from each, but in the essential particular of selling commodities and consummating sales they act for and are controlled by the latter alone, who in the absence of a contract may discharge them and substitute new brokers in their places at any time.

Again in 1964, the Commission affirmed the propriety of the activities of field brokers in the *Tillie Lewis Foods* case as follows:

> * * * the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small

[1] *In the Matter of Great Atlantic and Pacific Tea Co.*, FTC Docket 3031, 26 F.T.C. 486 (1930); *In the Matter of Tillie Lewis Foods, Inc.*, FTC Docket 7226, 65 F.T.C. 1099, 1131 (1964).

canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice.

Complaint counsel's approach to proof of a Section 2(c) violation ignores the character of brokers as intermediaries who promote trade by bringing buyers and sellers together and who act for their own interest in earning a fee and not as the representative of either party to the transaction. In some transactions, the broker may first be approached by a seller to find an outlet for the seller's goods; in others, the broker may be first approached by a buyer seeking a source of supply. In all instances, both buyers and sellers will benefit from the transaction. Both will receive information concerning conditions in the market and the availability of goods. Both will, by utilizing the services of the broker, save expense which they would otherwise have borne. The seller, for example, will have saved the expense of making his own buying calls direct on the buyers. Both will benefit from any negotiation the broker may have carried on to bring about a price favorable to both parties. Thereafter, both will benefit in the event of claims by one or the other. The broker, in the interest of protecting the fee which he has earned and of protecting his relationships with both parties for the future, will mediate and seek to resolve the controversy to the satisfaction of both parties. In every aspect of the brokerage function, the point is the same; both parties benefit from the services of an independent broker, but the broker performs the services for his own purpose, which is to consummate the transaction and obtain his commission.

It is no answer to suggest that independent brokers drop the contested services. The services are intrinsic to the brokerage function. Other types of middlemen engaged in distribution provide a variety of services to benefit both buyers and sellers and thereby encourage them to do business with them. These include all of the same types of benefit complaint counsel allege in this case to be the basis for implying agency. If, because of the rule of law being proposed by complaint counsel, Ruby and other independent brokers could not provide such benefits, they, of course, would not be competitive with other forms of distribution such as commission merchants, wholesalers, the seller's own sales force and the like and would, in time, disappear from the competitive arena.

The contention of complaint counsel that the "thing of value" referred to in Section 2(c) includes the brokerage services which the brokers performed constitutes something as compensation which was given to the respondent must be rejected. A review of the cases decided under Section 2(c) supplies no support for this theory. In every case, the "thing of value" paid as compensation was actual cash which could be computed from the transactions there involved. In no case has the

"thing of value" been equated in terms of activities inherently incidental to the performance of the brokerage function.

Furthermore, the legislative history of Section 2(c) as pointed out by the Supreme Court in *FTC* v. *Broch & Co.*, 363 U.S. 166 (1960), makes it clear that the thrust of the section was to prevent price discrimination among customers of the same seller which arises when the seller pays brokerage direct to a buyer or indirectly to a buyer through a dummy broker or other representative of the buyer. In *Broch*, the Court stated (p. 168) that:

> The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.

And further, the Court affirmed with respect to Section 2(c) (p. 169) that:

> One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of §2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased §2(c) broadly, * * * to cover * * * all other means by which brokerage could be used to effect price discrimination.

As recently as 1967, the Commission has pointed out in an opinion, *In the Matter of Modern Marketing Services, Inc.*, FTC Docket 3783, 71 F.T.C. 1676 (1685):

> As we pointed out in our brief filed as amicus curiae in *Empire Rayon Co., Inc., supra:* "The crucial question in every case brought under Section 2(c) is whether the buyer is receiving preferential treatment effected through the payment of brokerage, or other compensation, or any allowance or discount in lieu thereof."

Complaint counsel have admitted that in this case there is neither price discrimination nor competitive injury.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the respondents and over the subject matter involved in this proceeding.

2. From the above discussion, it is concluded that respondents' motion for summary decision must be granted and the complaint dismissed.

ORDER

It is ordered, That respondents' motion for summary decision be, and the same hereby is, granted.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed.

It is further ordered, That request for oral argument upon this motion for summary decision be denied.

DOCKETS 8786, 8787, 8788, 8789 AND 8790

[COMBINED] ORDER DISMISSING COMPLAINTS

The administrative law judges filed their initial decisions in these matters on July 30, 1973, August 1, 1973, and August 3, 1973, ordering that respondents' motions for summary decisions be granted and that the complaints herein be dismissed. No appeals were taken from the initial decisions, and on September 11, 1973, the Commission ordered that the effective dates thereof be stayed until further order of the Commission.

The Commission has now determined that the administrative law judges were correct in finding on the basis of admissions made by complaint counsel that the evidence which complaint counsel intended to offer in support of the complaints would not sustain the essential factual allegations that the brokers were acting for or in behalf of the buyers or subject to the buyers' direct or indirect control. Consequently, the dismissals of the complaints were proper. The Commission, however, does not consider the initial decisions appropriate in all respects to dispose of these matters and has determined that they should be adopted only to the extent that they hold that the evidence relied upon by complaint counsel would not support the charges that respondents had violated Section 2(c) of the Clayton Act, as amended.

It is ordered, That the initial decisions, modified as indicated herein, be, and they hereby are, adopted as the decisions of the Commission.

It is further ordered, That the complaints be, and they hereby are, dismissed.

IN THE MATTER OF

IMPERIAL OF OHIO, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 8906. Complaint, Dec. 11, 1972—Decision, Jan. 22, 1974

Consent order requiring two affiliated Cleveland, Ohio, firms engaged in the retail sales of wall-to-wall carpeting and home improvements, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Vivian L. Solganik* and *Philip R. Fine.*
For the respondents: *Leonard T. Gilbert*, Cleveland, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Imperial of Ohio, Inc., a corporation, and Imperial Aluminum, Inc., a corporation, and Albert Scholz, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation promulgated under the Truth in Lending 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 Imperial of Ohio, Inc. and Imperial Aluminum, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Ohio, with their principal offices and places of business located at 9300 Midwest Avenue, Cleveland, Ohio.

Respondent Albert Scholz is an individual and is the President of each of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondents.

PAR. 2. Imperial of Ohio, Inc., is now, and for some time last past has been, engaged in the offering for sale, sale, delivery and installation of wall-to-wall carpeting to the public at retail. Imperial Aluminum, Inc., is now, and for some time last past has been, engaged in the offering for sale, sale, delivery and installation of residential home improvements including, but not limited to, siding materials, storm windows and gutters to the public at retail.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents arrange for the extension of consumer credit, or offer to extend or arrange for the extension of such consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business, and in connection with credit sales, as the term "credit sale" is defined in Regulation Z, are now engaged,

and for some time last past have been engaged, in the extension of credit, as the term "credit" is defined in Regulation Z. Respondents many times have caused, and are now causing, their customers to execute a document entitled "Offer of Purchase Subject to Consumer Credit Protection Act of 1968," referred to herein as "the sales contract," and one or more confession of judgment (cognovit) notes for the purchase and installation of home improvements to the residence of the customer.

PAR. 5. Respondents many times, in the ordinary course of their business, negotiate to third parties the sales contracts or other instruments of indebtedness executed in connection with credit purchases.

By and through the use of both the sales contract and the cognovit note, respondents:

1. Have failed to accurately disclose the date on which the finance charge begins to accrue, as prescribed by Section 226.8(b)(1) of Regulation Z.

2. Have failed to accurately state the "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

3. Have failed to disclose the "total of payments," as prescribed by Section 226.8(b)(3) of Regulation Z.

4. Have failed to accurately disclose the number, amount and due dates, or periods of payments, scheduled to repay the indebtedness, as prescribed by Section 226.8(b)(3) of Regulation Z.

5. Have failed to state the "unpaid balance of cash price," as prescribed by Section 226.8(c)(3) of Regulation Z.

6. Have failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as prescribed by Section 226.8(c)(3) of Regulation Z.

7. Have failed to disclose the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

PAR. 6. In a number of instances, respondents have sold, and continue to sell, credit life, accident or health insurance to their customers as part of consumer credit transactions, and such insurance is not mandatory, thus making the cost of such insurance part of the amount financed, as "amount financed" is defined in Section 226.2(d) of Regulation Z. Respondents have caused the following terminology to be used in their sales contract with regard to such insurance:

4. Life Insurance ----------$_____

Accident and Health Insurance ----------$_____

By and through the use of the aforementioned sales contract and terminology with regard to credit life, health or accident insurance, respondents:

1. Have failed to disclose, in writing, to the customer that insurance coverage is not required by the creditor, as prescribed by Section 226.4(a)(5)(i) of Regulation Z.

2. Have failed to obtain specific, dated, and separately signed, affirmative written indication from customers of the desire to have insurance coverage, as prescribed by Section 226.4(a)(5)(ii) of Regulation Z.

PAR. 7. By and through the use and acceptance of the sales contract and the cognovit note, and by virtue of the work performed by respondents' employees on a customer's residence, respondents have retained or acquired, or will retain or acquire, a "security interest," as "security interest" is defined in Section 226.2(z) of Regulation Z, in real property which is used, or which is expected to be used, as the principal residence of the customer. Respondents' retention or acquisition of such security interest in said real property gives their customrs, who are extended consumer credit, as "consumer credit" is defined in Section 226.2(k) of Regulation Z, the right to rescind the transaction until midnight of the third business day following the date of consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later, as prescribed by Section 226.9 of Regulation Z.

By and through the use of the aforementioned sales contract and cognovit note, respondents:

1. Have failed to provide the "notice to customer required by federal law" to the customer on one side of a separate statement which identifies the transaction to which it relates and in the form prescribed by Section 226.9(b) of Regulation Z.

2. Have failed to set out the "effect of rescission" required by Section 226.9(d) of Regulation Z, in the manner and form prescribed by Section 226.9(b) of Regulation Z.

3. Have failed to furnish two copies of the "notice to customer required by federal law," as prescribed by Section 226.9(b) of Regulation Z.

PAR. 8. Respondents have caused additional information and provisions to appear in the various versions of the sales contracts used by both corporate respondents. Typical and illustrative examples of such additional information and provisions, but not all inclusive thereof, are the following:

NOTICE

It is agreed and understood that cancellation of this agreement at any time after —— and for any reason whatsoever shall constitute a breach thereof, and the cancelling party shall pay to the other party, as and for liquidated damages, a sum of money equal to thirty per cent of the cash price hereinafter set forth. However, it is further understood and agreed that the title or property in any of the material or items which are to be delivered

to the purchaser shall pass and be transferred to the purchaser immediately upon completion of the manufacturing process, if any, or if no manufacturing process is required, then upon delivery to said purchaser, or upon the date following the time during which the purchaser shall have been able to rescind this contract without penalty therefor, whichever event last occurs, property in said material or items shall thereupon pass and be transferred to the purchaser without any further notice thereof, and irrespective of the date of delivery as set forth herein.

In the event, however, that the purchasers cancel this order at any time prior to its completion as relates to the manufacture of merchandise, furnishing of labor or delivery of materials, and subsequent to the date set forth for cancellation and rescission herein without penalty, then in such event the purchasers, and each of them, acknowledge that they have executed a promissory note, in blank, containing a Warrant of Attorney, and do hereby authorize the Company to fill in and reduce that note to judgment against them or to any one of them, in an amount equal to thirty per cent of the purchase price as hereinafter appears, and levy execution thereon, and such amount shall be regarded as payment in full of liquidated damages for cancellation after the time herein provided by law. Should, however, the purchaser cancel this order subsequent to the manufacture of merchandise, if required, or subsequent to delivery of the materials, but prior to installation of the merchandise or materials upon the premises, if such installation herein is required, and should such cancellation occur subsequent to the time provided by law for its occurrence without penalty, then in that event, the purchasers do hereby authorize the Company to reduce the aforesaid promissory cognovit note to judgment against them in an amount equal to the cash purchase price as hereinafter set forth, less a credit for the sum which the Company would have spent for labor in the installation of the merchandise and materials, had the Company been permitted to perform in accordance with the written provisions contained herein, and levy execution thereon. Any judgment taken upon the aforesaid promissory note, as and for liquidated damages, shall be for the principal amount together with interest at the rate of eight per cent per annum from the date of cancellation.

It is specifically understood and again here reiterated that if the customer or purchaser cancels this offer or contract on or before the — day of ——, 19 —, there shall be absolutely no liability for any liquidated damages, penalty or other provision resulting from such cancellation. HOWEVER, specific provision is herein made for cancellation upon payment of liquidated damages under the following circumstances, and for which the customer has executed a promissory cognovit note in blank and authorized its use as payment for such damages: 1. Cancellation prior to manufacture or delivery of merchandise; 2. Cancellation subsequent to manufacture of merchandise but prior to delivery therefor; 3. Cancellation subsequent to delivery of merchandise but prior to installation thereof. This agreement shall constitute the entire understanding of the parties, and no other understanding collateral or otherwise shall be binding unless in writing and signed by all parties hereto. The purchasers agree to hold IMPERIAL ALUMINUM, INC. harmless for non-delivery caused by fire, strikes, war, transportation, an Act of God, or inability to secure materials.

TERMS

☐*Cash Sale*—A transaction whereby the purchase price is payable in four installments or less—*No disclosure statement required, and no right to rescission.*

☐*Credit Sale*—A transaction whereby the purchase price is to be paid in more than four installments—*Disclosure statement required.*

☐*Credit Sale with Right to Rescind*—The customer shall, in the event that this offer is accepted, have the right to rescind the resulting contract within the time so provided, in that

this transaction is one in which a security interest is or will be or may be retained or acquired in real property which is used or expected to be used as the *principal residence of the customer.*

☐*Credit Sale with No Right to Rescind*—The customer shall not, in the event this offer is accepted, have the right to rescind the resulting contract in that this transaction is one in which a security interest is or will be or may be retained or acquired in real property which is *not used or expected to be used as the principal residence of the customer.*

Said additional information has been stated, utilized or placed by the respondents so as to mislead or confuse the customer and contradicts, obscures and detracts attention from the information required to be disclosed by Regulation Z, thereby violating Section 226.6(c) of Regulation Z.

PAR. 9. Respondents have caused the following additional information and clause to appear in their contract under the heading "Waiver of Right to Rescission:"

WAIVER OF RIGHT TO RESCISSION

☐Not applicable

☐The customer does hereby waive his right to rescission for the following reasons:

1. The extension of credit is needed in order to meet a bona fide immediate personal financial urgency of the customer.

2. The customer has determined that a delay of three (3) business days in performance of the creditor's obligation under the transaction will jeopardize the welfare, health or safety of natural persons or endanger property which the customer owns or for which he is responsible, and as more fully set forth below:

By and through the use of the above-quoted provision, respondents have, in a number of instances, provided their customers with a printed form to use for the purpose of modifying or waiving his right to rescind a transaction subject to the provisions of Section 226.9 of Regulation Z, thereby violating the provisions of Section 226.9(e)(3) of Regulation Z.

PAR. 10. By the aforesaid failure to make disclosures, respondents have failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failure to comply with Regulation Z constitutes violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated a complaint charging that respondents named in the caption hereof have violated provisions of the Truth in Lending Act, 15 U.S.C. 1601, *et seq.*, and the inplementing regulation promulgated thereunder, 12 C.F.R. Section 226; and

Respondents, while this matter was pending before the administra-

tive law judge, having voluntarily entered into an agreement containing consent order to cease and desist dated May 3, 1973; and

The Commission, by order issued Sept. 18, 1973, having withdrawn this matter from adjudication pursuant to Rule 3.22(a) and Rule 2.34(d) of the Commission's Rules of Practice; and

The executed agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint which the Commission issued, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commision's rules; and

The Commission having thereafter considered the agreement containing consent order to cease and desist and having provisionally accepted the same, and the agreement having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondents Imperial of Ohio, Inc. and Imperial Aluminum, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Ohio, with their principal offices and places of business located at 9300 Midwest Avenue, Cleveland, Ohio.

Respondent Albert Scholz is an individual and is the President of each of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth, and his address is the same as that of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Imperial of Ohio, Inc., a corporation, and Imperial Aluminum, Inc., a corporation, their respective successors and assigns, and their respective officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, and respondent Albert Scholz, individually and as an officer of said corporations, in connection with the extension of consumer credit or advertisments to aid, promote or assist, directly or indirectly, in the extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. Section 226) of

the Truth in Lending Act (Pub.L. 90–321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to accurately disclose the date on which the finance charge begins to accrue, as prescribed by Section 226.8(b)(1) of Regulation Z.

2. Failing to accurately state the "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

3. Failing to disclose the "total of payments," as prescribed by Section 226.8(b)(3) of Regulation Z.

4. Failing to accurately disclose the number, amount, and due dates, or periods of payment, scheduled to repay the indebtedness, as prescribed by Section 226.8(b)(3) of Regulation Z.

5. Failing to state the "unpaid balance of cash price," as prescribed by Section 226.8(c)(3) of Regulation Z.

6. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as prescribed by Section 226.8(c)(3) of Regulation Z.

7. Failing to disclose the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

8. Failing to disclose, in writing, to the customer that insurance coverage is not required by the creditor, as prescribed by Section 226.4(a)(5)(i) of Regulation Z.

9. Failing to obtain specific, dated and separately signed, affirmative written indication from the customer of the desire to have insurance coverage, as prescribed by Section 226.4(a)(5)(ii) of Regulation Z.

10. Failing to provide the "notice to customer required by federal law" to the customer on one side of a separate statement which identifies the transaction to which it relates, and in the form prescribed by Section 226.9(b) of Regulation Z.

11. Failing to set out the "effect of rescission," required by Section 226.9(d) of Regulation Z, in the manner and form prescribed by Section 226.9(b) of Regulation Z.

12. Failing to furnish two copies of the "notice to customer required by federal law," as prescribed by Section 226.9(b) of Regulation Z.

13. Supplying any additional information, contract clause, or other statement pertaining to a transaction generally, unless such additional information, contract clause or other statement is provided in a fashion which complies with Section 226.6(c) of Regulation Z.

14. Providing their customers with any kind of printed form by which the customer may modify or waive his right to rescind a

transaction, as prescribed by Section 226.9(e)(3) of Regulation Z.

15. Failing, in any consumer credit transaction or advertisement, to make all disclosure determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner form and amount required by Sections 226.6, 226.7, 226.8, 226.9, and 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to each operating division and to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed changes in the corporate respondents such as dissolution, assignment or sale resultant in the emergence of a successor corporation, the creation or dissolution of subsidiaries, which may affect compliance obligations arising out of the order, or any other changes in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That 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

HOLIDAY MAGIC, INC., ET AL.

Docket 8834. Interlocutory Order, Jan. 23, 1974

Order granting application of complaint counsel for filing of contingent claim for restitution against estate of an individual respondent with the California State Superior Court. Complaint counsel may file a reply, within five days, to respondents' answer to the request for substitution of parties in the complaint.

Appearances

For the Commission: *Joseph S. Brownman* and *Stuart Cameron*.

For the respondents: *Glen A. Mitchell* of *Stein, Mitchell & Mezines*, Wash., D.C.

ORDER GRANTING APPLICATION TO FILE CONTINGENT CLAIM

On January 14, 1974 complaint counsel filed with the Commission an application requesting that the Commission: (1) amend the complaint in this matter to substitute one Sam Olivo, executor of the estate of William Penn Patrick for decedent respondent Patrick, and (2) file a contingent claim for restitution against the estate of William Penn Patrick with the Superior Court for the State of California for the County of Marin. In order to resolve this latter request prior to the passing of the filing deadline of Jan. 24, 1974, the Commission ordered that respondent answer said latter request by 9:00 a.m. Jan. 22, 1974. Respondents have done so and, having considered the arguments of both parties the Commission has concluded that the application should be granted.

In so doing it has determined, based on the initial decision, that there is reason to believe that it will have a claim against Mr. Patrick's estate following final disposition of this matter on the merits. This should not be taken to mean that the Commission would not, in the appropriate circumstances, file such a claim without a supporting initial decision.

The Commission does not, in filing the requested claim, render any opinion on the question of the substitution of Mr. Olivo for Mr. Patrick in the complaint. It reserves this question for consideration of respondents' answer on this subject which is due on Feb. 5, 1974 as per its order of Jan. 16, 1974. In view of the novelty of this question of substitution, the Commission will entertain a reply from complaint counsel if filed within five (5) days of the filing of respondents' answer.

Accordingly, the Commission having found reason to believe that it may have a claim in restitution against the estate of decedent respondent William Penn Patrick,

It is ordered, That complaint counsel's application that the aforesaid contingent claim be filed with the Superior Court for the State of California, for the County of Marin be, and it hereby is, granted.

IN THE MATTER OF

THE SOUTHLAND CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8915. Complaint, Feb. 16, 1973—Decision, Jan. 24, 1974*

Consent order requiring the nation's largest operator and franchisor of self-service convenience retail food stores, principally "7-ELEVEN," and producer and distributor of dairy products, based in Dallas, Tex., among other things to cease engaging in illegal reciprocal purchasing or selling arrangements. The order further requires respondent to withdraw and isolate from all sales and purchasing personnel certain statistical data relating to purchases and sales.

Appearances

For the Commission: *Joseph A. Jeffrey, Carl D. Hevener, Harold G. Munter*

For the respondents: *G. Duane Vieth, Arnold & Porter*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. Section 41 *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporation and the individuals named as respondents in the caption hereof, and more particularly designated and described hereinafter, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint, stating the following:

PARAGRAPH 1. Respondent, the Southland Corporation, (hereinafter "Southland") is a corporation, incorporated in Texas on Nov. 21, 1961 as Southland Corporation of Texas, succeeding Southland Corporation (Delaware), which had been organized on Dec. 10, 1934. The present corporate name was adopted on Mar. 18, 1963. The principal offices of Southland are located at 2828 North Haskell Avenue, Dallas, Tex.

PAR. 2. Southland is the country's largest operator and franchisor of self-service convenience retail food stores and is also a major processor and distributor of dairy products. Southland's total sales for the year ended Dec. 31, 1971, were $1,085,107,334 and net earnings were $17,796,595. At year end 1971, Southland's total assets were $326,478,061 and net worth was $137,132,383. In Fortune magazine's rating of the fifty largest retailing companies in the United States, Southland ranked 24th in sales in 1970 and 26th in 1969. Southland's rate of sales growth during the period 1960–1970 was 14.74 percent, ranking it 10th among the nation's top 50 retailers.

PAR. 3. On Dec. 31, 1971, Southland's operations included 4,460 stores—some of which were convenience food stores (principally "7-

* Complaint reported as ordered amended by the administrative law judge at a prehearing conference on May 17, 1973, and confirmed by order of May 24, 1973.

ELEVEN"), Bradshaw supermarkets, and Barricini Candy Shops. Southland's other operations included dairy, chemical and ice operations in 37 states and the District of Columbia.

PAR. 4. (a) The organizational structure of Southland is divided into Divisions—namely, Stores, Dairies, Ice and Chemicals.

(b) The Stores Division operates the 7-Eleven convenience food stores, Gristede's stores, and Bradshaw supermarkets.

(c) The Dairies Division processes, distributes and sells milk, ice cream and related products; it is further divided into 11 subdivisions with distribution in 27 states and the District of Columbia through 30 processing plants and 89 principal distribution centers.

(d) The Ice Division manufactures, delivers and sells commercial and packaged block and processed ice.

(e) The Chemical Division presently manufactures and distributes various products, some of which are, but not limited thereto, the following: cleaning compounds, sanitizing agents, food stabilizers, flavor concentrates and other specialty chemical products, largely for industrial customers. This division consists of 10 sales offices and 5 plants located in 11 cities in six states, marketing its products in nearly every state in the nation.

PAR. 5. Southland, as an operator of food stores and also as a large dairy operator, purchases substantial quantities of numerous food products and related commodities, raw materials, equipment, supplies and services from many other companies, a number of which are among the major corporations in the United States in their respective product and service areas. Some of the major industries from whom Southland makes substantial purchases are: baking, beer, dairy, beverage, and other food processing, food distribution and food-related industries.

PAR. 6. The Chemical Division of Southland was organized on Jan. 1, 1969. Prior to this date, the chemical operations were conducted through the Southland Chemical Corporation (hereinafter referred to as Chemical Corporation), located at 2841 Pierce Street, Dallas, Tex. The latter corporation was incorporated in the State of Texas on Mar. 30, 1965 as a wholly-owned subsidiary of Southland and subsequently liquidated on Dec. 31, 1968.

PAR. 7. The Chemical Division of Southland presently manufactures and distributes, as did its predecessor, the Southland Chemical Corporation, a diversified line of products and specialty chemical products. These products and specialty chemical products include, but are not limited to: cleaning compounds, sanitizing agents, food stabilizers, flavor concentrates, conveyor lubricants, insecticides, adhesives, can end sealants, release and other coatings, fountain syrups, colors, purees, beverage concentrates, flavor bases, miscellaneous flavors,

sodium and calcium propionate, food additives, paint, industrial coatings, and other products.

PAR. 8. Sales are made in a not insubstantial amount by Southland's Chemical Division to the major companies from whom Southland purchases substantial quantities and dollar value of products, namely, companies operating in the baking, beer, dairy, beverage, and other food processing, food distribution and food-related industries.

PAR. 9. (a) Respondent John P. Thompson, an individual, is chairman of the board and chief executive officer of Southland and formerly served as president of the Southland Chemical Corporation.

(b) Respondent H.E. Hartfelder, an individual, is president of Southland and formerly served as vice president of the Southland Chemical Corporation.

(c) Respondent Jere W. Thompson, an individual is vice president, Stores Operations of Southland and formerly served as vice president of the Southland Chemical Corporation.

(d) Respondent M. T. Cochran, Jr., an individual, is vice president, Dairy Operations, of Southland, and formerly served as vice president of the Southland Chemical Corporation.

(e) Respondent Ronald R. Goodnight, an individual, is general manager of Southland's Chemical Division, and formerly served as vice president, general manager, of the Southland Chemical Corporation.

(f) Respondent W. R. Tennison, an individual, is national sales manager of Southland's Chemical Division, and formerly served as sales manager of the Southland Chemical Corporation.

PAR. 10. Southland, in the course and conduct of its business, is engaged in the shipment, manufacturing, purchase for resale, and sale of various goods and products in "commerce," as commerce is defined in the Federal Trade Commission Act.

PAR. 11. In the course and conduct of Southland's business since at least as early as 1965, and continuing to the date of this complaint, respondents are now and have been engaged in unfair acts and practices in commerce, in that they have engaged in reciprocal dealing through the use of the purchasing leverage of the Southland Stores and Dairies Division to obtain sales for Southland's Chemical Corporation and thereafter its Chemical Division.

Respondent Southland engaged in reciprocal acts through the assistance of individual respondents John P. Thompson, H. E. Hartfelder, Jere W. Thompson, M. T. Cochran, Jr., Ronald R. Goodnight, and W. R. Tennison. The respondents have done, among other things, one or more of the following:

(a) Planned and subsequently entered into the manufacture of certain

specialty chemical products with the objective of selling said products to Southland's suppliers on the basis or reciprocal purchases.

(b) Compiled a list of potential customers for the Chemical Corporation and the Chemical Division by obtaining and utilizing a list of suppliers from Southland's Stores Division.

(c) Utilized the information obtained in (b) to estimate the potential sales to such suppliers and thereafter did endeavor to promote and sell Southland's chemicals and related products of its Chemical Division and Chemical Corporation to such suppliers through a course of reciprocal dealings.

(d) Utilized the assistance of the executive officers of Southland by requesting and obtaining their influence, power, prestige and cooperation relative to selling or other problems which developed with customers or potential customers of the Chemical Corporation or Chemical Division who were also suppliers to Southland's other divisions.

(e) Made a number of acquisitions of stock or assets of companies with products in the speciality chemical industry to facilitate Southland's rapid expansion into the industry and to put it into a position to sell such products to those of its principal suppliers who were known to use such products and who were likely to purchase such products from Southland in the hope of retaining Southland's purchases of their own products.

(f) Communicated and conferred with executives in a number of corporations which are suppliers to Southland and requested, induced, encouraged and/or required, directly or indirectly, said supplier corporations to purchase products from the Southland Chemical Division and/or the Chemical Corporation with the result that said supplier corporations did make said purchases from Southland.

(g) Used the substantial purchasing leverage of the Southland Stores Division to promote sales of the Chemical Division and/or Chemical Corporation to the supplier corporations of the Stores Division.

(h) Compiled and coordinated comparative purchase and sales data and other information between the Stores Division and the Chemical Division or Chemical Corporation.

(i) Utilized the data and information referred to in (h) in sales calls, discussions, conferences, telephone calls, communications and high level management meetings, with actual and potential customers of the Chemical Division and/or the Chemical Corporation relative to their sales to Southland's Stores Division and their purchases from the Chemical Division or Chemical Corporation.

PAR. 12. The aforesaid acts and practices by the respondents have had the following effects, among others:

(a) Major supplier corporations of Southland have caused instructions

to be circulated within such corporations wherein Southland's specialty chemicals and related products were requested to be purchased and were so purchased.

(b) Respondent Southland's competitors in the sale of specialty chemicals and other related products have lost sales of such products in a not insubstantial amount by being terminated and foreclosed from selling to firms from whom Southland is a substantial purchaser.

(c) Respondents' acts and practices have unduly and unfairly hindered and obstructed Southland's competitors from competing on the basis of price, quality and service in the sale of specialty chemicals and related products.

PAR. 13. The aforesaid acts and practices of respondents constitute a restraint of trade and an unfair method of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent the Southland Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 2828 North Haskell Avenue, Dallas, Tex.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purposes of this order, the definitions below shall apply, although words of inclusion used herein are not words of limitation:

"Respondent" includes the Southland Corporation, a corporation, its divisions, subsidiaries, affiliates, successors, and assigns.

"Company" includes any business entity other than respondent.

"Purchase" and "purchases" include any receipt or products, services, or raw materials from any company in exchange for money, products, services, or raw materials.

"Sell" and "sales" include any conveyance of products or raw materials to, or any performance of services for any company in exhcnage for money, products, services, or raw materials, but shall not include sales to consumers by respondent's retail stores.

"Personnel" includes officers, directors, employees, agents and representatives.

"Sales personnel" includes any personnel who are primarily engaged in promoting or obtaining sales to any company on behalf of respondent, including, but not limited to, respondent's personnel holding any of the positions listed in Appendix 1, hereof.

"Purchasing personnel" includes any personnel who are primarily engaged in making purchases from any company on behalf of respondent, including, but not limited to, respondent's personnel holding any of the positions listed in Appendix 2, hereof.

"Executive personnel" refers to respondent's personnel holding any of the positions listed on Appendix 3, hereof.

"Purchasing decision" includes any decision as to the selection by respondent of any company as a supplier, the allocation of purchases by respondent among companies, the purchase by respondent of any products, services, or raw materials, the failure or refusal by respondent to place any company on a bidders list, the failure or refusal by respondent to designate any company as a qualified bidder, the selection by respondent of a winning bidder, or the continuance, discontinuance, increase, or decrease of purchases by respondent from any company.

I.

It is ordered, That respondent, its officers, directors, employees, agents, and representatives, directly or through any corporate or other device, shall forthwith cease and desist from:

A. Purchasing or entering into or adhering to any agreement or

understanding to purchase from any company which is an actual or potential supplier of respondent on the understanding that any of such purchases are conditioned upon or related to any sales by respondent or any company other than such actual or potential supplier;

B. Selling or entering into or adhering to any agreement or understanding to sell to any company which is an actual or potential customer of respondent on the understanding that any of such sales are conditioned upon or related to any purchases by respondent or any company other than such actual or potential customer;

C. Purchasing in order to promote or induce sales to any company;

D. Communicating to any company that:

1. respondent's purchasing decisions will or may be conditioned upon or related to sales by respondent or any company;

2. sales by respondent will or may be conditioned upon or related to purchases by respondent or any company;

E. Discussing, comparing, or exchanging statistical data or other information with any company in order to ascertain, develop, facilitate, or further any relationship between purchases and sales of the nature prohibited by this order;

F. Preparing or maintaining any document containing statistical data or other information regarding respondent's actual or potential purchases from any company and its actual or potential sales to such company;

G. Discussing, comparing, or utilizing data regarding actual or potential sales by respondent to any actual or potential supplier in making any purchasing decision;

H. Causing or permitting any sales personnel to:

1. engage in purchasing from any company;

2. obtain or retain statistical data or other information which shows actual or potential purchases from any company;

3. attend any meeting, the primary purpose of which is a discussion of respondent's purchases or its purchasing strategy, or at which there is a discussion of the purchases or the purchasing strategy of any division of respondent other than the divisions for which such sales personnel has sales responsibilities;

4. specify or recommend that purchases could or should be made from any company.

Provided, however, That nothing contained in this subparagraph H shall prohibit sales personnel holding the bracketed ([]) positions listed

in Appendix 1, hereof, from making or participating in the making of purchasing decisions incidental to their sales functions, so long as such activities do not have the purpose or effect of developing, facilitating, or furthering any relationship between purchases and sales of the nature prohibited by this order.

I. Causing or permitting any purchasing personnel to:

1. engage in obtaining sales to any company;

2. obtain or retain statistical data or other information which shows actual or potential sales to any company;

3. attend any meeting, the primary purpose of which is a discussion of respondent's sales or its strategy for obtaining sales, or at which there is a discussion of the sales or sales strategy of any division of respondent other than the divisions for which such purchasing personnel has purchasing responsibilities.

4. specify or recommend that sales could or should be made to any company.

J. Causing or permitting any executive personnel holding the bracketed ([]) positions listed in Appendix 3, hereof to:

1. engage in promoting or obtaining sales by respondent's Chemical Division to any company which is an actual or potential supplier to respondent;

2. obtain or retain statistical data or other information which shows actual or potential sales by respondent's Chemical Division to any company which is an actual or potential supplier to respondent;

3. attend any meeting at which there is a discussion of sales by respondent's Chemical Division to any company which is an actual or potential supplier to the division of respondent for which such personnel has executive responsibility, or the Chemical Division's strategy for obtaining sales to any such company;

4. specify or recommend that sales could or should be made by respondent's Chemical Division to any company which is an actual or potential supplier to respondent.

II.

It is further ordered, That respondent shall, within sixty (60) days subsequent to the date of this order, withdraw and continue to isolate:

(A). from the possession, custody and control of all sales personnel, all statistical data and other information which shows actual or potential purchases by respondent from any company;

(B). from the possession, custody and control of all purchasing

personnel, all statistical data and other information which shows actual or potential sales by respondent to any company.

III.

It is further ordered, That respondent shall, within sixty (60) days subsequent to the date of this order:

A. issue a copy of Attachment A, hereof, to each of respondent's current personnel who, at any time within the two (2) years preceding the date of this order, has served as sales or purchasing personnel, or who has compiled or distributed statistical purchase or sales data (other than messenger personnel);

B. insert and maintain within all manuals and other such documents which set out respondent's policies or procedures for purchasing from any company or for obtaining sales to any company, or its policies relating to the compilation or distribution of statistical purchase or sales data:

1. the language of Attachment A, hereof;

2. a current list of all of respondent's positions held by personnel who are primarily engaged in purchasing or in obtaining sales.

IV.

It is further ordered, That respondent shall, within sixty (60) days subsequent to the date of this order, mail a copy of Attachment B, hereof, together with a copy of this order, to:

A. each company from which respondent has made purchases, in either of its two (2) fiscal years preceding the date of this order, in excess of twenty thousand dollars ($20,000);

B. each company to which respondent's Chemical Division has made sales in either of its two (2) fiscal years preceding the date of this order.

V.

It is further ordered, That respondent notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its corporate structure which may affect compliance obligations arising out of this order, including, but not limited to dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of operating subsidiaries, and shall promptly notify the Federal Trade Commission of any other change in the respondent which may affect compliance obligations arising out of this order.

VI.

It is further ordered, That respondent shall, within sixty (60) days subsequent to the date of this order, file with the Federal Trade Commission a written report setting forth in detail the manner and form in which it has complied with this order, including, but not limited to the following:

A. the name and title of each individual to whom a copy of Attachment A, hereto, was issued pursuant to Paragraph III. above.

B. the name of each company to which a copy of this order was mailed pursuant to Paragraph IV. above.

VII.

It is further ordered, That respondent shall, within sixty (60) days of the third (3rd) anniversary of the date of this order:

A. Cause each of its then-current sales personnel to complete and furnish to respondent a sworn statement in the form of Attachment C, hereof;

B. Cause each of its then-current purchasing personnel to complete and furnish to respondent a sworn statement in the form of Attachment D, hereof;

C. Cause each of its then-current executive personnel to complete and furnish to respondent a sworn statement in the form of Attachment E, hereof.

VIII.

It is further ordered, That respondent shall:

A. Request each of its personnel who, at any time subsequent to the date of this order, has served as sales personnel, and who leaves the employ of respondent prior to the third (3rd) anniversary of the date of this order, to complete and furnish to respondent within ten (10) days preceding such termination of employment, a sworn statement in the form of Attachment C, hereof;

B. Request each of its personnel who, at any time subsequent to the date of this order, has served as purchasing personnel, and who leaves the employ of respondent prior to the third (3rd) anniversary of the date of this order, to complete and furnish to respondent within ten (10) days preceding such termination of employment, a sworn statement in the form of Attachment D, hereof;

C. Request each of its personnel who, at any time subsequent to the date of this order, has served as executive personnel, and leaves the employ of respondent prior to the third (3rd) anniversary of the date of this order, to complete and furnish to respondent

within ten (10) days preceding such termination of employment, a sworn statement in the form of Attachment E, hereof.

IX.

It is further ordered, That respondent shall submit to the Federal Trade Commission:

A. Within sixty (60) days subsequent to the third (3rd) anniversary of the date of this order, all sworn statements which it has received pursuant to Paragraph VII, above;

B. Within sixty (60) days subsequent to the first (1st) anniversary of the date of this order, and annually thereafter for a period of two (2) years, all sworn statements which it has received pursuant to Paragraph VIII, above, together with the name and last-known address of each individual who failed to complete a sworn statement as requested by respondent pursuant to said Paragraph VIII at any time in the one (1) year period immediately prior to any such submission.

X.

It is further ordered, That nothing in this order shall prohibit respondent from purchasing from any company, or entering into any agreement or understanding with any company to purchase, food products manufactured or processed to respondent's uniform specifications and bearing respondent's trademarks or trade names, on the condition that respondent's proprietary chemical ingredients (other than propionates or ice cream stabilizers) are used in the manufacture of such products, and where the use of respondent's ingredients is essential to insure nationwide uniformity in the quality of such products.

ATTACHMENT A

Re: Federal Trade Commission Order Concerning the Selling and Purchasing Activities of The Southland Corporation and its Subsidiaries.

Pursuant to an Order of the Federal Trade Commission, we issue the following policies and guidelines:

General

No employee shall:

1. discuss, compare, or exchange statistical data or other information with another company in order to ascertain, develop, facilitate, or further any reciprocal relationship between our purchases and our sales.

2. prepare, maintain, or in any manner obtain any document containing statistical data or other information regarding our purchases from any company and our sales to such company.

Purchasing

It is our policy to purchase solely on the basis of price, quality, and service. Purchasing

personnel shall be prepared to justify all purchases in light of these criteria. No purchase may be conditioned upon or related to our sales or sales by any other company, nor shall any employee suggest or imply to any actual or potential supplier that any purchase is so conditioned or related.

No purchasing personnel shall:

1. engage in sales or marketing on our behalf;

2. in any manner obtain statistical data or other information which shows our actual or potential sales to any company, or which specifies that purchases should be made from a company because of the status of such company as an actual or potential customer;

3. attend any meeting, the primary purpose of which is the discussion of our sales or our strategy for obtaining sales, or at which there is a discussion of the sales or sales strategy of any of our divisions other than those for which you have purchasing responsibilities.

4. specify or recommend to our sales or marketing personnel that sales could or should be made to any company.

Selling

No employee promoting sales to any actual or potential customer shall suggest or imply that such sales are conditioned upon or related to our purchases or purchases by any other company.

No sales or marketing personnel shall:

1. engage in purchasing on our behalf;

2. in any manner obtain statistical data or other information which shows our actual or potential purchases from any company, or which specifies or recommends that sales could or should be made to a company because of the status of such company as an actual or potential supplier;

3. attend any meeting, the primary purpose of which is the discussion of our purchases or our purchasing strategy, or at which there is a discussion of the purchases or purchasing strategy of any of our divisions other than those for which you have sales responsibilities.

4. specify or recommend to our purchasing personnel that purchases could or should be made from any company.

Violation of Policies or Guidelines

Violation of the above policies or guidelines shall subject any offending employee to dismissal from his employment.

ATTACHMENT B

To Our Customers and Suppliers:

Pursuant to the attached Order of the Federal Trade Commission, we herewith advise you that it is the policy of The Southland Corporation to purchase solely on the basis of price, quality, and service. We wish to assure you that our purchases will in no way be conditioned upon or related to our sales to you or any other company.

Chief Executive Officer

ATTACHMENT C

Name:

Dates of Employment and positions held with The Southland Corporation or its subsidiaries:

I have marked the statements below which have been true at all times since ____ (the date of this Order) ____ :

____ 1. I have not discussed, compared, or exchanged statistical data or other information with another company in order to ascertain, develop, facilitate, or further any reciprocal relationship between purchases and sales by The Southland Corporation or its subsidiaries.

____ 2. I have not prepared, maintained, or in any manner obtained any documents containing statistical data or other information regarding purchases and sales by The Southland Corporation and its subsidiaries.

____ 3. I have not prepared, maintained, or in any manner obtained statistical data or other information which specified or recommended that sales could or should be made to any company because of the status of that company as an actual or potential supplier of The Southland Corporation or its subsidiaries.

____ 4. I have not suggested or implied to any company that purchases by The Southland Corporation or its subsidiaries might be conditioned upon or related to sales to that company.

____ 5. While employed in a selling capacity, I have not engaged in purchasing on behalf of The Southland Corporation or its subsidiaries, other than incidential purchases in connection with my sales functions.

____ 6. While employed in a selling capacity, I have not in any manner obtained statistical data or other information which showed actual or potential purchases from any company by The Southland Corporation or its subsidiaries.

____7. While employed in a selling capacity, I have not attended a meeting, the primary purpose of which was the discussion of the purchases or purchasing strategy of The Southland Corporation or its subsidiaries.

_____
(Signature)

City of _____

State of _____

Sworn to and subscribed before me this day of , 1973.

_____
(Notary Public)

ATTACHMENT D

Name:

Dates of Employment and positions held with The Southland Corporation or its subsidiaries:

I have marked the statements below which have been true at all times since (the date of this Order) :

____1. I have not discussed, compared, or exchanged statistical data or other information with another company in order to ascertain, develop, facilitate, or further any reciprocal relationship between purchases and sales by The Southland Corporation or its subsidiaries.

____2. I have not prepared, maintained, or in any manner obtained any documents containing statistical data or other information regarding purchases and sales by The Southland Corporation and its subsidiaries.

____3. I have not prepared, maintained, or in any manner obtained statistical data or other information which specified or recommended that purchases could or should be made to any company because of the status of that company as an actual or potential customer of The Southland Corporation or its subsidiaries.

____4. I have not suggested or implied to any company that purchases by The Southland Corporation or its subsidiaries might be conditioned upon or related to sales to that company.

____5. While employed in a purchasing capacity, I have not engaged in sales or marketing on behalf of The Southland Corporation or its subsidiaries.

____6. While employed in a purchasing capacity, I have not in any manner obtained statistical data or other information which showed actual or potential sales to any company by The Southland Corporation or its subsidiaries.

____7. While employed in a purchasing capacity, I have not attended a meeting, the primary purpose of which was the discussion of the sales or sales strategy of The Southland Corporation or its subsidiaries.

_____
(Signature)

City of _____

State of _____

Sworn to and subscribed before me this day of , 1973.

_____
(Notary Public)

ATTACHMENT E

Name and address:

Positions held, with dates with The Southland Corporation or its subsidiaries since (the date of this Order):

I have marked the statement below is true:

____1. I have engaged in one or more of the activities of the nature prohibited by PARAGRAPH I, subparagraphs A through G, inclusive, of (this Order) at some time since (the date of this Order).

____2. I have not engaged in any activities of the nature prohibited by PARAGRAPH I, subparagraphs A through G, inclusive, of (this Order) since (the date of this Order).

_____
(Signature)

City of _____

State of _____

Sworn to and subscribed before me this day of 1973.

_____

(Notary Public)

Appendix 1

[Sales Managers]
Assistant Sales Managers
[Sales Representatives]
Branch Outside Salesmen

Appendix 2

Procurement Managers
Purchasing Agents
Buyers
Assistant Merchandise Managers
Inventory Managers

Appendix 3

Chairman of the Board
President
Executive Vice President
Vice President—Store Operations
Vice President—Dairy Operations

Store Operations

[Operations Managers]
[Merchandise Managers]
[Regional Managers]
[Division Managers]
[Zone Managers]
[District Managers]

Dairy Operations

[Operations Manager]
[Regional Managers]
[Division Managers]
[Zone Managers]
[District Managers]
[Branch Managers]

Other Operations (excluding Chemical Division)

[Operations Managers]
[Regional Managers]

[Division Managers]
[Zone Managers]
[District Managers]
[Branch Managers]
[Distribution Center Managers]
[Assistant Distribution Center Managers]

Chemical Division

Division Manager
Assistant Division Manager

IN THE MATTER OF

PEPSICO, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket 8903. Complaint, Nov. 15, 1972—Decision, Jan. 25, 1974

Consent order requiring PepsiCo, Inc., to divest within 18 months, as a package, the soft drink concentrate business, Flavette, it acquired as a result of its acquisition of Rheingold Corp., along with the soft drink bottling plant (Union Bottling Works, Inc.) owned and operated by a PepsiCo subsidiary in St. Louis, Mo. Excluding the seven leading firms from consideration, approval of a substantial soft drink bottler and/or soft drink concentrate manufacturer as a proposed acquirer would not be withheld. Further, PepsiCo is required to purchase soft drink concentrate from Flavette for its Los Angeles bottler for a period of three years; and for a ten-year period, PepsiCo is prohibited from acquiring any manufacturer or seller of concentrate without prior FTC approval.

Appearances

For the Commission: *Amy R. Richter, Ira S. Nordlicht, James Egan*

For the respondent: *Howrey, Simon, Baker & Murchison*, Wash., D.C. and *Mudge, Rose, Guthrie & Alexander*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that PepsiCo, Inc., sometimes hereinafter referred to as respondent or PepsiCo, has violated and is now violating the provisions of Section 7 of the Clayton Act, as amended, (U.S.C. Title 15, Section 18) and the provisions of Section 5 of the Federal Trade Commission Act, as amended, (U.S.C. Title 15, Section 45) in the manner hereinafter more particularly designated and described, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to the provisions of the aforesaid

Clayton Act and Federal Trade Commission Act, stating its charges in this respect as follows:

I

DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) *Soft drinks*—nonalcoholic carbonated beverages.

(b) *Concentrate*—the basic soft drink ingredient, principally containing flavors, and sometimes sweeteners, and sold to bottlers for use in combination with other ingredients, principally carbon dioxide, water, and sugar or another sweetener, to produce soft drinks.

(c) *Bottler*—any individual, partnership, corporation, association or other legal entity which processes soft drink ingredients into a finished product, packages the soft drink product, and distributes the packaged product primarily at wholesale.

II

PEPSICO, INC.

2. PepsiCo is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. In 1965, PepsiCo, Inc. adopted its present name, having formerly been known as Pepsi-Cola Company. It maintains its executive offices and principal place of business at Anderson Hill Road, Purchase, N.Y. Respondent had sales of $1,225,398,000; net income, after taxes, of $62,662,000; and assets of $827,740,000, in 1971. In 1971, PepsiCo made domestic sales to approximately 350 bottlers located in every State of the United States and Puerto Rico.

3. The principal businesses of PepsiCo and its subsidiaries consist of the manufacture and distribution of concentrate for soft drink beverages, the bottling or canning and sale of soft drinks (primarily at wholesale), the manufacture and distribution of snack or convenience foods, the manufacture and merchandising of sporting goods, and the transportation of household goods and other property. The principal subsidiaries and divisions of PepsiCo are Pepsi-Cola Division, Frito-Lay Division, PepsiCo International Division, PepsiCo Transportation Division (includes North American Van Lines), and Wilson Sporting Goods Co. In 1972, PepsiCo entered into wine production and marketing by acquisition, and owns a non-controlling interest in a Spanish winery.

4. In fiscal 1971, beverage operations accounted for 45 percent of PepsiCo's net sales and revenues, and 60 percent of income, before taxes. In that year, food products accounted for 29 percent and 25

percent, transportation 11 percent and 7 percent, sporting goods, 10 percent and 7 percent, and leasing 5 percent and 1 percent, of net sales and revenues, and income, before taxes, respectively.

5. Franchises, issued by PepsiCo, license independent bottlers to produce and sell those soft drinks specified by the franchise and the use of the trade names and trademarks pertaining thereto in a specified territory and nowhere else. PepsiCo's wholly-owned bottlers serve about 20 percent of the total U.S. population, a larger portion of the nation than served by any of its independent bottlers.

6. Besides the long-established and well-known soft drink, "Pepsi-Cola" (and its low calorie counterpart, "Diet Pepsi-Cola"), PepsiCo has, since 1958, introduced several other soft drink concentrates which were either developed internally or obtained through acquisition. In 1959, PepsiCo first offered "Teem," a lemon-and-lime drink. In 1960, it offered the "Patio" line of concentrate flavors. In 1964, PepsiCo acquired the Tip Corporation of America, which was engaged in the manufacture and sale of concentrate for the soft drink "Mountain Dew." Currently, PepsiCo offers a complete flavor range of the concentrates used by bottlers.

7. In the course and conduct of its business, PepsiCo is, and has been, at all times relevant herein, engaged in selling its concentrate and soft drinks to numerous purchasers located in various States of the United States, and caused such products to be transported in a continuous flow of interstate commerce from its facilities in various States of the United States to such purchasers located in various other States of the United States. In so doing, PepsiCo is, and has been, engaged in "commerce" within the meaning of the Clayton Act, as amended, and the Federal Trade Commission Act, and has been continuously so engaged at all times relevant herein.

8. Except as to the extent limited by the acts, practices, and methods of competition, hereinafter more particularly defined and described, in the course and conduct of its business, PepsiCo has been, at all times relevant herein, and, is now, in competition with other corporations, firms, partnerships and persons engaged in the manufacture, distribution, and sale of soft drink concentrate in commerce.

III

RHEINGOLD CORP.

9. Rheingold Corp. (hereinafter referred to as Rheingold) is a corporation organized in 1928, and existing and conducting its business under and pursuant to the laws of the State of New York. It maintains its executive office and principal place of business at 41 East 42nd Street,

New York, N.Y. Rheingold had sales of $230,228,040; net income after taxes of $3,954,000; and assets of $101,371,708 in 1971.

10. A management company, Rheingold, is engaged, through its subsidiaries, in the soft drink business and the beer business. In 1971, the soft drink business accounted for approximately 30 percent of Rheingold's total dollar sales volume, but approximately 75 percent of its profits.

11. As to the soft drink business, Rheingold has been engaged in manufacturing and distributing soft drinks in southern Calif., central Fla., Puerto Rico and Mexico. In southern Calif., Rheingold manufactures and distributes soft drinks, primarily PepsiCo products, in Los Angeles, Riverside, and San Bernardino Counties since 1946; and in Orange County since Jan. 1969. In Los Angeles, it also has the exclusive franchise from Crush International, Inc. to sell "Hires" root beer. In Dec. 1971, Rheingold acquired National Beverages, Inc. of Orlando, Fla., which holds the exclusive franchise to produce and sell PepsiCo products, as well as "Dr. Pepper" and "Seven-Up" in a combined 15-county area in central Fla. Since 1946, Rheingold has been the exclusive bottler of PepsiCo products in Puerto Rico. Rheingold is the nation's second largest independent bottler of PepsiCo products (serving approximately 5 percent of the total 1970 U.S. population), and is also the world's largest independent bottler of PepsiCo products by virtue of serving large parts of the Republic of Mexico since 1957.

12. The Flavette Corp., a subsidiary of Rheingold, produces concentrate for sale to over 100 franchised bottlers which use it to produce soft drinks sold under such Flavette-owned trademarks as "Grapette," "Orangette," "Lemonette," "Cherryette," "Lymette," "Old Red Eye," "Mr. Root Beer," "Sunburst," and "Dr. Wells." Flavette sells canned Flavette soft drinks, produced by contract canners, to its franchised bottlers for resale by them. Flavette-brand soft drinks are sold in regions of the United States containing 45 million people. Rheingold intends to extend the franchising of Flavette nationwide and to add new brands of soft drinks and, thereby, capture a substantial part of the soft drink concentrate market.

13. "Rheingold Malta," a non-alcoholic carbonated soft drink sold in bottles and cans, was introduced in late 1971 by Rheingold's subsidiary, Jacob Ruppert, Inc., and produced at its plant in New Bedford, Mass. Initial sales of "Malta" were made principally in Puerto Rico through Rheingold's subsidiary, Pepsi-Cola Bottling Co. of Puerto Rico; such sales totalled $35,446, in 1971, and $156,837, for the nine months ending Sept. 30, 1972. In the spring of 1972, sales of "Malta" commenced in the New York City area through independent distributors; in Aug., 1972, expanded to Chicago, Ill.; and in Oct. 1972, further expanded to the

entire State of New Jersey. Sales of Malta by Jacob Ruppert, Inc., through such distributors, were $39,000 for the period ending Sept. 30, 1972. Jacob Ruppert, Inc. is not now and never has been a franchisee or distributor of any PepsiCo products.

14. Mason & Mason, Inc., acquired by Rheingold in Oct., 1972, was a manufacturer of concentrate which it sold to over 90 franchised bottlers located in 33 states. Such bottlers produced soft drinks under its trade name, "Mason's" root beer. Total sales by Mason & Mason, Inc., for 1971 are $754,383. Rheingold's acquisition of Mason & Mason, Inc. was part of its expansion of its Flavette concentrate production and bottler franchising operations.

15. As to the beer business, Rheingold has, since 1964, been engaged in the manufacture and distribution of beer. Rheingold acquired Rheingold Breweries, Inc. (then known as Liebmann Breweries, Inc.) in 1964; and, in 1965, it acquired the trademarks and certain assets of the Jacob Ruppert beer business. It now manufactures beer in N.Y., N.J. and Mass. for sale by it in 18 states, Washington, D.C. and Puerto Rico. The major portion of its beer sales is made in the States of New York, New Jersey, and Connecticut. In those areas, Rheingold beer products have, for many years, maintained a significant share of the total beer market. Four brands of beer are produced: "Rheingold," "Ruppert-Knickerbocker," "Gablinger's," and "Esslinger." Although beer sales in 1971 represented about 70 percent of Rheingold's dollar volume, it accounted for only 25 percent of its profits.

16. Rheingold, in the course and conduct of its business, purchased concentrate and other ingredients and products from, and sells concentrate, soft drinks, beer and other products to, numerous corporations located in various States of the United States and, thereby, caused such products to be transported in a continuous flow of interstate commerce from corporations located in one state to those located in various other states, and in so doing, Rheingold is engaged "in commerce" within the meaning of the Clayton Act and the Federal Trade Commission Act.

IV

VIOLATION ALLEGED

17. On Oct. 24, 1972, PepsiCo, in furtherance of an attempt by it to purchase controlling ownership of Rheingold, filed with the Securities and Exchange Commission a Schedule 13D, pursuant to the Securities Act of 1934; and, on Oct. 25, 1972, caused to be widely published a tender offer to purchase 1,600,000 shares of common stock of Rheingold, with an announced view to gain control of Rheingold. As subsequently amended on Nov. 7, 1972, this offer to purchase by PepsiCo will expire

at 5:00 p.m. EST on Nov. 16, 1972, unless further extended, and now provides that all shares in excess of 1,600,000 will be purchased if more shares are tendered. Rheingold shareholders who tendered their shares pursuant to the offer to purchase, as amended, may withdraw their shares so tendered at any time prior to 5:00 p.m. EST on Nov. 16, 1972, or may withdraw such shares after Dec. 24, 1972, unless theretofore purchased by PepsiCo.

18. As hereinafter more particularly designated and described, the effect of such acquisition, pursuant to this offer to purchase by PepsiCo, may be substantially to lessen competition, tend to create a monopoly, and/or constitute an unfair method of competition in commerce, in violation of the provisions of Section 7 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act. Consequently, this attempt by PepsiCo, as stated by its offer to purchase and related actions, constitutes an unfair method of competition in commerce and/or an unfair act or practice in commerce, in violation of Section 5 of the Federal Trade Commission Act.

A. The Soft Drink Concentrate Market.

19. The soft drink concentrate market consists of corporations which manufacture and sell concentrate to independent bottlers who purchase the concentrate and manufacture it into finished soft drinks, generally under the concentrate makers' trade names, for resale to retailers. The concentrate manufacturers generally restrict the areas in which their bottlers may sell the finished products. In 1967, sales of concentrate were $353 million. In 1971, sales of concentrate were approximately $450 million. The three largest concentrate companies—the Coca-Cola Company, PepsiCo, Inc. and Royal Crown Cola Co.—sell almost the entire assortment of concentrate types.

20. The four leading concentrate manufacturers, including the Seven-Up Company, account for approximately 71 percent of all concentrate sales in 1971, and the eight largest had approximately 84 percent of concentrate sales in 1971. In 1965, the four largest concentrate manufacturers accounted for approximately 66 percent of all concentrate sales, and the eight largest had approximately 80 percent of concentrate sales.

21. Profits in the concentrate business are much higher than the average profits earned by United States manufacturers. In 1971, PepsiCo's profits expressed as a rate of return on stockholder's equity, after taxes, amounted to 16 percent, as compared to the 9.7 percent average for all United States manufacturers.

22. Barriers to entry into the concentrate business are quite high. Recently, a few large food manufacturers unsuccessfully attempted to

enter the concentrate market. One of the most significant barriers to entry is the inability of new entrants to find well-established bottlers which are willing to sell their products, since these bottlers already sell products of the leading concentrate manufacturers.

23. There are few small concentrate operations of the type which can be expanded into companies which could offer significant competition with the eight largest concentrate companies. Also, few companies have the capability, which Rheingold possesses as a large bottler in its own right, to expand such small concentrate operations.

24. PepsiCo had about a 16 percent share of the concentrate market in 1971, which made it the second largest manufacturer of concentrate.

25. In 1970, Rheingold acquired the business of the Grapette Company, including its several concentrate lines—"Grapette," "Orangette," and "Sunburst." Also, in that year, it acquired the "Dr. Wells" concentrate business. These companies served primarily the south and southwestern regions of the country. Since acquiring these companies, Rheingold has increased the number of independent active bottlers which handle such lines from 55 to 90 and also increased the geographic scope of its operations. Recently, in Oct., 1971, Rheingold acquired Mason & Mason, Inc., a concentrate manufacturer of "Mason's" root beer, which has 90 bottlers whose primary geographic area of operations is the midwestern and southwestern regions of the United States. Rheingold has plans to continue to expand the operations of its concentrate business both by increasing the geographic area of its existing operations and also by acquiring other small concentrate companies. Rheingold currently has about 2 percent of the concentrate market in the geographic areas which it serves, which encompasses about 45 million people.

26. Acquisition of Rheingold by PepsiCo will preclude Rheingold from expanding one of the few remaining small concentrate operations which could be developed into a competitive force capable of offering significant competition to the eight largest soft drink companies. In addition, the acquisition would foreclose other concentrate operations from selling to Rheingold's bottling operations in southern Calif., central Fla. and Puerto Rico and would raise barriers to entry into the concentrate market.

27. There has been a steady decline in the number of bottlers over the past 20 years from 5,400, in 1948, to 2,300 in 1971, as the result of bottler consolidations.

28. The largest concentrate manufacturers are also large bottlers and have been active acquirers of their own bottlers in recent years.

29. As of Dec. 31, 1957, PepsiCo operated bottling plants at the following locations: Long Island City, N.Y.; Boston, Mass.; New

Brunswick, N.J.; Jersey City, N.J.; Pittsburgh, Pa.; Teterboro, N.J.; Philadelphia, Pa.; Bronx, N.Y.; Milwaukee, Wis.; Brooklyn, N.Y.; Alexandria, Va.; and Phoenix, Ariz. These plants served areas whose 1970 population was approximately 24 million or 12 percent of the total 1970 U.S. population. These plants purchase concentrate almost exclusively from PepsiCo.

30. PepsiCo has acquired, and plans to continue to acquire, independent soft drink bottlers licensed to manufacture and sell PepsiCo brand name soft drinks. Subsequent to their acquisition, such bottlers have purchased concentrate almost exclusively from PepsiCo and thereby concentrate sellers, other than PepsiCo, are deprived of access to a significant segment of the market.

31. Between 1958 and 1972, PepsiCo acquired the following bottlers:

Date of Acquisition	*Firm Acquired*
1958	Pepsi-Cola Bottlers of St. Louis, Inc.
1959	Dossin's Food Products
1960	Pepsi-Cola Bottling Co. of Las Vegas
1965	Westchester County Bottling Co., Inc.
1965	Berry's Beverages
1967	Pepsi-Cola Bottling Company of Plymouth, Inc.
1968	Pepsi-Cola Bottling Co. of Dallas
1968	Pepsi-Cola Bottling Co. of Lubbock
1969	Warwick Club, Inc.
1972	Pepsi-Cola Bottling Company of New Castle

32. In 1971, PepsiCo operated 18 wholly-owned bottling plants whose sales of bottled and canned soft drinks were 117,372,676 cases of 8 oz. case equivalents or 3 percent of total U.S. sales of bottled and canned soft drinks. The 1970 population of the areas served by such bottlers, excluding Rheingold, was approximately 41 million or 20 percent of the total 1970 U.S. population. All of the bottlers, whose acquisitions were described in Paragraph 31, have purchased concentrate almost entirely from PepsiCo since their acquisition by PepsiCo.

33. Bottling operations owned by concentrate producers, including Rheingold, accounted for over 15 percent of total U.S. soft drink sales in 1971. The policies of concentrate producers are to restrict the source of concentrate for their bottling operations to themselves, thereby foreclosing the concentrate purchases of such bottling operations to new or toe hold concentrate producers. The result of such policy is to raise the barriers to potential entrants and to lessen the possibility of future deconcentration in the production of concentrate. The acquisition by PepsiCo of Rheingold, if consummated, will raise even further the barriers to entry facing potential concentrate producers, and lessen the

possibility of future deconcentration of firms engaged in the production of concentrate.

B. Effects.

34. The effect of the proposed acquisition of Rheingold by PepsiCo may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of soft drink concentrate throughout the United States and in certain sections thereof. In particular, the effects of such violation have been and may be the following, among others:

(a) Actual competition between Rheingold and PepsiCo in the sale of soft drink concentrate in the areas in which both compete will be eliminated, prevented or lessened.

(b) Potential competition between Rheingold and PepsiCo throughout the United States will be eliminated, prevented or lessened.

(c) Concentration in the manufacture and sale of soft drink concentrate will be increased.

(d) Barriers to entry into the manufacture and sale of soft drink concentrate will be increased.

35. The effect of the proposed acquisition of Rheingold, may be substantially to lessen competition or tend to create a monopoly in the soft drink concentrate industry. In particular, the effects of such violation have been and may be to raise barriers to entry into the manufacture and sale of soft drink concentrate, and to restrict, restrain, hinder, lessen and eliminate competition in the manufacture and sale of soft drink concentrate. The acquisition of Rheingold, if consummated, therefore, constitutes a violation of Section 7 of the Clayton Act, as amended, and/or Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereto with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and the respondent having been served with a copy of the complaint together with a notice of contemplated relief; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provi-

sionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent PepsiCo, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Anderson Hill Road, Purchase, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent, PepsiCo, Inc., a corporation, its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns (hereinafter "PepsiCo") shall, within eighteen (18) months from the date of service upon it of this order, divest absolutely and in good faith to a single acquirer, subject to the approval of the Federal Trade Commission (hereinafter the "Commission"): (a) the soft drink bottling plant owned and operated by a PepsiCo subsidiary in St. Louis, Mo.; and (b) the soft drink concentrate business acquired by PepsiCo as a result of its acquisition of the stock of Rheingold Corp., including, but not limited to, the soft drink concentrate business conducted by Rheingold Corp. through its subsidiary, Flavette Corporation and its divisions, Mason & Mason and Beverage Developers. The St. Louis soft drink bottling plant to be divested hereunder shall consist of the land, buildings and soft drink bottling machinery and equipment owned and operated by Union Bottling Works, Inc., a subsidiary of PepsiCo, at 647 Tower Grove Avenue, St. Louis, Mo., together with all assets (subject to liabilities), properties, rights and privileges, tangible and intangible, associated with said plant, including, but not limited to, inventory, customer lists, route trucks, and good will (hereinafter the "St. Louis bottler"). The soft drink concentrate business to be divested hereunder shall consist of all assets (subject to liabilities), properties, rights and privileges, tangible and intangible, including, but not limited to, all machinery and equipment, inventory, customer lists, franchises, franchising rights, trade names, trademarks and good will owned and used by Rheingold Corp. in the production and sale of soft drink concentrate, together with all additions and improve-

ments to said operations since their acquisition by PepsiCo (hereinafter "Flavette").

II.

It is further ordered, That approval of a proposed divestiture hereunder shall not be withheld solely on the ground that the proposed acquirer is a substantial soft drink bottler and/or a soft drink concentrate manufacturer; *Provided, however,* That PepsiCo shall not divest any of the above-described assets to any of the following companies: the Coca-Cola Co.; Royal Crown Cola Co.; Seven-Up Co.; Dr. Pepper Co.; Canada Dry Corp.; Cott Corp.; Crush International Ltd.

III.

It is further ordered, That pending divestiture of the St. Louis bottler and Flavette, and for a period of three (3) years following divestiture, PepsiCo will purchase from Flavette soft drink concentrate sufficient to enable the Pepsi-Cola Bottling Company of Los Angeles to produce soft drinks under one or more of the Flavette trademarks or trade names at a level at least equal to the sales of such products (measured in cases of twenty-four (24) eight (8) ounce equivalents) by said company during the twelve (12) months ending Dec. 31, 1972, and further, at a level sufficient to increase such sales at a cumulative annual rate at least equal to the rate of growth of the national soft drink industry in the preceding year, as reported by the National Soft Drink Association. PepsiCo will use its best efforts to effect such sales by the Pepsi-Cola Bottling Company of Los Angeles.

IV.

It is further ordered, That pending divestiture pursuant to this order, PepsiCo shall make no changes in the St. Louis bottler and Flavette which would impair their respective capacities for the production and sale of soft drinks and soft drink concentrate, unless such capacity is restored prior to divestiture; *Provided, however,* That nothing in the order shall prevent PepsiCo from exercising good faith business judgment with respect to the operation and management of the St. Louis bottler and Flavette.

V.

It is further ordered, That the St. Louis bottler and Flavette shall not be sold or transferred, directly or indirectly, to any acquirer who, at the time of divestiture, is an officer, director or employee, or under the control of PepsiCo or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of PepsiCo's common

stock; *Provided, however,* That nothing herein shall preclude divestiture to an acquirer who is an independent PepsiCo franchised bottler so long as such bottler does not own or control, directly or indirectly, more than one (1) percent of the outstanding shares of PepsiCo's common stock.

VI.

It is further ordered, That if PepsiCo is unable to sell or dispose of the St. Louis bottler and Flavette entirely for cash, nothing in this order shall be deemed to prohibit PepsiCo from retaining, accepting and enforcing in good faith any security interest therein for the sole purpose of securing to PepsiCo full payment of the price, with interest, at which the St. Louis bottler and Flavette are sold or disposed of; *Provided, however,* That if, after a good faith divestiture pursuant to this order, the acquirer fails to perform its obligations and PepsiCo regains ownership and control by enforcement of any such security interest, PepsiCo shall redivest within one (1) year.

VII.

It is further ordered, That for a period of ten (10) years from the date of service upon it of this order, PepsiCo shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Commission, the whole or any part of the stock or share capital of any concern engaged at the time of such acquisition in the manufacture and/or sale of soft drink concentrate in the United States, or the assets of any such concern (other than assets purchased or sold in the ordinary course of business) which are related to the manufacture and/or sale of soft drink concentrate in the United States.

VIII.

It is further ordered, That PepsiCo shall, within ninety (90) days from the date of service upon it of this order, and every ninety (90) days thereafter until the divestiture required by Paragraph I of this order has been completed, submit in writing to the Commission a report setting forth in detail its plans, actions and progress in complying with the divestiture required by Paragraph I of this order. Such compliance reports shall include, in addition to such other information and documentation as may hereafter be required to show compliance with this order, a summary of all discussions and negotiations with prospective acquirers of the assets involved, the identity of all such prospective acquirers, and copies of all written communications to and from such persons. PepsiCo shall, within one (1) year from the date of service upon it of this order, and every year thereafter, submit in writing to the

Commission a report setting forth in detail the manner and form in which it has complied and is complying with Paragraphs III and VII of this order.

IX.

It is further ordered, That PepsiCo shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

IN THE MATTER OF

BATON ROUGE ATHLETIC CLUB AND HEALTH SPA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2487. Complaint, Jan. 28, 1974—Decision, Jan. 28, 1974

Consent order requiring two Baton Rouge, La., health spas to warn clearly that any body wrapping device or treatment offered by them may be dangerous to health, and that prospective users should seek a physician's advice before using any such wrap.

Appearances

For the Commission: *Thomas J. Daquila.*

For the respondents: *William H. Cooper*, Baton Rouge, La.

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 Baton Rouge Athletic Club and Health Spa, Inc. (formerly Baton Rouge Health Club Management, Inc.), and Baton Rouge Health Club Management, Inc., Number Two, corporations, and Guy M. Bellelo and Raymond K. Roy, individually and as officers of the said corporations, 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, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Baton Rouge Athletic Club and Health Spa, Inc. (formerly Baton Rouge Health Club Management, Inc.) is a corporation organized and engaged in business under and by virtue of