

IN THE MATTER OF
BIDDLE PURCHASING COMPANY, ET AL.

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

Docket 3032. Complaint, Jan. 13, 1937—Decision, July 17, 1937

Where manufacturers, processors, and producers engaged in sale of commodities, in course of interstate commerce, to distributing concerns and buyers of such commodities in course of such commerce, through orders placed with it in behalf of such buyers by a purchasing agency engaged in (1) sale under contract of a market information service to over 2,400 distributing concerns scattered over the United States, and consisting principally of wholesalers of groceries, drugs, hardware, plumbing, automobile and electrical supplies, lumber, stationery, and other general merchandise, and in (2) providing, under said contract as interpreted, optional purchasing service for its contracting buyers under which service by it, if any, to seller was incidental, seller shipped direct to buyer in response to order placed with such purchasing agency by buyer, buyers rendered no service to sellers or to agency which, as agent and representative of buyer and subject to his control, received and accepted, for use of and payment over to buyer, in its entirety, such brokerage, with result that such payments, in effect, were actually made from seller to buyer, and latter received a discount in price equivalent to brokerage fee paid, and such buyers secured a lower price on commodities thus purchased than others, not members of such purchasing organization, received, on similar goods in like quantity bought direct from such sellers; in pursuance of a general plan and scheme whereby fees and commissions paid by sellers were made available to and transmitted to buyer—

- (a) Payed fees and commissions as brokerage on the sale of commodities to various distributing concerns and buyers engaged in purchase of commodities in course of interstate commerce, with knowledge of the fact that such fees were intended to be and were being paid over to such buyers by aforesaid purchasing company, as above set forth; and

Where distributing concerns engaged in sale of commodities in course of interstate commerce, and purchasers of the market information service and purchasing service of the purchasing company or agency hereinabove described—

- (b) Received and accepted fees and commissions paid as brokerage by such various sellers, as hereinabove set forth, in connection with purchase of commodities by such buyers through such purchasing agency; and

Where such purchasing agency, as hereinabove set forth, as instrumentality and means through which such sellers unlawfully were enabled to make payment of such fees and commissions as brokerage to such buyers and latter were enabled to receive and accept same—

- (c) Received such fees and commissions as brokerage from aforesaid sellers; and
(d) Transmitted and paid over same to aforesaid buyers:

Complaint

Held, That such acts and practices constituted a violation of Subsection C of Section 2 of Act of Congress approved Oct. 15, 1914, as amended.

Before *Mr. John W. Addison*, trial examiner.

Mr. Allen C. Phelps and *Mr. A. W. Chapman* for the Commission.

Davies, Richberg, Beebe, Busick & Richardson, of Washington, D. C., and *Mr. Samuel J. Rawak*, of New York City (with whom also appeared, for various respondents, counsel as hereinbelow set forth), for Biddle Purchasing Co. and nine other respondents.

Kaufman & Weitzner, of New York City (with whom also appeared counsel as hereinbelow set forth), along with aforesaid firm and said *Samuel J. Rawak*, for said Biddle Purchasing Co. and eight other respondents.

Mr. Milton Lowenfisch, of New York City, along with aforesaid firm and said *Samuel J. Rawak*, for Middendorf & Rohrs.

Mr. Louis D. Schwartz, of New York City, along with aforesaid firm, *Mr. Samuel J. Rawak*, and *Kaufman & Weitzner*, for Colonial Molasses Co., Inc.

Tenney, Harding, Sherman & Rogers, of Chicago, Ill., for Albert Dickinson Co.

Mr. Erwin C. Easton, of San Francisco, Calif., for Cava Packing Co.

Milling, Godchaux, Saal & Milling, of New Orleans, La., for Godchaux Sugars, Inc.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," as amended by an Act of Congress, approved June 19, 1936, entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C. title 15, sec. 13), and for other purposes," the Federal Trade Commission, having reason to believe that the respondents named above in the caption hereof and hereinafter more particularly designated and described, have violated, and are now violating, the provisions of Subsection (c) of Section 2 of said act as amended, hereby issues its complaint against the said respondents, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Biddle Purchasing Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at 107 Chambers Street in the city and State of New York.

PAR. 2. Respondent, General Grocer Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an office and principal place of business located at 301 South Eighth Street, in the city of St. Louis, State of Missouri. Respondent, Smart & Final Co., Ltd., is a corporation organized and existing under and by virtue of the laws of the State of California, with an office and principal place of business located at 315 Marine Avenue, in the city of Wilmington, State of California. Respondent, The Eavey Co., is a corporation organized and existing under and by virtue of the laws of the State of Ohio, with an office and principal place of business located at Detroit and Third Streets, in the city of Xenia, State of Ohio. Respondent, Michigan Trading Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Michigan, with an office and principal place of business located at 140 Twelfth Street, in the city of Detroit, State of Michigan. Respondent, C. G. Meaker Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and principal place of business located at 139 Wall Street in the city of Auburn, State of New York. Respondent, Midden-dorf & Rohrs, is a copartnership composed of Peter Rohrs and John Rohrs, with an office and principal place of business located at 3 Little West Twelfth Street in the city and State of New York. Respondent, Koll Grocer Company, is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, with an office and principal place of business located in the city of Owensboro, State of Kentucky.

PAR. 3. Respondent, Dannemiller Coffee Company, is an importing corporation organized and existing under and by virtue of the laws of the State of New York with an office and principal place of business located at 116 39th Street, in the city of Brooklyn, State of New York. Respondent, Colonial Molasses Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and principal place of business located at 616 Kent Avenue, in the city of Brooklyn, State of New York. Respondent, Albert Dickinson Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with an office and principal place of business located at 2750 West 35th Street, in the city of Chicago, State of Illinois. Respondent, Ervin A. Rice Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with an office and principal place of business located at 2230 South LaSalle Street, in the city of Chicago, State of Illinois. Respondent, Cava Packing Company, is a corporation organized and existing under and by virtue

of the laws of the State of California, with an office and principal place of business located in the city of Salinas, State of California. Respondent, Godchaux Sugars, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Louisiana, with an office and principal place of business located at Masonic Temple Building in the city of New Orleans, State of Louisiana.

PAR. 4. Said respondent, Biddle Purchasing Company, is engaged in the business of providing market information and purchasing services for numerous and divers wholesalers, jobbers, merchants, and dealers located in the several States of the United States, certain of whom are named in paragraph 2 above and joined as respondents herein, and being hereinafter more particularly described and referred to for convenience as respondent buyers. Said respondent, Biddle Purchasing Company, in the course and conduct of its business, as aforesaid, pursues a policy and practice of purchasing commodities, particularly foodstuffs, for the wholesalers, jobbers, merchants, and dealers above referred to, from numerous and divers manufacturers, processors, importers, and producers, located in the several States of the United States, certain of whom are named in paragraph 3 above and joined as respondents herein, and being hereinafter more particularly described and referred to for convenience as respondent sellers. In the course and conduct of its business, as aforesaid, said respondent, Biddle Purchasing Company, represents and acts for or on behalf of said respondent buyers and the other buyers above mentioned generally and as a group or class engaged in common practices, and specifically for each and every named respondent buyer, in the purchase of commodities, which are transported between and among the several States, whenever specifically requested so to do, and in the manner and form specified, directed, and ordered by said respondent buyers, and such other buyers acting individually.

PAR. 5. That said respondent buyers named in paragraph 2 above are each engaged in the business of buying commodities usually from sellers located in States other than the State in which such buyers are located and of reselling such commodities to their customers.

Said respondent buyers are fairly typical and representative members of a large group or class of wholesalers, jobbers, merchants, and dealers all of whom have by contract subscribed to the market and buying service furnished by respondent Biddle Purchasing Company. Said group or class embraces approximately 2,400 of such dealers and is so numerous as to make it impracticable to specifically name each and every one of them as respondents herein or to bring them before the Commission in this proceeding. All of said buyers are or

have been engaged in similar practices to those hereinafter charged against the respondent buyers.

PAR. 6. Said respondent sellers named in paragraph 3 above are each engaged in the business of selling commodities usually to buyers located in States other than the State in which said sellers are respectively located. Said respondent sellers are fairly typical and representative members of a large group or class of manufacturers, processors, importers, and producers, engaged in the common practice of selling some of their commodities, in interstate commerce, through respondent Biddle Purchasing Company, to said respondent buyers and other buyers of the above class or group who use the purchasing services of said respondent Biddle Purchasing Company. Said group or class of said sellers comprises a large number of such manufacturers, processors, importers, and producers and are too numerous to be individually named herein as respondents.

PAR. 7. Respondent Biddle Purchasing Company, in the course and conduct of its said business, receives orders to purchase commodities, particularly groceries and foodstuffs, from members of said group of buyers, including respondent buyers, located in the various States of the United States, and transmits such orders to and executes the same with members of said group of sellers, including respondent sellers, who in most cases are located in States of the United States other than the State in which such buyer or buyers are located. As a result of the transmission of said orders by such buyers to respondent Biddle Purchasing Company, the execution of the same by said respondent at the instance and request of said buyer or buyers, and the acceptance of said orders by said sellers or one or more of them, goods, wares and merchandise particularly foodstuffs, are in the case of each order and in a continuous succession of such orders sold and delivered by one or more of the said sellers to one or more of the said buyers. By such means and in the manner stated all of the respondents cause to be transported from one State to another goods and commodities to be resold to the buyers' customers or to consumers. In the operations and activities referred to, each and every one of the respondents is engaged in interstate commerce, in practices which contemplate and result in the transportation of commodities in interstate commerce and in making sales and purchases which directly affect and bring about such commerce.

PAR. 8. In the course of the buying and selling transactions hereinabove referred to, resulting in the delivery of commodities from one or more of the said sellers to one or more of the said buyers, by means of the purchasing services of respondent Biddle Purchasing

Company, as agent for said buyers, said sellers have transmitted and do transmit, pay to and deliver to said respondent Biddle Purchasing Company, a so-called brokerage fee or commission, the amount of which varies, but which is usually between one and five per cent of the quoted sale price agreed upon by buyer and seller. Said respondent Biddle Purchasing Company has and does receive such fees and commissions for the use and benefit of said buyers and has transmitted and does transmit and pay over said fees or commissions to said buyers, in the amount and to the extent to which such fees or commissions are received by it, such payments to the individual buyer being the amount paid by the individual seller in the given transaction to which such buyer is a party.

PAR. 9. In all of said transactions respondent Biddle Purchasing Company is the agent and representative of said buyers, acting for them and in their behalf and under their direct control. In fact, such so-called brokerage fees or commissions are not transmitted by said sellers to respondent Biddle Purchasing Company nor are the same received, held or retained by said Biddle Purchasing Company as payment for any services rendered by said respondent Biddle Purchasing Company to said sellers, but on the contrary such fees and commissions are so paid and received for the use of said buyers. In fact such fees or commissions are not paid to said buyers by respondent Biddle Purchasing Company as compensation for any services rendered to it by said buyers. The payment of said fees or commissions by said sellers to said buyers through the intermediary respondent Biddle Purchasing Company and the receipt and acceptance of such fees and commissions by said buyers from said sellers, through said intermediary, in the manner and under the circumstances hereinabove set forth, is in violation of the provisions of section 2, subsection (C) of the act described in the preamble hereof. The receipt of said fees and commissions by respondent Biddle Purchasing Company from said sellers and the acceptance thereof for the benefit of said buyers, and the transmission of and payment of the same by respondent Biddle Purchasing Company to said buyers is in violation of the terms of said statute.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", as amended by an Act of Congress approved June 19, 1936, entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies,

and for other purposes' approved October 15, 1914, as amended (U. S. C. title 15, sec. 13), and for other purposes," the Federal Trade Commission on January 13, 1937, issued and served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with violating the provisions of subsection C of section 2 of the said act as amended. After the issuance of said complaint and the filing of respondents' answers thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Allen C. Phelps and Albert W. Chapman, Attorneys for the Commission, before John W. Addison, an examiner of the Commission, theretofore duly designated by it, and in opposition to the allegations of the complaint by Davies, Richberg, Beebe, Busick & Richardson and Samuel J. Rawak, attorneys for all of the above named respondents except respondents Dannemiller Coffee Company, Albert Dickinson Company, Cava Packing Co., and Godchaux Sugars, Inc., and by Tenney, Harding, Sherman & Rogers, Attorneys for respondent Albert Dickinson Company, Erwin C. Easton, Attorney for respondent Cava Packing Co., Milling, Godchaux, Sall & Milling, Attorneys for respondent Godchaux, Sugars, Inc.; and said testimony and other evidence was duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of counsel aforesaid; and the Commission having duly considered the same, and being now fully advised in the premises, finds that this proceeding is in the interest of the public, and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Biddle Purchasing Company is a corporation organized and existing under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at 107 Chambers Street in the city and State of New York.

PAR. 2. Respondent, General Grocer Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an office and principal place of business located at 301 South Eighth Street, in the city of St. Louis, State of Missouri. Respondent, Smart & Final Co., Ltd., is a corporation organized and existing under and by virtue of the laws of the State of California, with an office and principal place of business located at 315 Marine

Avenue, in the city of Wilmington, State of California. Respondent, the Eavey Co., is a corporation organized and existing under and by virtue of the laws of the State of Ohio, with an office and principal place of business located at Detroit and Third Streets, in the city of Xenia, State of Ohio. Respondent, Michigan Trading Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Michigan, with an office and principal place of business located at 140 Twelfth Street, in the city of Detroit, State of Michigan. Respondent, C. G. Meaker Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and principal place of business located at 139 Wall Street in the city of Auburn, State of New York. Respondent, Middendorf & Rohrs, is a copartnership composed of Peter Rohrs and John Rohrs, with an office and principal place of business located at 3 Little West Twelfth Street in the city and State of New York. Respondent, Koll Grocery Company, is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, with an office and principal place of business located in the city of Owensboro, State of Kentucky.

PAR. 3. Respondent, Dannemiller Coffee Company, is an importing corporation organized and existing under and by virtue of the laws of the State of New York with an office and principal place of business located at 116 39th Street, in the city of Brooklyn, State of New York. Respondent, Colonial Molasses Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and principal place of business located at 616 Kent Avenue, in the city of Brooklyn, State of New York. Respondent, Albert Dickinson Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with an office and principal place of business located at 2750 West 35th Street, in the city of Chicago, State of Illinois. Respondent, Ervin A. Rice Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with an office and principal place of business located at 2230 South LaSalle Street, in the city of Chicago, State of Illinois. Respondent, Cava Packing Company, is a corporation organized and existing under and by virtue of the laws of the State of California, with an office and principal place of business located in the city of Salinas, State of California. Respondent, Godchaux Sugars, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Louisiana, with an office and principal place of

business located at Masonic Temple Building in the city of New Orleans, State of Louisiana.

PAR. 4. Respondent Biddle Purchasing Company is engaged in the business of selling a market information service and also purchasing services to over 2,400 distributing concerns scattered over the United States, who are principally wholesalers of groceries, drugs, hardware, plumbing, automobile and electrical supplies, lumber, stationery, and other general merchandise. These distributing concerns are located in 744 cities in every State of the United States, except Nevada, and in Hawaii, Canada, and the District of Columbia. Respondents named in paragraph 2 hereof are among the distributing concerns purchasing the market information service and the purchasing services of respondent Biddle Purchasing Company and they are representative members of the entire group, insofar as the practices charged in the complaint are concerned. This group will hereafter be referred to as buyers. In making available and providing its purchasing services to the said buyers, the Biddle Purchasing Company agrees to and does purchase merchandise for said buyers from more than 5,000 individual manufacturers, processors, importers, or producers who are scattered over the United States. Respondent manufacturers, processors, and producers named in paragraph 3 hereof are representative of this entire group, all of whom in making sales to the buyers above mentioned through respondent Biddle Purchasing Company use the same methods as the named respondents. This group will hereafter be referred to as sellers.

PAR. 5. Respondent sellers are engaged in selling commodities in the course of interstate commerce. Respondent buyers are engaged in purchasing commodities in the course of interstate commerce. Respondent Biddle Purchasing Company transmits orders for merchandise from respondent buyers to respondent sellers, as a result of which commodities are shipped from sellers to buyers usually from one State to another. All of said respondents are engaged in interstate commerce in participating in the commercial transactions hereafter more specifically described.

PAR. 6. Respondent Biddle Purchasing Company is an 1893 New Jersey corporation, successor to a company formed in 1879. It has branch offices in Meridian, Miss., Chicago, Ill., Pittsburgh, Pa., Baltimore, Md., San Francisco, Calif., and Seattle, Wash. It has a force of from five to ten salesmen who habitually travel throughout the United States and parts of Canada and Hawaii to solicit distributing concerns to purchase the Biddle market information service and purchasing services. These men at times also contact manufacturers

and processors. It also has thirty-two buyers and twenty-five assistant buyers who place orders for the Biddle subscribers and who contact manufacturers, processors, and producers on behalf of Biddle clients. Respondent Biddle Purchasing Company often examines and tests the wares of such manufacturers and producers and get descriptions of goods and prices, which information is sent to the Biddle subscribers. It sends bulletins, surveys, forecasts, tables, charts, and cards to subscribers, to keep them posted on general market conditions and on the merchandise which can be purchased by them. Bulletins go weekly or twice a week from New York, Chicago, San Francisco, Meridian, and Seattle and seasonally from Baltimore, giving prices and all data requisite on hundreds of items offered. It also supplies subscribers in some of its lines with indexed wooden trays in which to keep for ready reference the price cards, revisions of which it sends in constantly. It is in a favorable position to furnish accurate, constant, regular and reliable market information service. It handles, through its buying operations, the goods upon which it reports to its clients. Among its employees are specialists who have devoted many years to their respective lines of merchandise and who are in constant contact with the markets in performing their duties with said respondent.

PAR. 7. The Biddle Purchasing Company subscribers severally employ Biddle at a stipulated monthly sum ranging from \$50.00 to \$25.00 or under. This employment is evidenced by a contract between Biddle and the subscriber which is in the following form:

The Undersigned hereby employs BIDDLE PURCHASING COMPANY OF NEW YORK, to purchase such material as they may order from time to time, with reasonable credit limits, and agree to pay BIDDLE PURCHASING CO., for such services_____dollars per month from_____for twelve months. This arrangement will continue thereafter at the same monthly rate until thirty days' written notice is given by either party to the other of desire to discontinue.

THE BIDDLE PURCHASING CO., will issue frequent Bulletins or other mediums reporting price changes, quotations and such market information as may seem advisable.

Signed_____

By_____

Making Address_____

Accepted:

BIDDLE PURCHASING COMPANY;

By_____

Date_____

No subscriber has any exclusive right to the Biddle services, but they are sold to any wholesaler who wants them, subject only to the requirement that we have good credit rating. The Biddle services

are quite often bought by several dealers in the same line in the same town. Biddle yearly buys for its subscribers from said sellers several million dollars worth of commodities for resale by the buyers and as a result of said purchases such merchandise is shipped and transported from the State in which the same is located when the order is placed into and through other States of the United States, where they are delivered to purchasers who are Biddle subscribers. Biddle receives daily from its subscribers from 1,000 to 1,500 orders. When a subscriber forwards an order to Biddle, usually at a specified price, Biddle transmits the order to the seller. The seller ships the product direct to the buyer, in most cases billing the buyer at the price specified in the order. The buyer in most cases makes payment direct to the seller. The seller then sends Biddle a commission or brokerage on the transaction and Biddle pays this to the buyer or credits it to his account. If a buyer fails to name the purchase price, he expects to get the last price quoted by Biddle in its bulletins, or a lower price. If Biddle finds that the market has advanced he communicates with the buyer and confirms the order at the new price before transmitting it to the seller. The buyer in some cases names the seller whose products are wanted, but in some cases he relies upon Biddle to transmit the order to some producer who will supply goods of the quality and standard required.

PAR. 8. All respondent sellers have made sales of commodities in interstate commerce through Biddle Purchasing Company to respondent buyers and other Biddle buyers and have paid brokerage fees on such transactions to respondent Biddle Purchasing Company, which brokerage fees were later paid over or credited by respondent Biddle Purchasing Company to the particular respondent buyer or other buyer. Respondent Dannemiller Coffee Company, after some correspondence in August 1936, discontinued the practice of paying the Biddle Purchasing Company brokerage on sales made to the Biddle buyers through the Biddle Purchasing Company. Respondent Albert Dickinson Company has secured Biddle Purchasing Company's promise to refund brokerage fees if the law is construed to make it illegal for it to pay such fees to Biddle. Respondent Godchaux Sugars, Inc. stopped selling sugar through the Biddle Purchasing Company early in August 1936. All of the respondent sellers at the time of payment of brokerage fees to respondent Biddle Purchasing Company had knowledge of the fact that the Biddle Purchasing Company paid such fees over to the buyer placing the order and to whom the goods were shipped.

PAR. 9. The sellers from whom respondent Biddle Purchasing Company buys for its clients pay to Biddle brokerage fees at the

same rate that they pay other brokers who sell goods for them. This rate ranges from 1 to 5% usually. It is a matter of common knowledge in the trade that the Biddle Purchasing Company receives these fees for the use of its subscribers and pays them over in their entirety to the buyers. Respondent Biddle Purchasing Company receives and accepts these brokerage fees for the use and benefit of its subscribers and does not claim any right, title, or interest in such fees. The buyers receive and accept these brokerage fees from respondent Biddle Purchasing Company and know that they are to receive them at the time they place orders for merchandise for execution by Biddle. The Biddle buyers, by reason of the fact that they receive the brokerage fees paid to Biddle, get a lower price on commodities purchased through Biddle from the sellers than other buyers who are not members of the Biddle organizations get on similar goods in like quantity bought direct from said sellers.

PAR. 10. In all of the purchasing transactions which the respondent Biddle Purchasing Company executes for its buyers, the Biddle Company is the agent and representative of the buyer, and acts in fact for such buyer and in his behalf, and is subject to his control, insofar as such purchasing transaction is concerned. Said respondent Biddle Purchasing Company in such purchasing transactions is neither the agent nor representative of the seller nor does it act for or in behalf or is it under the control of such seller. Such services as respondent Biddle Purchasing Company may render to the seller in selling his commodities are incidental to the particular purchase and sale transaction, and if any services are so rendered by Biddle in connection with the sale or purchase of such commodities, such services are donated by the Biddle company to the seller. There is not, in fact, any payment of brokerage commissions made by any of respondent sellers to respondent Biddle Purchasing Company, which is not intended for the buyer and which does not reach the buyer. Such brokerage commissions, being intended for the buyers, are not in fact paid in satisfaction of any contractual or other indebtedness due from the seller to respondent Biddle Purchasing Company for services rendered, or otherwise. These payments, in effect, are actually made from the seller to the buyer and the buyer receives a discount in price equivalent to the brokerage fees paid to him. Respondent buyers render no service to respondent sellers in connection with the purchase of commodities through respondent Biddle Purchasing Company. Respondent buyers render no service to respondent Biddle Purchasing Company in connection with the purchase of goods, wares and merchandise made for them by said respondent Biddle Purchasing Company.

Conclusion

25 F. T. C.

PAR. 11. The contract between respondent Biddle Purchasing Company and its subscribers is construed by the parties thereto as being a contract for the sale and purchase of the Biddle market information service with a privilege extended to the buyers of using the Biddle purchasing services at their option. The buyers pay the monthly fee stipulated in the contract for the market information service. The buyers exercise their option to use the Biddle Purchasing Company's purchasing services in order to secure a discount in price from the current marketing price and the buyers when purchasing commodities through Biddle compute the net price at which the purchase is made as being the quoted price less the fee or commission paid by the seller as brokerage to Biddle and by Biddle transmitted to them. The buyers, in their bookkeeping, do not treat the brokerage fees and commissions received from respondent Biddle Purchasing Company as being an offset to the monthly fee paid by them to Biddle. The amount of the monthly fee paid by the buyers to Biddle is fixed at the time the contract is made, but the amount of the brokerage fees and commissions which may be received by a given buyer from the utilization of the Biddle purchasing services is unknown and incapable of ascertainment at the time the contract is entered into.

PAR. 12. All payments of brokerage fees made by respondents as hereinabove set forth are made as a part of a general plan or scheme which contemplates and results in payment of brokerage fees from the seller to the buyer through the respondent Biddle Purchasing Company, and which enables the buyers to secure discounts in price from the sellers under the guise of brokerage payments.

CONCLUSION

The Commission concludes that respondents Dannemiller Coffee Company, Colonial Molasses Company, Inc., Albert Dickinson Company, Ervin A. Rice Company, Cava Packing Company and Godchaux Sugars, Inc., have violated and are violating Subsection C, Section 2 of the Clayton Act as amended, by paying fees and commissions as brokerage to respondent Biddle Purchasing Company in the sale of commodities to respondent buyers and other buyers, with knowledge of the fact that such fees and commissions were and are intended to be and were and are being paid over by said respondent Biddle Purchasing Company to said buyers.

The Commission further concludes that respondents General Grocer Company, Smart & Final Company, Ltd., The Eavey Company, Michigan Trading Corporation, C. G. Meaker Company, Inc., Mid-

dendorf & Rohrs and Koll Grocery Company have violated and are violating the provisions of subsection C, section 2 of said statute, by receiving and accepting fees and commissions paid as brokerage by said respondent sellers and other sellers, in connection with the purchase of commodities by said buyers through respondent Biddle Purchasing Company.

The Commission further concludes that respondent Biddle Purchasing Company has violated and is violating the provisions of subsection C, section 2 of said statute, by receiving such fees and commissions as brokerage from respondent sellers and transmitting and paying over the same to respondent buyers; further, that said respondent Biddle Purchasing Company is the instrumentality and means by which respondent sellers unlawfully are enabled to make payment of such fees and commissions as brokerage to respondent buyers, and by which respondent buyers are enabled to receive and accept the same.

The Commission further concludes that the violations of said statute referred to are in pursuance of a general plan and scheme whereby fees and commissions paid by the sellers are made available to and transmitted to the buyers.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answers of all of the respondents, testimony and other evidence taken before John W. Addison, an examiner of the Commission, theretofore duly designated by it, in support of the allegations of said complaint, and in opposition thereto, briefs filed herein and oral arguments by Allen C. Phelps, counsel for the Commission, and by Davies, Richberg, Beebe, Busick & Richardson and Samuel J. Rawak, counsel for respondents Biddle Purchasing Company, Colonial Molasses Company, Inc., and Ervin A. Rice Co., General Grocer Co., Smart & Final Co., Ltd., The Eavey Co., Michigan Trading Corporation, C. G. Meaker Co., Inc., Koll Grocery Company, Inc., and Middendorf & Rohrs, and Erwin C. Easton, counsel for respondent Cava Packing Company, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of an Act of Congress as approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" as amended by an Act of Congress approved June 19, 1936, entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes' approved October 15, 1914, as amended (U. S. C. title 15, sec. 13), and for other purposes."

It is ordered, That respondents Dannemiller Coffee Company, Colonial Molasses Co. Inc., Albert Dickinson Company, Ervin A. Rice Co., Cava Packing Company and Godchaux Sugars, Inc., and their officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of commodities in interstate commerce or in the District of Columbia, do forthwith cease and desist from paying or granting to respondent Biddle Purchasing Company any fee or commission on sales of commodities, as brokerage or as an allowance in lieu thereof, which fee or commission is intended to be paid over or which is in fact subsequently to be paid over, in whole or in part, by said respondent Biddle Purchasing Company to any purchaser of such commodities.

It is further ordered, That respondents General Grocer Company, Smart & Final Company, Ltd., The Eavey Co., Michigan Trading Corporation, C. G. Meaker Co., Inc., Middendorf & Rohrs and Koll Grocery Company, and their officers, representatives, agents, and employees, in connection with the purchase of commodities in interstate commerce or in the District of Columbia, do forthwith cease and desist from accepting or receiving from respondent Biddle Purchasing Company any fee or commission which has been paid or granted to said Biddle Purchasing Company, as brokerage or as an allowance in lieu thereof, by a seller of commodities on sales made by such seller to said respondents.

It is further ordered, That respondent Biddle Purchasing Company, its officers, representatives, agents, and employees, in connection with the purchase or sale of commodities in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Receiving or accepting any fee or commission, as brokerage or as an allowance in lieu thereof, from any seller of commodities, which fee or commission is intended to be paid over to the purchaser of such commodities, or which is to be applied for the use and benefit of such purchaser;

2. Paying or granting to any purchaser of commodities any fee or commission received or accepted by said Biddle Purchasing Company, as brokerage or an allowance in lieu thereof, from the seller of such commodities.

It is further ordered, That the respondents and each of them shall within 90 days after service upon them of this order file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Complaint

IN THE MATTER OF

EASTERN PHARMACAL COMPANY, INC.

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

Docket 2948. Complaint, Oct. 16, 1936—Decision, July 19, 1937

Where a corporation engaged in distribution and sale of a certain liquid pharmaceutical product, in substantial competition with others engaged in distribution and sale of acetyl salicylic acid products, such as aspirin, in commerce among the various States and in the District of Columbia, and including among such competitors those who make, sell and distribute acetyl salicylic acid products, such as aspirin, as above set forth, without in any wise misrepresenting the composition, nature, quality, or effectiveness of their products—

Made use of name "Aspiral" in designating its said product in advertising literature of various types circulated to prospective purchasers, and featured said name on the cartons in which its said product was displayed for sale to purchasing public, and set forth in its advertising literature that its said "Elixir Aspiral offers the better way of prescribing aspirin," facts being its said "Aspiral" was neither true acetyl salicylic acid nor aspirin, as commonly designated and long, well, and favorably known to drug trade and to purchasing public as meaning acetyl salicylic acid preparation of recognized merit and value;

With capacity and tendency to mislead and deceive substantial number of purchasing public into erroneous and mistaken belief that said product was aspirin and designed and intended for treatment of same ills and conditions as aspirin, and that it contained all ingredients contained in aspirin, and with effect of causing a substantial volume of such public to buy substantial volume of its said product on account of such belief, and of causing an unfair diversion of trade from, and otherwise substantially injuring, competitors in commerce:

Held, That such acts and practices were all to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. John J. Keenan*, trial examiner.

Mr. Morton Nesmith for the Commission.

Mr. George H. Rosen, of New York City, and *Mr. Isaac Silberman*, of Monticello, N. Y., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Eastern Pharmacal Company, Inc., hereinafter referred to as respondent, has been and now is using unfair methods of competition in com-