

Syllabus

IN THE MATTER OF
THE WEBB CRAWFORD COMPANY ET AL.

COMPLAINT, FINDINGS, CONCLUSION, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF PARAGRAPH (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 3214. Complaint, Aug. 26, 1937—Decision, Oct. 20, 1938

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (c)—BUYER "BROKERAGE" PAYMENTS—BUYER CONTROLLED BROKERS

The payment of brokerage to, and the receipt thereof by, a broker upon the purchases of a buyer possessing the power of control over such broker, or in whose behalf such broker acts, is a practice which Congress deemed to be an inherently unfair trade practice and specifically and unconditionally proscribed by said paragraph of said Act.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (c)—BUYER "BROKERAGE" PAYMENTS—WHERE CORPORATE OWNERS BUYER "BROKERAGE" RECIPIENTS ON CORPORATE PURCHASES—CORPORATE ENTITY FICTION—AVAILABILITY AS SAVING

The payment of brokerage to, and the receipt thereof by, buyers on their own purchases, whether the same is paid directly to the buyers or transmitted to them through intermediaries, is a practice which Congress deemed to be an inherently unfair trade practice and specifically and unconditionally proscribed by said paragraph of said act, and while a corporate buyer, *de facto* owners of which receive so-called brokerage payments on its purchases, may for some purposes be considered a legal entity distinct from the members who compose it, that distinction is a fiction of the law which is disregarded when it is urged to an intent and purpose which is not consonant with the reason and policy of the law.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (c)—BUYER "BROKERAGE" PAYMENTS—"SERVICES RENDERED" CLAUSE—APPLICABILITY

The "services rendered" clause of said paragraph of said Act does not set up conditions upon which brokerage may be paid by sellers either to buyers or to their intermediaries, agents, or representatives, upon the buyers' own purchases, and in such a case no selling services whatsoever could, in law, be rendered to sellers in connection with the purchases of the buyer, by either the broker controlled and owned by and acting in its behalf, or by the buyer directly, or by any agent, representative or employee of either such broker or buyer, within the meaning of said paragraph of such act.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (c)—BUYER "BROKERAGE" PAYMENTS—COMPETITIVE EFFECT—WHETHER ADVERSE PREREQUISITE

While it may appear that payment of so-called brokerage fees or commissions by sellers to, or receipt thereof by, buyer-owned and controlled broker upon buyer's purchases has injured competition between such sellers and between such broker and buyer and their respective competitors, such fact need not be considered by Commission in arriving at conclusion of violation of para-

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graph in question, since, as a matter of law, it is unnecessary for an injurious effect upon competition to be shown in proceedings instituted thereunder.

DISCRIMINATION IN PRICE—CLAYTON ACT, SEC. 2(C)—BUYER "BROKERAGE" PAYMENTS—WHERE RECIPIENT BROKERAGE CONCERN OWNED BY CORPORATE BUYER-OWNERS—AS BUYER INTERMEDIARY, AND VIOLATION OF PARAGRAPH IN LAW AND IN FACT

Where various concerns competitively engaged in sale to corporation which,

(1) as largest wholesale grocer in territory served by it, was in active competition with others therein engaged, and of which (2) the three general officers, actively engaged in management and operation thereof, and owners of over 95 percent of its stock, constituted partner owners of a general merchandise brokerage concern, and which latter (3) was managed by minority stockholder in said corporate wholesale grocer, and brother of one of said individuals, and office of which (4) was located in building or space of aforesaid corporation, and through which (5) said wholesale grocer ordered substantial quantity of goods and merchandise, and to which, when not disadvantageous, (6) it gave preference in ordering its requirements on all occasions when it had connections with concerns selling required commodities, and which, (7) as thus engaged, was in active competition with other merchandise brokers endeavoring to sell commodities of their respective seller accounts to said corporate wholesale grocer and competitors thereof—

- (a) Paid to such brokerage concern, on all transaction of purchase and sale for which orders had been placed by said corporate wholesale grocer through said concern, and in connection with which transactions said concern acted for and in behalf of said corporate wholesale grocer only and under its sole control, and did not represent or act for or in behalf of or under control of sellers nor render same any brokerage or selling or other services in connection with sale of commodities to or purchase thereof by said corporate wholesale grocer, or benefits, if any, other than incident to its aforesaid buyer-controlled activity, so-called brokerage fees or commissions ranging from 1 percent to 5 percent on each purchase, and amounts constituting, in the aggregate, from 75 percent to 85 percent of said brokerage concern's total income; and

Where said individuals, officers, as aforesaid, and owners, substantially, of said corporate wholesale grocer, and owners, with said manager, of over 99 percent of the stock thereof, and partner-owners of said brokerage concern, and who, as such corporate officers, had no knowledge pertinent to demand or requirements or seller obligations not equally available to them as such partner-owners, and who, as such corporate officers, could have performed any function performed as such partner brokers—

- (b) Received, as periodically distributed, profits resulting from receipts of aforesaid so-called brokerage fees or commissions paid by said various sellers, upon purchases of commodities made, as hereinbefore described, by said corporate wholesale grocery buyer, which sold, at cost and below prevailing market prices, commodities thus purchased;

With result that effect of such payment of so-called brokerage fees or commissions by sellers to, and receipt thereof by, such brokerage concern upon purchases of said corporate wholesale grocer buyer, was to cause and continue to cause substantial injury to competition between—

- (1) Those sellers who had granted and paid such so-called brokerage fees or commissions to said brokerage concern and those sellers who had refused to do so, in that there had been and would continue to be a diversion of said corporate wholesale grocer buyer's business from the latter to the former;
- (2) Said brokerage concern and competing merchandise brokers, in that said corporate wholesale grocer buyer admittedly gave preference to said brokerage concern when not disadvantageous for it to do so, resulting in diversion of trade to it from others on occasions when competing brokers represented sellers offering commodities of like grade, quality, and price to those offered by such various sellers represented by said brokerage concern, and in that ability of such brokerage concern to obtain business of said corporate wholesale grocer buyer, because of relationship which existed between them, made more accessible to its selling accounts; and
- (3) Said corporate wholesale grocer buyer, and its competitors in the resale of commodities, upon the purchase of which it, in effect, received so-called brokerage fees or commissions, in that it, through receipt of said so-called brokerage fees or commissions, was enabled to, and in effect did, purchase commodities at prices substantially lower than prices at which its competitors could, and did, purchase same commodities from same sellers, and it was thereby enabled to resell said commodities at prices substantially lower than prices at which its competitors could resell same:

Held. That payment of so-called brokerage fees or commissions to, and receipt thereof by, said brokerage concern upon purchases of said corporate wholesale grocer buyer, under circumstances set forth, constituted, in fact and in law, payment of so-called brokerage fees or commissions to, and receipt thereof by, latter, within meaning of said paragraph of said act, and such payment by sellers of so-called brokerage fees or commissions in substantial amounts to, and receipt thereof by, said corporate brokerage concern, said corporate wholesale buyer, and said individuals, upon purchases of such corporate buyer, constituted violation of Paragraph (c) of Section 2 of an Act of Congress approved Oct. 15, 1914, as amended by Act approved June 19, 1936.

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

Mr. John Darsey for the Commission.

Green & Michael, of Athens, Ga., and *Watkins, Grant & Watkins*, of Atlanta, Ga., for The Webb Crawford Co. and Daniel Brokerage Co.

Langston, Allen & Taylor, of Goldsboro, N. C., for Charles F. Cates & Sons, Inc.

Milling, Godchaux, Saal & Milling, of New Orleans, La., for Godchaux Sugars, Inc. and Myles Salt Co., Ltd.

Monroe & Lemann, of New Orleans, La., for J. Aron & Co., Inc.

Stearns & Jones, of Chicago, Ill., for Morton Salt Co.

Bank & Scribner, of Washington, D. C., for Shotwell Manufacturing Co.

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COMPLAINT

Pursuant to the provisions of an Act of Congress, approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936, Public 692 (the Robinson-Patman Act); the Federal Trade Commission hereby issues its complaint against the respondents herein named, stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent, The Webb Crawford Co., is a Georgia corporation having its principal place of business and wholesale grocery warehouse at Athens, Ga. It is, and has been, engaged in the business of buying groceries and allied products, and selling the same at wholesale to retail customers located within the State of Georgia. The officers and stockholders together with the number of shares of stock owned by each are as follows:

Ed. D. Wier, president, 224 shares;

E. L. Wier, vice president, 82 shares;

Carter W. Daniel, secretary-treasurer, 388 shares;

C. R. Daniel, manager, 32 shares;

R. E. Fain, stockholder, 6 shares.

PAR. 2. The individual respondents, Carter W. Daniel, Ed. D. Wier, and E. L. Wier, trading under the firm name and style "Daniel Brokerage Co.," a partnership, have their principal place of business in the city of Athens, State of Georgia, and in the same building as the respondent, The Webb Crawford Co., and are the tenants of the said Webb Crawford Co. Said individual respondents are the same individuals above named as secretary-treasurer, president and vice president, respectively, of The Webb Crawford Co. and own 50 percent, 25 percent, and 25 percent interests, respectively, in said partnership. They engage in the business of merchandise brokers, acting as intermediaries in the purchase of goods, wares and other commodities, including groceries and allied products from the various seller respondents hereinafter named, on behalf of the aforesaid Webb Crawford Co. and other wholesale buyers who are not included herein as respondents. The Webb Crawford Co., the stock of which is 93 percent owned and which company is wholly controlled, as aforesaid, by these individual respondents, is the largest customer of the Daniel Brokerage firm and it purchases a substantial portion of its requirements through the agency of said brokerage firm.

PAR. 3. Respondent Charles F. Cates & Sons, Inc., is a North Carolina corporation engaged as a packer of pickles and preserved fruits, having its principal place of business at Faison, N. C.

PAR. 4. Respondent Godchaux Sugars, Inc., is a Louisiana corporation, having its principal place of business in the Masonic Temple Building, New Orleans, La.

PAR. 5. Respondent J. Aron & Co., Inc., is a Louisiana corporation, having its principal place of business at 416 Poydras Street, New Orleans, La.

PAR. 6. Respondent Myles Salt Co., Ltd., is a Louisiana corporation, having its principal place of business at 1048 Constance Street, New Orleans, La.

PAR. 7. Respondent Morton Salt Co. is an Illinois corporation, having its principal place of business at 208 West Washington Street, Chicago, Ill.

PAR. 8. Respondent J. D. Johnston, Jr., Co. is a manufacturer of peanut butter, having its principal place of business at Brundidge, Ala.

PAR. 9. Respondent The Shotwell Manufacturing Co. is a manufacturer of confectionery specialties, having its principal place of business at 3501 West Potomac Avenue, Chicago, Ill.

PAR. 10. Respondent Cincinnati Soap Co. is a manufacturer of soaps having its principal place of business at 209 West Seventh Street, Cincinnati, Ohio.

PAR. 11. Respondent Jackson Hay Co. is a wholesale distributor of hay, having its principal place of business at Jackson, Mich.

PAR. 12. The various respondents named and described in the above paragraphs numbered 3 to 11 inclusive, individually, and as a group representative of a class of sellers too numerous to be separately named herein or to be brought before the Commission in this proceeding without manifest inconvenience and delay, all of whom are hereinafter designated and referred to as "seller respondents," are engaged in the sale and distribution of goods, wares and merchandise to customers located in the several States of the United States other than the State in which the seller's principal place of business is located and in the course of such commerce sell to the respondent, The Webb Crawford Co., goods, wares and merchandise and cause the commodities so sold to be transported from the State in which located at time of sale into the State of Georgia.

PAR. 13. Respondent, The Webb Crawford Co., places its orders for a substantial portion of the goods, wares and merchandise by it required in the ordinary course and conduct of its business with, and purchases from, the seller respondents through the agency of the aforesaid individual respondents, Carter W. Daniel, Ed. D. Wier, and E. L. Wier, trading under the firm name and style "Daniel Brokerage Co." and upon receipt of said orders said respondent sellers and each of them ship, and the respondent The Webb Crawford Co., and Carter W. Daniel, Ed. D. Wier and E. L. Wier, trading as "Daniel Brokerage Co.," and each of them, causes said sellers to ship, the said

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goods, wares and merchandise from the State in which said seller is located into and through various other States of the United States to The Webb Crawford Co. located in the State of Georgia.

PAR. 14. In the course of the buying and selling transactions hereinabove referred to, resulting in the delivery of goods, wares and merchandise from one or more of the said sellers to The Webb Crawford Co., by means of the purchasing services of the individual respondents, Carter W. Daniel, Ed. D. Wier and E. L. Wier, trading as Daniel Brokerage Co. and acting as intermediaries for said buyer, said sellers have transmitted and do transmit, pay to, and deliver to the respondent, The Webb Crawford Co., and to said individual respondents, Carter W. Daniel, Ed. D. Wier and E. L. Wier, doing business as Daniel Brokerage Co., a so-called brokerage fee or commission, being a certain percentage of the quoted sale price agreed upon by buyer and seller. In the course of such buying and selling transactions respondent, The Webb Crawford Co., has received and accepted and is receiving and accepting such fees and commissions for which no services connected with the aforesaid purchases by The Webb Crawford Co. were rendered to the aforesaid sellers, and said individual respondents, doing business as Daniel Brokerage Co., have and do receive such fees and commissions while at the same time they own approximately 93% of the stock and have and exercise the entire control of The Webb Crawford Co., the buyer. Under the circumstances as hereinabove set out, namely, that the same individuals who traded as Daniel Brokerage Co. at the same time owned a controlling interest in the buyer, The Webb Crawford Co., no services connected with the transactions of sale and purchase of merchandise sold to the said respondent, The Webb Crawford Co., on which such brokerage fees or commissions were and are being paid to the said Carter W. Daniel, Ed. D. Wier and E. L. Wier, doing business as Daniel Brokerage Co., have either been or are being rendered to the sellers by respondents, Carter W. Daniel, Ed. D. Wier, and E. L. Wier.

PAR. 15. The payment of said fees or commissions by said sellers to the majority stockholders, officers and directors of the buyer, The Webb Crawford Co., through the intermediary respondents, Carter W. Daniel, Ed. D. Wier and E. L. Wier, and the receipt and acceptance of such fees and commissions by said majority stockholders, officers and directors from said sellers through themselves as intermediaries, 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 and acceptance of said fees and commissions by respondents, Carter

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W. Daniel, Ed. D. Wier, and E. L. Wier, trading under the firm name and style, Daniel Brokerage Co., is in violation of the terms of said statute.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by section 1 of the Act of Congress 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," approved June 19, 1936 (the Robinson-Patman Act), the Federal Trade Commission, on August 26, 1937, issued and served its complaint in this proceeding upon the parties respondent named in the caption hereof, charging them with violating the provisions of paragraph (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 John Darsey, attorney for the Commission, before John J. Keenan, an examiner for the Commission, theretofore duly designated by it, and in opposition to the allegations of the complaint by Max Michael, Edgar Watkins, Sr., Emile Godchaux, and Walter J. Suthon, Jr., attorneys for the said respondents, and said testimony and other evidence were 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, answers, testimony, and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of the said John Darsey for the Commission, and the said Max Michael and Edgar Watkins, Sr., for the respondents, 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.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, The Webb Crawford Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia. It is engaged in the whole-sale grocery business, maintaining its executive office in its warehouse

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in Athens, Ga., from which warehouse it serves the northeast Georgia territory.

The officers of The Webb Crawford Co. are:

Ed. D. Wier, President,
E. L. Wier, Vice President,
Carter W. Daniel, Secretary-Treasurer.

The Webb Crawford Co. has outstanding 744 shares of stock, more than 95 percent of which is owned by Ed. D. Wier, E. L. Wier, and Carter W. Daniel. The stockholders of The Webb Crawford Co., and the number of shares owned by each, are:

Ed. D. Wier-----	236 shares
E. L. Wier-----	82 "
Carter W. Daniel-----	388 "
Carl R. Daniel-----	32 "
R. E. Fain-----	6 "

The officers of The Webb Crawford Co. are each paid a salary of \$375 per month.

The Webb Crawford Co. will hereinafter be referred to as the buyer respondent.

PAR. 2. The respondent, Daniel Brokerage Co., is a partnership engaged in the general merchandise brokerage business. The partners, together with the interest owned by each, are:

Ed. D. Wier-----	25 per cent
E. L. Wier-----	25 " "
Carter W. Daniel-----	50 " "

Carl R. Daniel, a brother of Carter W. Daniel and a minority stockholder in the buyer respondent, is the manager of Daniel Brokerage Co. The office of the Daniel Brokerage Co. is located in the building occupied by the buyer respondent, for which office space the Daniel Brokerage Co. pays the buyer respondent \$10 per month as rental.

The Daniel Brokerage Co. was formed in August 1936 as the successor of G. A. Christian Brokerage Co. The G. A. Christian Brokerage Co. was a partnership composed of G. A. Christian, Ed. D. Wier, E. L. Wier, and Carter W. Daniel, each of whom owned a 25 percent interest therein. Prior to August 1936, G. A. Christian was an officer of, and owned 287 shares of stock in, the buyer respondent. In July 1936 Carter W. Daniel purchased the interest of G. A. Christian in the G. A. Christian Brokerage Co. and also his stock in the buyer respondent.

The Daniel Brokerage Co. will hereinafter be referred to as the broker respondent.

PAR. 3. The respondent, Charles F. Cates & Sons, Inc., is a corporation organized, existing, and doing business under and by vir-

tue of the laws of the State of North Carolina, having an office and principal place of business located at Faison, N. C.

The respondent, Godchaux Sugars, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, having an office and principal place of business located in the Carondelet Building, New Orleans, La.

The respondent, J. Aron & Company, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, having an office and principal place of business located at 416 Poydras Street, New Orleans, La.

The respondent, Myles Salt Co., Ltd., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, having an office and principal place of business located at 1048 Constance Street, New Orleans, La.

The respondent, Morton Salt Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, having an office and principal place of business located at 208 West Washington Street, Chicago, Ill.

Each of the respondents, hereinabove named in this paragraph, is engaged in the sale and distribution of commodities to customers residing in the various States of the United States.

This group of respondents will hereinafter be referred to as seller respondents.

J. D. Johnston, Jr., Co., The Shotwell Manufacturing Co., Cincinnati Soap Co., and Jackson Hay Co. were also named as parties respondent in the complaint herein. It appears that these named respondents are partnerships, and the individual members thereof were not served with process herein.

PAR. 4. The buyer respondent is the largest wholesale grocer serving the northeast Georgia territory. It does an annual dollar volume of business in excess of \$2,000,000. The buyer respondent is engaged in active competition with other wholesale grocers who serve the northeast Georgia territory.

The buyer respondent and its competitors, in the course and conduct of their respective businesses, purchase commodities for resale to the retail trade from manufacturers, producers, and distributors located in various States of the United States, and cause such commodities to be shipped from the various States in which they are manufactured and produced to the respective places of business of the buyer respondent and its competitors located in the State of Georgia.

PAR. 5. Since June 19, 1936, in the course and conduct of the wholesale grocery business of the buyer respondent as described in

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paragraph 4 hereof, orders for a substantial quantity of goods and merchandise have been, and are, placed by the buyer respondent with the seller respondents and other sellers through the medium of the broker respondent, pursuant to which orders commodities have been, and are, sold and shipped in interstate commerce as aforesaid by the seller respondents and other sellers to the buyer respondent. On all such transactions of purchase and sale between the buyer respondent and the seller respondents and other sellers since the effective date of the Robinson-Patman Act and prior to service of the complaint herein, the seller respondents and other sellers granted, paid, transmitted, and delivered to the broker respondent so-called brokerage fees or commissions ranging from 1 to 5 percent of the amount of each purchase. Since August 28, 1937, the date of the service of the complaint herein, some of the seller respondents and other sellers determined to keep, and have kept, a record of all such so-called brokerage fees or commissions which, but for this proceeding, would have been paid to the broker respondent on the transactions of purchase and sale as hereinabove described and to pay said brokerage fees and commissions in escrow or set them up as abeyance accounts on their respective books; such brokerage fees and commissions to be paid to the broker respondent when, as and if the legality of the payment thereof should be determined.

During the period from August 1936 to November 1937, the seller respondents and other sellers paid and transmitted to the broker respondent so-called brokerage fees or commissions in the total amount of \$23,127.70 upon the purchases made by the buyer respondent and others.

The so-called brokerage fees or commissions paid and transmitted by the seller respondents and other sellers to the broker respondent upon the purchases made by the buyer respondent since June 19, 1936, comprise from 75 to 85 percent of the total income of the broker respondent.

Many sellers represented by the G. A. Christian Brokerage Co. prior to June 19, 1936, refused to permit its successor, the broker respondent, to represent them thereafter because of the Robinson-Patman Act.

The broker respondent has connections with only a small proportion of the sellers from whom purchases are made by the buyer respondent.

When it is not disadvantageous to do so, the buyer respondent gives preference to the broker respondent in placing orders for its requirements on all occasions when the broker respondent has connections with sellers who sell the commodities required.

PAR. 6. All of the profits of the broker respondent resulting from the receipt of the so-called brokerage fees or commissions paid by the seller respondents and other sellers upon the purchases made by the buyer respondent, as aforesaid, are periodically distributed to the individual respondents, Ed. D. Wier, E. L. Wier, and Carter W. Daniel, the partners in the broker respondent, in proportion to their respective interests therein. In the period from August 1936 to November 1937, the profits of the broker respondent were divided and distributed to the said individual respondents as follows:

Ed. D. Wier.....	\$4,000
E. L. Wier.....	4,000
Carter W. Daniel.....	8,000

The individual respondents, Ed. W. Wier and Carter W. Daniel, from time to time, have deposited their profits from the broker respondent to the credit of their respective accounts with the buyer respondent. Such transactions are recorded on the books of the buyer respondent as loans to the buyer respondent by the respective individual respondents making the deposits. Usually promissory notes, representing the total amounts deposited by each individual respondent to their respective accounts in the buyer respondent over a period of time, are executed by the buyer respondent payable to the respective individual respondents making the deposits.

Respondent, E. L. Wier, very rarely makes deposits of his profits from the broker respondent in the buyer respondent because his personal expenses will not permit him to do so.

PAR. 7. The function of, and the services performed by, brokers representing sellers in connection with the sale of commodities is to find customers for sellers and, acting under and subject to the control of sellers, to sell commodities to those customers for and on behalf of sellers and as the agents of said sellers; the brokers' function in such cases is a selling function, and the services rendered by them is a selling service rendered to sellers.

PAR. 8. In all of the transactions of purchase and sale of commodities, as set forth in paragraph 5 hereof, wherein the broker respondent purchases commodities for the buyer respondent or negotiates or deals with the seller respondents and other sellers in connection with the purchase of commodities by, or the sale thereof to, the buyer respondent the broker respondent acts for and in behalf of the buyer respondent only and under its sole control, and in such transactions the broker respondent does not intend to, and in fact does not, represent the seller respondents or other sellers as their agent or act for or in behalf or under the control of the seller respondents or other sellers, and does not intend to, and in fact does not, render to

the seller respondents or other sellers any brokerage or selling services whatsoever or any other form of services in connection with the sale of commodities to, or the purchase thereof by, the buyer respondent.

In all such transactions since August 1936, wherein the broker respondent has purchased commodities for the buyer respondent or negotiated or dealt with the seller respondents and other sellers in connection with the purchase of commodities by, or the sale thereof to, the buyer respondent, the following circumstances and conditions have existed:

The broker respondent has been a partnership composed of the individual respondents, Ed. D. Wier, E. L. Wier, and Carter W. Daniel, who are president, vice president, and secretary-treasurer, respectively, of the buyer respondent, and who together own more than 95 percent of the outstanding stock of the buyer respondent;

Carl R. Daniel, a brother of Carter W. Daniel and a minority stockholder in the buyer respondent, has been employed as manager of the broker respondent at a salary of \$375 per month, and as such has been subject to the direction and control of, and has been controlled by, the individual respondents, Ed. D. Wier, E. L. Wier, and Carter W. Daniel;

The office of the broker respondent has been located in the building occupied by the buyer respondent;

Respondent, Ed. D. Wier, the president of the buyer respondent and a partner in the broker respondent, has also acted in the capacity of salesman for the buyer respondent;

Respondent, E. L. Wier, vice president of the buyer respondent and a partner in the broker respondent, has also acted in the capacity of buyer for the buyer respondent;

Respondent, Carter W. Daniel, secretary-treasurer of the buyer respondent and a partner in the broker respondent, has administered the financial affairs of the buyer respondent;

There has been no knowledge with regard to customer or consumer demand, requirements of the buyer respondent, or obligations of the buyer respondent to the seller respondents or other sellers available to the individual respondents, Ed. D. Wier, E. L. Wier, and Carter W. Daniel, in their respective capacities as officers of the buyer respondent which has not been available to the same individuals acting in their respective capacities as partners in the broker respondent; and

There has been no function performed by the individual respondents, Ed. D. Wier, E. L. Wier, and Carter W. Daniel, in their respective capacities as partners in the broker respondent which could not

have been performed by the same individuals acting in their respective capacities as officers of the buyer respondent.

PAR. 9. No brokerage or selling services whatsoever, or any other form of services in connection with the purchase of commodities by, or the sale thereof to, the buyer respondent are intended to be, or are, rendered to the seller respondents or other sellers by the broker respondent or by any agent, representative, or employee of the broker respondent.

In all matters and transactions wherein the broker respondent negotiates or deals with sellers in connection with the purchase of commodities by, or the sale thereof to, the buyer respondent, the broker respondent is the agent and representative of the buyer respondent, and acts in fact for and in behalf, and is subject to the direct control, of the buyer respondent, and any services or benefits which may accrue to the seller respondents or other sellers therefrom are services and benefits solely incidental to the services rendered the buyer respondent by the broker respondent.

PAR. 10. The seller respondents are fairly representative of a large group of sellers engaged in manufacturing various commodities which they sell and ship in interstate commerce to the buyer respondent and to other purchasers thereof. Each of the seller respondents actively competes with other manufacturers and sellers of similar commodities in endeavoring to sell and ship the same in interstate commerce to the buyer respondent, and to competitors of the buyer respondent.

PAR. 11. The broker respondent is in active competition with other merchandise brokers who endeavor to sell the commodities of their respective seller accounts to the buyer respondent and to the competitors of the buyer respondent.

PAR. 12. The buyer respondent is in active competition with other wholesale grocers who purchase commodities in interstate commerce and resell the same to the retail trade in the northeast Georgia territory.

PAR. 13. The buyer respondent has sold at cost and below prevailing market prices commodities purchased through the broker respondent, upon which purchases so-called brokerage fees or commissions were paid to the broker respondent by the sellers thereof.

PAR. 14. The effect of the payment of the so-called brokerage fees or commissions by the seller respondents and other sellers to, and the receipt thereof by, the broker respondent upon the purchases of the buyer respondent has been, and will continue:

To cause substantial injury to competition between those sellers who have granted and paid such so-called brokerage fees or commissions to the broker respondent and those sellers who have refused

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to do so, in that there has been and there will continue to be a diversion of the buyer respondent's business from the latter to the former;

To cause substantial injury to competition between the broker respondent and competing merchandise brokers, in that the buyer respondent admittedly gives preference to the broker respondent when not disadvantageous for it to do so, resulting in a diversion of trade from the latter to the former on occasions when competing brokers represent sellers offering commodities of like grade, quality and price to those offered by seller respondents and other sellers represented by the broker respondent; also, in that the ability of the broker respondent to obtain the business of the buyer respondent, because of the relationship which exists between them, makes selling accounts more accessible to the broker respondent; and

To cause substantial injury to competition between the buyer respondent and its competitors in the resale of commodities, upon the purchase of which the buyer respondent in effect receives so-called brokerage fees or commissions, in that the buyer respondent, through the receipt of said so-called brokerage fees or commissions, is enabled to, and in effect does, purchase commodities at prices substantially lower than the prices at which its competitors can, and do, purchase the same commodities from the same sellers, and the buyer respondent is thereby enabled to resell said commodities at prices substantially lower than the prices at which its competitors can resell said commodities.

CONCLUSION

The Commission concludes as follows with regard to the application of paragraph (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act, to the facts heretofore found:

The payment of brokerage to, and the receipt thereof by, a broker upon the purchases of a buyer possessing the power of control over such broker or in whose behalf such broker acts is a practice which Congress deemed to be an inherently unfair trade practice and specifically and unconditionally proscribed by said paragraph of said act.

The broker respondent is a buyer-controlled intermediary within the meaning of said paragraph of said act, and in all transactions wherein the broker respondent purchases commodities for the buyer respondent or negotiates or deals with sellers in connection with the purchase of commodities by, or the sale thereof to, the buyer respondent, the broker respondent acts for and in behalf, and subject to the direct control, of the buyer respondent within the meaning of said paragraph of said act.

Since June 19, 1936, the seller respondents and other sellers have paid and transmitted so-called brokerage fees or commissions in substantial amounts to, and the same have been accepted and received by, the broker respondent upon the purchases of the buyer respondent.

The payment of brokerage to, and the receipt thereof by, buyers on their own purchases, whether the same is paid directly to the buyers or transmitted to them through intermediaries, likewise is a practice which Congress deemed to be an inherently unfair trade practice and specifically and unconditionally proscribed by said paragraph of said act.

The buyer respondent is a corporation and for some purposes it may be considered a legal entity distinct from the members who compose it. But that distinction is a fiction of the law which is disregarded when it is urged to an intent and purpose which is not consonant with the reason and policy of the law.

The payment of the so-called brokerage fees or commissions to, and the receipt thereof by, the broker respondent upon the purchases of buyer respondent when the sole parties at interest in the broker respondent are the three partners therein, who are officers of the buyer respondent, and the manager thereof, who is a minority stockholder of the buyer respondent, which four individuals own more than 99 percent of the outstanding stock of the buyer respondent, is in fact and in law payment of so-called brokerage fees or commissions to, and receipt thereof by, the buyer respondent within the meaning of said paragraph of said act.

The "services rendered" clause of said paragraph of said act does not set up conditions upon which brokerage may be paid by sellers either to buyers or to their intermediaries, agents, or representatives, upon the buyers' own purchases.

The following explanation of the purpose of said "services rendered" clause appears in the conference report of the Committee of Conference of the House and Senate which considered the bills passed by each and reported out the Robinson-Patman Act in the form in which it was enacted:

Subsection (c) deals with brokerage. It is the same as subsection (b) in the House bill, which in turn is the same as subsection (c) in the Senate amendment, except that the words "except for services rendered," as contained in the House bill, do not appear in the Senate amendment. In the conference report these words are retained, so that, with adjacent language, it reads, "* * * any allowance or discount in lieu thereof, except for services rendered, in connection with the sale or purchase of goods, wares, or merchandise * * *."

With the words of the House bill thus retained, this subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf or subject to the direct or indirect control of the other. (74th Cong., 2d sess., 80 Cong. Rec., pt. 9, p. 9414.)

A more particularized explanation of the purpose of said "services rendered" clause, indicating the type of services referred to, appears in the report of the House Committee on the Judiciary, which report in this regard reads as follows:

Section (b) (same as section (c)) deals with the abuse of the brokerage function for purposes of oppressive discrimination. The true broker serves either as representative of the seller to find him market outlets, or as representative of the buyer to find him sources of supply. In either case he discharges functions which must otherwise be performed by the parties themselves through their own selling or buying departments, with their respective attendant costs. Which method is chosen depends presumptively upon which is found more economical in the particular case; but whichever method is chosen, its cost is the necessary and natural cost of a business function which cannot be escaped. It is for this reason that, when free of the coercive influence of mass buying power, discounts in lieu of brokerage are not usually accorded to buyers who deal with the seller direct since such sales must bear instead their appropriate share of the seller's own selling cost.

Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made. But the positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be rendering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary so controlled for such services unless compelled to do so by coercive influences in compromise of his natural interest. Whether employed

by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered, where in fact, if a "broker," so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller, would render the section a nullity. The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume. (74th Cong., 2d session, H. Rep. 2287, pp. 14, 15.)

No selling services whatsoever were in fact, or could be in law, rendered to sellers in connection with the purchases of the buyer respondent by either the broker respondent or the buyer respondent, or by any agent, representative or employee of either said broker respondent or buyer respondent within the meaning of said paragraph of said act.

While it is found as a fact in this proceeding that the payment of the so-called brokerage fees or commissions by the seller respondents and other sellers to, and the receipt thereof by, the broker respondent upon the purchases of the buyer respondent, has injured competition between the seller respondents, the broker respondent and the buyer respondent, and their respective competitors, the fact has not been considered by the Commission in arriving at its conclusion herein, for the reason that the Commission concludes as a matter of law that it is unnecessary for an injurious effect upon competition to be shown in proceedings instituted under said paragraph of said act.

Since June 19, 1936, the seller respondents and other sellers have paid and transmitted so-called brokerage fees or commissions in substantial amounts to, and the same have been received by, the broker respondent, the buyer respondent, and the individual respondents, Ed. D. Wier, E. L. Wier, and Carter W. Daniel upon the purchases of the buyer respondent in violation of Paragraph (c) of Section 2 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answers of the parties respondent named in the caption hereof, testimony and other evidence, taken before John J. Keenan, an examiner for the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed in support of said complaint and in opposition thereto and the oral arguments of John Darsey, counsel for the Commission, and Max Michael and Edgar Watkins, Sr., counsel for the respondents, and the Commission having made its findings as to the facts and its conclusion that the said parties respondent have violated, and are now violating, 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."

It is ordered, That the respondents Charles F. Cates & Sons, Inc., Godchaux Sugars, Inc., J. Aron & Company, Inc., Myles Salt Company, Ltd., and Morton Salt Co., and their respective officers, representatives, agents, and employees, in connection with the sale of commodities in interstate commerce to the respondent The Webb Crawford Co., do forthwith cease and desist from granting, paying, transmitting and delivering to the respondent The Webb Crawford Co., its officers, representatives, agents, or employees, and the respondents Ed. D. Wier, E. L. Wier, and Carter W. Daniel, either in their capacities as partners in the Daniel Brokerage Co., or in their individual capacities, any fees or commissions as brokerage or any allowance in lieu thereof.

It is further ordered, That the respondent The Webb Crawford Co., its officers, representatives, agents, and employees, and the respondents Ed. D. Wier, E. L. Wier, and Carter W. Daniel, either in their capacities as partners in the Daniel Brokerage Co., or in their individual capacities, in connection with the purchases of commodities in interstate commerce by the respondent The Webb Craw-

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Order

ford Co., do forthwith cease and desist from accepting or receiving from sellers any fees or commissions as brokerage or any allowance in lieu thereof.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to the respondents J. D. Johnston, Jr., Co., The Shotwell Manufacturing Co., Cincinnati Soap Co. and Jackson Hay Co., for the reason that the respective individual members of said partnerships were not served with process herein.

It is further ordered, That the parties respondent shall, within 30 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
TOM BLOOM, DOING BUSINESS AS NATIONAL PRESS
SERVICE

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

Docket 3488. Complaint, July 12, 1938—Decision, Oct. 25, 1938

Where an individual engaged in sale and distribution, in commerce among the various States and in the District of Columbia, of a correspondence course of instruction in press clipping and writing, and of a booklet entitled "Press Clipping and Picture Manual," and other printed matter, pamphlets, and press cards in connection therewith, in substantial competition with others likewise engaged in sale and distribution in said commerce of books, pamphlets, and other printed matter and courses of study and instruction intended for preparing students thereof, by correspondence, for various positions, employments, trades, and professions; in advertising his said course and booklet, pamphlets, press cards, and other printed matter in connection therewith, in numerous periodicals and newspapers—

- (a) Represented that purchasers thereof earned \$25 and up every week, or \$15 a week, or "big money," and that purchasers could turn out a feature article or trade journal item a day and sell such articles or items for as much as \$10 each, facts being purchasers could not earn such amounts or "big money," and purchaser could not turn out feature article or trade journal item daily and sell same as above represented;
- (b) Represented that writing, feature writing or clipping and selling press items, is as easy as A-B-C, and that one can make a success of such vocations without special ability or training or previous experience or "connections," and that purchasers could begin making money at once writing feature articles, trade journal items, and could rewrite same item half a dozen times from different angle or slant and sell it to as many editors, through various statements to foregoing effect, such as "Can you read? Can you write? Do you know your A B C's? If so, then you can make a success of this business," etc., and " * * * no waiting to MAKE MONEY! YOU CAN BEGIN AT ONCE!," etc., facts being such statements were false and misleading, one could not make a success of either vocation without special ability or training or previous experience or connections, or begin making money at once, etc., as hereinabove set forth;
- (c) Represented that press cards issued to its subscribers would gain attention, consideration, and entree to the holder, and were the "Open Sesame" to otherwise barred places, and that its said "Press Clipping and Picture Manual" contained complete information on how and where to find valuable articles and where to send them for cash, and disclosed "FASCINATING" way to make "BIG" money and build up an active and growing income, through such statements, among numerous others, as "Courtesy of the Press to you!," "You will be proud to present your credentials, in the form of your PRESS CARD * * * There is magic in that word