

IN THE MATTER OF
MISSISSIPPI SALES COMPANY, INC., JOBBERS PRODUCE
COMPANY, INC., AND S. O. SCOTT, INDIVIDUALLY, AND
AS PRESIDENT, DIRECTOR, AND MAJORITY STOCK-
HOLDER OF SAID CORPORATIONS, ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF FAR. (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 3511. Complaint, July 27, 1938—Decision, May 15, 1940

DISCRIMINATING IN PRICE—CLAYTON ACT, SECTION 2 (c)—BROKERAGE AND COM-
MISSION PROVISIONS—SELLER TO BUYER PAYMENTS—INTERMEDIARIES—BUYER
CONTROLLED BROKERS—BROKERAGE PAYMENTS TO AND RECEIPT BY, ON BUYER
PURCHASES.

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
prescribed by said paragraph of said act.

DISCRIMINATING IN PRICE—CLAYTON ACT, SECTION 2 (c)—BROKERAGE AND COM-
MISSION PROVISIONS—SELLER TO BUYER PAYMENTS—INTERMEDIARIES—CORPORATE
ENTITIES—WHERE BROKER INTERMEDIARY AND BUYER DISTINCT, BUT SAME CON-
TROL AND OWNERSHIP COMMON TO BOTH.

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 trans-
mitted to them through intermediaries, is a practice which Congress deemed
to be an inherently unfair trade practice and specifically and uncondition-
ally prescribed by said paragraph of said act, and while corporate broker "M"
and corporate buyer "J" may be considered legal entities distinct from the
members who compose them, such distinction is a fiction of the law which
is disregarded when it is urged to an intent and purpose which is not con-
sonant with the reason and policy of the law, and where the principal party
at interest in both broker "M" and buyer "J" was "S," who was president,
director, active manager, and owner of 98 percent of the stock of each,
payment of brokerage fees or commissions to and receipt thereof by "M"
upon the purchases of "J" was in fact and in law payment of brokerage fees
or commissions to and receipt thereof by buyer "J" within the meaning of the
paragraph in question of the act.

DISCRIMINATING IN PRICE—CLAYTON ACT, SECTION 2 (c)—BROKERAGE AND COM-
MISSION PROVISIONS—SELLER TO BUYER PAYMENTS—"SERVICES RENDERED"
CLAUSE.

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 Great Atlantic & Pacific Tea Company v. Federal
Trade Commission*, 106 F. (2d) 667 (C. C. A. 3d, 1939), 29 F. T. C. 1591;

Oliver Brothers v. Federal Trade Commission, 102 F. (2d) 763, 770, 771 (C. C. A. 4, 1939), 28 F. T. C. 1926, 1937, 1938; *Biddle Purchasing Co. v. Federal Trade Commission*, 76 F. (2d) 687 (C. C. A. 2d, 1938), 26 F. T. C. 1511; *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. (2d) 268 (C. C. A. 5th, 1940), 30 F. T. C. 1630).

DISCRIMINATING IN PRICE—CLAYTON ACT, SECTION 2 (c)—BROKERAGE AND COMMISSION PROVISIONS—SELLER TO BUYER PAYMENTS—INTERMEDIARIES—CORPORATE ENTITIES—WHERE BROKER INTERMEDIARY AND BUYER DISTINCT, BUT SAME CONTROL AND OWNERSHIP COMMON TO BOTH—RECEIPT BROKERAGE OR COMMISSION PAYMENTS AS DIVIDENDS OR PROFITS BY BROKER'S AND BY BUYER'S COMMON PRESIDENT AND MAJORITY STOCKHOLDER.

Where three corporations engaged in different parts of the country in the sale and distribution of commodities to customers residing in the various States, and fairly representative of a large group of sellers engaged in selling and shipping commodities in interstate commerce to a corporate produce jobber on orders placed by latter through corporate general merchandise broker, as below more fully set forth, and in active competition, in the case of each, with other sellers of competitive commodities in endeavoring to sell its products to produce jobber aforesaid and to other purchasers—

Paid, in common with other sellers above referred to, on all such transactions of purchase and sale in interstate commerce, certain agreed percentages of the amount of each purchase as brokerage fees or commissions to said general merchandise broker, president, director, active manager, and majority stockholder of which served in similar capacity and similarly controlled said produce jobber, and business of which was conducted from same offices and by identical personnel as served said produce jobber, orders of which, upon which such brokerage fees or commissions, were thus paid, were made through such brokerage concern; and

Where said brokerage concern and said produce jobber, which was in active competition with other produce jobbers who purchased commodities in interstate commerce for resale to same customers to whom it endeavored to resell commodities purchased by it as above set forth, and said individual, who owned, managed, and was in control of both, as aforesaid—

Received and accepted such brokerage fees or commissions from sellers as above set forth, upon purchases made through said brokerage concern, and in connection with which said concern acted for and in behalf and subject to control of said produce jobber, and in connection with which no brokerage or selling services whatsoever, or any other form of services in connection with purchases of commodities by or sale thereof to said produce jobber, were rendered to sellers by said brokerage concern or its said president or any employee of either, and in connection with which individual aforesaid, who served and controlled said produce jobber and said brokerage concern as above set forth and to whom were periodically distributed net profits of such brokerage concern resulting from receipt of brokerage fees or commissions paid to it by sellers upon purchases of such produce jobber as above indicated, had no knowledge or information with regard to customer or consumer demand or merchandise requirements or obligations of said produce jobber to sellers involved, in his capacity as president and active manager of said produce company, which was not equally well known to him in his capacity as president and active manager of said brokerage concern;

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Held, That such payments of brokerage or commissions on transactions aforesaid, and under the circumstances set forth, by such sellers to said brokerage concern, produce jobber and individual aforesaid, upon the purchases of said produce jobber in interstate commerce, and such receipt and acceptance, whether directly or indirectly, by said brokerage concern, produce jobber and individual aforesaid, of such brokerage fees or commissions upon such purchases, constituted violation of provisions of section 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act.

Before *Mr. Robert S. Hall*, trial examiner.

Mr. John Darsey for the Commission.

Wilbourn, Miller & Wilbourn, of Meridian, Miss., for Mississippi Sales Co., Inc., Jobbers Produce Co., Inc., S. O. Scott, The Penny Stores, Inc. and Buckley-Young Co.

Mr. Harry S. Dunmire, of Philadelphia, Pa., for American Fruit Growers, Inc.

Patterson & Patterson, of Seattle, Wash., for Pacific Fruit and Produce Co.

COMPLAINT

The Federal Trade Commission having reason to believe that the parties respondent named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936, have violated and are now violating the provisions of section 2 (c) 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 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), hereby issues this its complaint against said parties respondent and states its charges with respect thereto as follows, to wit:

PARAGRAPH 1. Respondent, Mississippi Sales Co., Inc., is a corporation organized and existing by virtue of the laws of the State of Mississippi, having an office and principal place of business located at 2500 A Street, in the city of Meridian, Miss. It also maintains branch offices in the cities of Columbus, Miss., Greenwood, Miss., and Jackson, Miss. The officers of said respondent, Mississippi Sales Co., Inc., are as follows:

S. O. Scott, president,
M. C. Fridge, vice president,
T. J. Roth, secretary-treasurer.

The majority of the outstanding stock of said respondent, Mississippi Sales Company, Inc., is owned by respondent S. O. Scott, the president of said respondent corporation.

The business of the said respondent, Mississippi Sales Co., Inc., is that of a general merchandise broker, and as such it acts as intermediary in transactions of sale and purchase of commodities, principally foodstuffs, between numerous sellers, among whom are the "seller respondents" hereinafter named and divers buyers, among whom are the "buyer respondents" hereinafter designated.

PAR. 2. Respondent, Jobbers Produce Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Mississippi, having an office and principal place of business located at 2500 A Street in the city of Meridian, Miss. It also maintains branch offices in the cities of Columbus, Miss., Greenwood, Miss., and Jackson, Miss. The officers of said respondent, Jobbers Produce Co., Inc., are as follows:

S. O. Scott, president,
M. C. Fridge, vice president,
T. J. Roth, secretary-treasurer.

The majority of the outstanding stock of respondent, Jobbers Produce Co., Inc., is owned by respondent, S. O. Scott, the president of said respondent corporation.

The business of the said respondent, Jobbers Produce Co., Inc., is that of a produce jobber. In the conduct of its said business produce is purchased by it from sellers residing in States other than the State of Mississippi, among whom are the "seller respondents" hereinafter named, pursuant to which purchases produce is shipped by such sellers from the respective States in which such sellers are located into and through various States of the United States to respondents, Jobbers Produce Co., Inc., and the produce so purchased is re-sold by said respondent, Jobbers Produce Co., Inc., to jobbers and wholesalers located in the various States of the United States, pursuant to which sales such produce is shipped and transported by said respondent, Jobbers Produce Co., Inc., into and through various States of the United States to its wholesaler and jobber customers.

PAR. 3. Respondent, S. O. Scott, is an individual residing in the city of Meridian, Miss., and having an office and place of business located at 2500 A Street, in said city and State.

PAR. 4. Respondent, The Penny Stores, Inc., is a corporation organized and existing by virtue of the laws of the State of Mississippi, having an office and principal place of business located in the city of Meridian, Miss.

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The majority of outstanding stock of said respondent, The Penny Stores, Inc., is owned by R. M. Snowden, who is president of said respondent corporation, and S. O. Scott.

Respondent, The Penny Stores, Inc., is engaged in the business of operating a chain of cash and carry grocery stores. In the conduct of such business commodities, particularly food products, are purchased by it from sellers residing in States other than the State of Mississippi, among whom are the "seller respondents" hereinafter named, pursuant to which purchases products are shipped by such sellers from the respective States in which such sellers are located into and through various States of the United States to the respondent, The Penny Stores, Inc.

PAR. 5. Respondent, Buckley-Young Co., is a corporation organized and existing under and by virtue of the laws of the State of Alabama, having an office and principal place of business located in the city of York, Ala.

The majority of the outstanding stock of said respondent, Buckley-Young Co., is owned by R. M. Snowden, who is vice president of said respondent corporation, and S. O. Scott.

Respondent, Buckley-Young Co., is engaged in selling groceries and allied products at wholesale. In the conduct of such business commodities, particularly food products, are purchased by it from sellers residing in States other than the State of Alabama, among whom are the "seller respondents" hereinafter named, pursuant to which purchases products are shipped by such sellers from the respective States in which such sellers are located into and through various States of the United States to the respondent, Buckley-Young Co.

PAR. 6. Respondent, American Fruit Growers, Inc., is a corporation organized and existing by virtue of the laws of the State of Delaware, having an office and principal place of business located at 2100 Penn Avenue in the city of Pittsburgh, Pa.

Respondent, Pacific Fruit & Produce Co., is a corporation organized and existing by virtue of the laws of the State of Delaware, having an office and principal place of business located at Occidental and King Streets, in the city of Seattle, Wash.

Respondent, Dow Fruit Co., is a corporation organized and existing by virtue of the laws of the State of Washington, having an office and principal place of business located in the city of Wenatchee, Wash.

Respondent, E. O. Muir Co., is a corporation organized and existing by virtue of the laws of the State of Utah, having an office and principal place of business located at 158 Pacific Avenue, in the city of Salt Lake City, Utah.

Respondents, William Henderson, Hunt Henderson, Christ Gamble, and Fred Gamble, are individuals doing business under the firm name and style of William Henderson Sugar Refinery, having an office and principal place of business located at 749 South Peters Street in the city of New Orleans, La.

The respondents named in this paragraph will be hereinafter referred to as "seller respondents."

Each of the "seller respondents" named in this paragraph is engaged in the sale of commodities to customers residing in States other than the respective States in which said "seller respondents" are located, pursuant to which sales commodities are shipped and transported by each of said "seller respondents" into and through various States of the United States to their respective customers. Said "seller respondents" are fairly typical and representative members of a large group or class of manufacturers, processors, and producers, engaged in the common practice of selling some of their commodities, in interstate commerce as aforesaid, through respondent, Mississippi Sales Co., Inc., to the respondents, Jobbers Produce Co., Inc., The Penny Stores, Inc., and Buckley-Young Co. Said group or class of said sellers comprise a large number of such manufacturers, processors, and producers, too numerous to be separately named herein or to be brought before the Commission in this proceeding without manifest inconvenience and delay.

PAR. 7. Respondent, Jobbers Produce Co., Inc., places orders for a substantial portion (probably 85 percent), of the products by it required in the ordinary course and conduct of its business with, and purchases the same from, the "seller respondents," and others, through the agency of the respondent, Mississippi Sales Co., Inc., and upon receipt of such orders each of said "seller respondents," and others, ships the products so ordered from the respective States in which said sellers are located into and through various other States of the United States to the respondent, Jobbers Produce Co., Inc.

In the course of the buying and selling transactions herein above referred to, resulting in the delivery of products from the "seller respondents," and others, to the respondent, Jobbers Produce Co., Inc., said "seller respondents" and others, since June 19, 1936, have transmitted, paid and delivered, and do transmit, pay and deliver to the respondents, Mississippi Sales Co., Inc., Jobbers Produce Co., Inc., and S. O. Scott, so-called brokerage fees or commissions, the same being certain percentages of the quoted sales prices agreed upon by said "seller respondents," and others, and the respondents, Mississippi Sales Co., Inc., Jobbers Produce Co., Inc., and S. O. Scott, and the respondents, Mississippi Sales Co., Inc., Jobbers Produce Co., Inc.,

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and S. O. Scott, since June 19, 1936, have received and accepted and are receiving and accepting such so-called brokerage fees or commissions while the ownership, management, and control of respondent, Mississippi Sales Co., Inc., is identified and affiliated with the ownership, management, and control of the respondent, Jobbers Produce Co., Inc., through the person and active management of respondent, S. O. Scott, who is president, director, and majority stockholder of both said respondent corporations, Mississippi Sales Co., Inc., and Jobbers Produce Co., Inc., and also through other mutual officers, directors, and employees.

In all of the buying and selling transactions hereinabove referred to, the so-called brokerage fees or commissions are paid and transmitted by said "seller respondents," and others, and accepted and received by said respondents, Mississippi Sales Co., Inc., Jobbers Produce Co., Inc., and S. O. Scott, while the respondent, Mississippi Sales Co., Inc., is acting in fact for and in behalf, and subject to the control, of respondent, Jobbers Produce Co., Inc., for which said so-called brokerage fees or commissions no services whatsoever in connection with such purchases have been rendered or are now being rendered to, for or on behalf of the said "seller respondents," and others, by the respondents, Mississippi Sales Co., Inc., Jobbers Produce Co., Inc., or S. O. Scott.

PAR. 8. Respondent, The Penny Stores, Inc., places orders for a substantial portion of the products by it required in the ordinary conduct of its business with, and purchases the same from, one or more of the "seller respondents," and others, through the agency of the respondent, Mississippi Sales Co., Inc., and upon receipt of such orders each of such sellers, ships the products so ordered from the respective States in which such sellers are located into and through various other States of the United States to the respondent, The Penny Stores, Inc.

In the course of the buying and selling transactions hereinabove referred to resulting in the delivery of products from said sellers to the respondent, The Penny Stores, Inc., said sellers, since June 19, 1936, have transmitted, paid and delivered, and do transmit, pay and deliver to the respondent, Mississippi Sales Co., Inc., so-called brokerage fees or commissions, the same being certain percentages of the quoted sales prices agreed upon by said sellers and the respondents, Mississippi Sales Co., Inc., and The Penny Stores, Inc., and the respondent, Mississippi Sales Co., Inc., since June 19, 1936, has received and accepted, and is receiving and accepting, such so-called brokerage fees or commissions while the ownership, management, and control of said respondent, Mississippi Sales Co., Inc., is identified and

affiliated with the ownership, management, and control of respondent, The Penny Stores, Inc., through respondent, S. O. Scott, who is president, director, and majority stockholder of respondent, Mississippi Sales Co., Inc., and who is also a stockholder in respondent, The Penny Stores, Inc., and also through the mutual stockholder interests of R. M. Snowden, who is president of respondent, The Penny Stores, Inc., and respondent, S. O. Scott, who together own the majority stock of respondent, The Penny Stores, Inc., and who also together own the majority stock of respondent, Buckley-Young Co., and other corporations not named herein.

In all of the said buying and selling transactions hereinabove referred to, the so-called brokerage fees or commissions are paid and transmitted by the said sellers to, and accepted and received by, the respondent, Mississippi Sales Co., Inc., while the said respondent, Mississippi Sales Co., Inc., is acting in fact for and in behalf, and subject to the control, of respondent, The Penny Stores, Inc., for which said so-called brokerage fees or commissions no services whatsoever in connection with such purchases have been rendered or are now being rendered to, for or on behalf of the said sellers by the respondent, Mississippi Sales Co., Inc.

PAR. 9. Respondent, Buckley-Young Co., places orders for a substantial portion of the products by it required in the ordinary conduct of its business with, and purchases the same from, one or more of the "seller respondents," and others, through the agency of the respondent, Mississippi Sales Co., Inc., and upon receipt of such orders each of such sellers, ships the products so ordered from the respective States in which they are located into and through various other States of the United States to the respondent, Buckley-Young Co.

In the course of the buying and selling transactions hereinabove referred to, resulting in the delivery of products from said sellers to the respondent, Buckley-Young Co., said sellers, since June 19, 1936, have transmitted, paid and delivered, and do transmit, pay, and deliver to the respondent, Mississippi Sales Co., Inc., so-called brokerage fees or commissions, the same being certain percentages of the quoted sales prices agreed upon by the said sellers and the respondents, Mississippi Sales Co., Inc., and Buckley-Young Co., and the respondent, Mississippi Sales Co., Inc., since June 19, 1936, has received and accepted, and is receiving and accepting, such so-called brokerage fees or commissions while the ownership, management, and control of said respondent, Mississippi Sales Co., Inc., is identified and affiliated with the ownership, management, and control of respondent, Buckley-Young Co., through respondent, S. O. Scott, who is president, director, and majority stockholder of respondent, Missis-

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issippi Sales Co., Inc., and who is also a stockholder in respondent, Buckley-Young Co., and also through the mutual stockholder interests of R. M. Snowden, who is vice president of respondent, Buckley-Young Co., and respondent, S. O. Scott, who together own the majority stock of respondent, Buckley-Young Co., and who also together own the majority stock of respondent, The Penny Stores, Inc., and other corporations not named herein.

In all of the buying and selling transactions hereinabove referred to, the so-called brokerage fees or commissions are paid and transmitted by the said sellers to, and accepted and received by, the respondent, Mississippi Sales Co., Inc., while the said respondent, Mississippi Sales Co., Inc., is acting in fact and in behalf, and subject to the control of respondent, Buckley-Young Co., for which said so-called brokerage fees or commissions no services whatsoever in connection with such purchases have been rendered or are now being rendered to, for, or on behalf of the said sellers by the respondent, Mississippi Sales Co., Inc.

PAR. 10. The transmission and payment of said so-called brokerage fees or commissions by the "seller respondent," and others, to, and the receipt and acceptance thereof by, the respondents, Mississippi Sales Co., Inc., Jobbers Produce Co., Inc., and S. O. Scott, upon the purchases of the respondent, Jobbers Produce Co., Inc., and the transmission and payment of said so-called brokerage fees or commissions by the "seller respondents," and others, to, and the receipt and acceptance thereof by, the respondent, Mississippi Sales Co., Inc., upon the purchases of the respondents, The Penny Stores, Inc., and Buckley-Young Co., in the manner and under the circumstances hereinabove set forth, is in violation of the provisions of section 2 (c) of the above mentioned 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 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 13, 1936 (the Robinson-Patman Act).

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 Clay-

ton 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 July 27, 1938, 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 Robert S. Hall, an examiner for the Commission, theretofore duly designated by it, and in opposition to the allegations of the complaint by R. E. Wilbourn, attorney 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 R. E. Wilbourn 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, Mississippi Sales Co., Inc., is a corporation organized and existing under the laws of the State of Mississippi. It maintains its principal office and place of business at 2500 A Street, in the city of Meridian, Miss., and branch offices in the cities of Columbus, Greenwood, and Jackson, Miss.

Mississippi Sales Co., Inc., has outstanding 100 shares of stock, 98 shares of which are owned by S. O. Scott, who is president of the corporation.

Mississippi Sales Co., Inc., is engaged in the general merchandise brokerage business. In the conduct of its said business it acts as intermediary in transactions of sale and purchase of commodities between numerous sellers and buyers.

PAR. 2. The respondent, Jobbers Produce Co., Inc., is a corporation organized and existing under the laws of the State of Mississippi. It maintains its principal office and place of business at 2500 A Street,

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in the city of Meridian, Miss., and branch offices at the cities of Columbus, Greenwood, and Jackson, Miss.

The jobbers Produce Co., Inc., has outstanding 100 shares of stock, 98 shares of which are owned by S. O. Scott, who is president of the corporation.

The business of the Jobbers Produce Co., Inc., is that of a produce jobber. In the conduct of its said business produce is purchased for resale by it from sellers located in States other than the State of Mississippi, pursuant to which purchases produce is shipped by such sellers from the respective States in which said sellers are located across State lines to the respondent, Jobbers Produce Co., Inc.

The business engaged in by each of the respondents, Mississippi Sales Co., Inc., and Jobbers Produce Co., Inc., in Meridian, Miss., and in each of their respective branch offices, is conducted in each office by the identical personnel from the same quarters under the direct and active supervision of the respondent, S. O. Scott.

PAR. 3. The respondent, S. O. Scott, is an individual residing in the city of Meridian, Miss., and having an office at 2500 A Street in said city and State. At all times hereinafter referred to the respondent S. O. Scott has been president, director, and active manager of each of the respondents Mississippi Sales Co., Inc., and Jobbers Produce Co., Inc., and has owned 98 percent of the outstanding capital stock of each of said corporations.

PAR. 4. The respondent American Fruit Growers, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with an office and principal place of business at 1400 Chamber of Commerce Building, Pittsburgh, Pa.

The respondent, Dow Fruit Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with an office and principal place of business in the city of Wenatchee, Wash.

The respondent, E. O. Muir Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Utah, with an office and principal place of business located at 158 Pacific Avenue in the city of Salt Lake City, Utah.

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.

The respondents named in this paragraph will hereinafter be referred to as seller respondents. These seller respondents are fairly representative of a large group of sellers engaged in selling and shipping commodities in interstate commerce to the respondent,

Jobbers Produce Co., Inc., and to other purchasers thereof. Each of the seller respondents actively competes with other sellers of competitive commodities in endeavoring to sell its products to the respondent, Jobbers Produce Co., Inc., and to other purchasers thereof.

PAR. 5. In the course and conduct of its said business, since June 19, 1936, the respondent, Jobbers Produce Co., Inc., has placed orders for a substantial quantity of commodities with the seller respondents and other sellers through the medium of the respondent, Mississippi Sales Co., Inc., pursuant to which orders commodities have been sold and shipped in interstate commerce by the seller respondents and other sellers to the respondent, Jobbers Produce Co., Inc. On all such transactions of purchase and sale in interstate commerce between the respondent, Jobbers Produce Co., Inc., and the seller respondents and other sellers, prior to the service of the complaint herein, the seller respondents and other sellers paid and transmitted to the respondent, Mississippi Sales Co., Inc., brokerage fees or commissions on the basis of an agreed percentage (usually 3 to 5 percent) of the amount of each purchase.

During the period from July 1, 1936, to July 1, 1938, the seller respondents and other sellers paid and transmitted approximately \$11,000 to the respondent, Mississippi Sales Co., Inc., as brokerage fees or commissions upon those purchases of the respondent, Jobbers Produce Co. Inc., which were invoiced directly to the respondent, Jobbers Produce Co., Inc. In addition, within the same period, an undetermined and substantial amount of brokerage fees or commissions were paid by said sellers to the respondent, Mississippi Sales Co., Inc., upon the purchases made by respondent, Jobbers Produce Co., Inc., from said sellers through the respondent, Mississippi Sales Co., Inc., in pool cars which were invoiced to other customers of said sellers.

PAR. 6. The net profits of the respondent, Mississippi Sales Co., Inc., resulting from the receipt of brokerage fees or commissions paid to it by the seller respondents and other sellers upon the purchases of the respondent, Jobbers Produce Co., Inc., as aforesaid, and upon the purchases of other customers, are periodically distributed to the respondent, S. O. Scott.

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'

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function in such cases is a selling function, and the service 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 respondent, Jobbers Produce Co., Inc., purchased commodities from sellers through the respondent, Mississippi Sales Co., Inc., the following circumstances and conditions existed:

The respondent, S. O. Scott, was president and director of each of the respondents, Mississippi Sales Co., Inc., and Jobbers Produce Co., Inc., and owned 98 percent of the outstanding capital stock of each of said corporations.

The business engaged in by each of the respondents, Mississippi Sales Co., Inc., and Jobbers Produce Co., Inc., was conducted from the same offices by the identical personnel under the direct and active supervision of the respondent, S. O. Scott; and

There was no knowledge or information with regard to customer or consumer demand, merchandise requirements of the respondent, Jobbers Produce Co., Inc., or obligations of the respondent, Jobbers Produce Co., Inc., to the seller respondents or other sellers, available to the respondent, S. O. Scott, in his capacity as president and active manager of the respondent, Jobbers Produce Co., Inc., which was not equally as well known to the respondent, S. O. Scott, in his capacity as president and active manager of the respondent Mississippi Sales Co., Inc.

PAR. 9. In all of the transactions of sale and purchase, hereinabove described, wherein the respondent, Jobbers Produce Co., Inc., purchased commodities from the seller respondents and other sellers through the respondent, Mississippi Sales Co., Inc., the respondent, Mississippi Sales Co., Inc., acted for and in behalf, and subject to the direct control, of the respondent, Jobbers Produce Co., Inc.

PAR. 10. 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 respondent, Jobbers Produce Co., Inc., as hereinafter described, were rendered to sellers by the respondent, Mississippi Sales Co., Inc., or the respondent, S. O. Scott, or any employee of either of said respondents.

PAR. 11. At all times hereinabove referred to, the respondent, Jobbers Produce Co., Inc., has been in active competition with other produce jobbers who purchase commodities in interstate commerce for resale to the same customers to whom the respondent, Jobbers Produce Co., Inc., endeavors to resell commodities purchased by it, as aforesaid.

PAR. 12. With respect to the allegations of the complaint concerning the payment of brokerage to, and the receipt thereof by, the respond-

ent, Mississippi Sales Co., Inc., upon the purchases of the respondents, The Penny Stores, Inc., and Buckley-Young Co., the Commission finds that in connection with such purchases the respondent, Mississippi Sales Co., Inc., did not act for or in behalf, or subject to the control, of either of the respondents, The Penny Stores, Inc., or Buckley-Young Co.

William Henderson, Hunt Henderson, Christ Gamble, and Fred Gamble, individuals doing business under the firm name and style of William Henderson Sugar Refinery and Pacific Fruit & Produce Co., were also named as seller respondents herein. In the case of the former it does not appear that any payments of brokerage have been made by the four named individuals doing business as William Henderson Sugar Refinery, to the respondent Mississippi Sales Co., Inc. In the case of the latter there was no answer filed or any appearance entered on behalf of this respondent, and the record does not contain any evidence of its corporate identity.

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

Since June 19, 1936, the seller respondents and other sellers have paid and transmitted brokerage fees or commissions in substantial amounts to, and the same have been accepted and received by, the respondent Mississippi Sales Co., Inc., upon the purchases of the respondent Jobbers Produce Co., Inc.

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 respondents, Mississippi Sales Co., Inc., and Jobbers Produce Co., Inc., are corporations and for some purposes they may be considered legal entities distinct from the members who compose them. 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 brokerage fees or commissions to, and the receipt thereof by, the respondent Mississippi Sales Co., Inc., upon the purchases of the respondent Jobbers Produce Co., Inc., when the principal party at interest in each of the said respondents, Mississippi Sales Co., Inc., and Jobbers Produce Co., Inc., is the respondent, S. O. Scott, who is president, director, active manager, and owner of 98 percent of the capital stock, of each of said corporations, is in fact and in law payment of brokerage fees or commissions to, and receipt thereof by, the respondent, Jobbers Produce Co., Inc., 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 Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. (2d) 667 (C. C. A. 3d, 1939), 29 F. T. C. 1591; *Oliver Brothers v. Federal Trade Commission*, 102 F. (2d) 763, 770, 771 (C. C. A. 4, 1939), 28 F. T. C. 1926, 1936-1938; *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. (2d) 687 (C. C. A. 2d, 1938), 26 F. T. C. 1511; *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. (2d) 268 (C. C. A. 5th, 1940), see post, p. 1630.

No selling services whatsoever were in fact, or could be in law, rendered to sellers in connection with the purchases of the respondent, Jobbers Produce Co., Inc., by either the respondent, Mississippi Sales Co., Inc., or the respondent, Jobbers Produce Co., Inc., or by any agent, representative, or employee of either said respondents within the meaning of said paragraph of said act.

Since June 19, 1936, the seller respondents and other sellers have paid and transmitted brokerage fees or commissions in substantial amounts to, and the same have been received by, the respondents, Mississippi Sales Co., Inc., Jobbers Produce Co., Inc., and S. O. Scott, upon the purchases of the respondent, Jobbers Produce Co., Inc., in interstate commerce, 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

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Order

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 Robert S. Hall, 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 R. E. Wilbourn, counsel for the respondents, and the Commission having made its findings as to the facts and its conclusion with respect to the violation of 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, American Fruit Growers, Inc., a corporation, Dow Fruit Co., a corporation, and E. O. Muir Co., a corporation, and their respective officers, representatives, agents, and employees, in connection with the sale of commodities in interstate commerce to the respondent, Jobbers Produce Co., Inc., do forthwith cease and desist from paying or granting to any of the respondents, Mississippi Sales Co., Inc., Jobbers Produce Co., Inc., or S. O. Scott, or any officer, representative, agent, or employee of any of the latter named respondents, any brokerage fee or commission, or any allowance or discount in lieu thereof.

It is further ordered, That each of the respondents, Mississippi Sales Co., Inc., and Jobbers Produce Co., Inc., and the respective officers, representatives, agents, and employees of each of said respondents, in connection with the purchase of commodities in interstate commerce by the respondent, Jobbers Produce Co., Inc., do forthwith cease and desist from the practice of receiving or accepting, either directly or indirectly, from sellers any brokerage fees or commissions, or any allowance or discount in lieu thereof.

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It is further ordered, That the respondent, S. O. Scott, do forthwith cease and desist from the practice of receiving or accepting brokerage fees or commissions, or any allowance or discount in lieu thereof, either directly or indirectly, as stock dividends or distribution of profits, or otherwise, in connection with the purchase of commodities in interstate commerce by the respondent, Jobbers Produce Co., Inc.

It is further ordered, That the charges of the complaint herein with respect to the respondents, The Penny Stores, Inc., Buckley-Young Co., Pacific Fruit & Produce Co., and William Henderson, Hunt Henderson, Christ Gamble, and Fred Gamble, individuals doing business under the firm name and style of William Henderson Sugar Refinery, be, and the same hereby are, dismissed for the reasons set forth with respect to each of said respondents in paragraph 12 of the findings as to the facts herein.

It is further ordered, That the respondents who are subject to the provisions of this order 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.

Order

IN THE MATTER OF
SWEETS COMPANY OF AMERICA, INC.

MODIFIED CEASE AND DESIST ORDER

Docket 2959. Order, May 25, 1940

Modified order, pursuant to provisions of Section 5 (1) of Federal Trade Commission Act, in proceeding in question, in which original order issued on December 7, 1938, 27 F. T. C. 1190, and in which Court of Appeals for the Second Circuit on January 29, 1940, in *Sweets Company of America, Inc. v. Federal Trade Commission*, 109 F. (2d) 296, 30 F. T. C. 1625, made and entered its written opinion directing that said order be modified by substitution of words "are likely to be made" for "may be made" in subdivision 1 thereof, by substitution of words "are likely to be used" for "may be used" in subdivision 2 thereof, and by substitution of words "are likely to be given" for "may be given" in subdivision 3 thereof, and on February 19, 1940, entered its decree modifying Commission's order as aforesaid directed, and, as so modified, affirmed said order and directed respondent to comply therewith—

Requiring respondent, its officers, etc., in connection with offer, etc., of candy in interstate commerce or in the District of Columbia, forthwith to cease and desist from (1) selling, etc., candy so packed, etc., that sales thereof to the general public are to be made or are likely to be made by means of a lottery, etc., (2) supplying, etc., dealers with packages, etc., of candy which are used, or which are likely to be used, to conduct a lottery, etc., in sale, etc., of candy therein contained to public, or (3) supplying, etc., dealers, for sale to public, with packages, etc., of candy composed of individually wrapped pieces of candy of uniform size and shape and of different colors, together with larger pieces of candy or any other merchandise, which said larger pieces of candy or other merchandise are to be or likely to be given as prizes to the purchasers procuring pieces of said candy of a particular color, as in said order below set forth.

Before *Mr. Miles J. Furnas* and *Mr. William C. Reeves*, trial examiners.

Mr. D. C. Daniel for the Commission.

Mr. Louis H. Solomon, of New York City, for respondent.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission on the complaint of the Commission, the answer of the respondent, the testimony and other evidence, and briefs and oral arguments for the respective parties; and the Commission having on December 7, 1938, made its findings as to the facts and conclusion that the respondent Sweets Co. of America, Inc., had violated the provisions of the Federal Trade Commission Act; and having on December 7, 1938, issued and subsequently served, upon the respondent, its order to cease and desist from said violations; and the respondent Sweets