

IN THE MATTER OF

JAMES J. FUNSTEN DOING BUSINESS AS FUNSTEN COMPANY; SAN XAVIER FISH PACKING COMPANY; AND PACIFIC MARINE PRODUCTS COMPANY

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

Docket 5131. Complaint, Feb. 15, 1944—Decision, Feb. 12, 1945

Where an individual who had long been engaged as the exclusive sales agent of two corporations packing and canning sea food, in which he and his wife owned a controlling stock interest, and which sold their products (a) through intermediaries to whom they customarily paid commissions or brokerage fees for their services, and (b) through said individual's organization, to which they paid 10 cents per case for its services;

Paid or granted as sales agent for said corporations, in connection with the interstate sale and distribution to buyers of said sea food products, whether under their own labels, or unlabeled, or under buyers' labels, brokerage fees or other compensation, which amounted customarily to 5 percent of the net price of the sea food products purchased, and which said individual charged to and collected from the corporation whose product he had sold:

Held, That such paying and granting of brokerage or other compensation to buyers on their own purchases, constituted violations of subsection (c) of Section 2 of the Clayton Act, as amended.

Mr. Edward S. Ragsdale for the Commission.

Pillsbury, Madison & Sutro, of San Francisco, Calif., for respondents.

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 subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, James J. Funsten, is an individual, trading as Funsten Company, with his principal office and place of business located at 260 California Street, San Francisco, Calif. (this respondent is hereinafter designated as Funsten Co.), is engaged, and for many years prior hereto has engaged, as the exclusive sales agent of two packing and canning corporations over which he, together with his wife, Florence Funsten, exercises financial control, namely, the San Xavier Fish Packing Co. of Monterey, Calif., and the Pacific Marine Products Co. of Astoria, Oreg. The respondent sells and distributes exclusively for these two corporations canned salmon, tuna, sardines, fish oil and fish meal and other sea food products. Such commodities are hereinafter designated as sea food products.

PAR. 2. Respondent, San Xavier Fish Packing Company, is a corporation, organized and existing under the laws of the State of California, with its principal office and place of business located at Monterey, Calif. The respondent corporation is now engaged, and for many years prior hereto has engaged, in the business of packing, canning, distributing and selling food products. The respondent sells and distributes its sea food products through its exclusive sales agent, Funsten Company. Respondent, James J. Funsten, and respondent's wife, Florence Funsten, own a controlling stock interest in this corporation.

PAR. 3. Respondent, Pacific Marine Products Co., is a corporation, organized and existing under the laws of the State of Oregon, with its principal office and place of business located at Astoria, Oreg. The respondent is now engaged, and for many years prior hereto has engaged, in the business of packing, canning, distributing and selling other sea food products, which it sells and distributes through its exclusive sales agent, Funsten Company. James J. Funsten and his wife, Florence Funsten, own a controlling stock interest in this corporation.

PAR. 4. The respondents, San Xavier Fish Packing Company and Pacific Marine Products Company, sell and distribute their sea food products exclusively through their sales agent, Funsten Co., but by two separate and distinct methods: first, through intermediaries who act as the respective respondents' agents in negotiating the sale of their sea food products at respondents' price and terms, and for which services such intermediaries are customarily paid commissions or brokerage fees; second, the respondents sell their sea food products through the Funsten Co. directly to buyers on and for their own accounts. Some of such buyers designate themselves as brokers but are paid directly or indirectly on their own purchases of sea food products, commissions or brokerage fees, usually in the amount of 5 percent of the net purchase price of the sea food products purchased.

Respondent, Funsten Co., is paid by San Xavier Fish Packing Company and the Pacific Marine Products Company the sum of 10¢ per case for its services as sales agent in selling and distributing canned fish foods for and in behalf of the two respective corporations mentioned.

To distinguish their sea food products from the sea food products sold by competitors and to facilitate sales, each of the packer respondents utilizes registered and unregistered trade-marks and brands for the various sea food products it sells and distributes, which brands and trade-marks are generally known as packer's or seller's brands. Representative of such brands are: "Golden Eagle," "Silver Beauty," "Sierra," "San Xavier," "AAA," "Triple A," "Salaroc" and "Skipanon."

The respondents also sell their sea food products unlabeled or unbranded, and under the labels or brands of some of their buyers, which labels or brands are generally known to the trade as private or buyer's brands.

Some of such buyers who utilize registered and unregistered private labels and brands incorrectly designate themselves as brokers. Such private brand buyers are primarily engaged in the purchase and sale of sea food products in their own names and for their own accounts.

PAR. 5. The respondents San Xavier Fish Packing Company and Pacific Marine Products Company in the course and conduct of their said business since June 19, 1936, have sold and distributed a substantial portion of their sea food products through their exclusive sales agent, Funsten

Co., directly to buyers who are located in States other than the States in which the respective respondents are located, and as a result of said sales and the respective respondents' instructions such sea food products are shipped and transported across State lines to buyers who are located in the various States of the United States.

PAR. 6. The respondent, Funsten Co., as sales agent for San Xavier Fish Packing Company and Pacific Marine Products, since June 19, 1936, in connection with the interstate sale and distribution of sea food products for and on behalf of the said two respective respondent principals has sold said sea food products in its own name to numerous buyers, and has been and is now paying, or has paid or granted, directly or indirectly, to such buyers commissions, brokerage fees or other compensation or allowances, or discounts in lieu thereof, sometimes under respondents' own labels, sometimes unlabeled, and sometimes under their respective buyers' labels.

A representative, but by no means complete, list of buyers who since June 19, 1936, have purchased sea food products from the respondent for their own account and for resale, and who have received and accepted, and who are now receiving and accepting, from said seller respondents on their respective purchases of sea food products, directly or indirectly, commissions, brokerage fees or allowances and discounts in lieu of brokerage fees, is as follows:

William H. Stanley, Inc.,
New York, N. Y.

John T. Leonard,
Charleston, S. C.

Griffith-Durney Company,
San Francisco, Calif.

James A. Seley & Company,
Los Angeles, Calif.

Walter M. Field & Company,
San Francisco, Calif.

The respondent, Funsten Co., customarily pays such buyers a commission or brokerage fee of 5 percent of the net price of the sea food products purchased by them, and charges to and collects said commission or brokerage fee from one or the other of the respective corporations whose product he has sold.

PAR. 7. The paying and granting by respondents, San Xavier Fish Packing Company and Pacific Marine Products Company, directly or indirectly through their sales agent, respondent, Funsten Co., and the transmission and payment by it, to the buyers of said sea food products, of commissions, brokerage or other compensation and allowances or discounts in lieu thereof on their own purchases, and the acts and practices of each of the respective respondents in promoting their sales of sea food products by such payments as set forth above, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an 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 Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Sec. 13), the Federal Trade Commission on February 15, 1944, issued and thereafter served its complaint in this proceeding upon the re-

spondents named in the caption hereof, charging them with violation of the provisions of subsection (c) of Section 2 of said act, as amended.

After the issuance of the complaint herein and the filing of the respondents' answer and supplemental answer, wherein respondents admitted all material allegations of fact set forth in said complaint and waived all intervening procedure, further hearings as to said facts, and expressly waived the filing of briefs and oral argument, this matter came on for final hearing before the Commission on said complaint, answer, and supplemental answer and the Commission, having duly considered the same and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, James J. Funsten, is an individual, trading as Funsten Company, with his principal office and place of business located at 260 California Street, San Francisco, Calif. This respondent, hereinafter frequently referred to as Funsten Company, is engaged, and for many years last past, has been engaged, as the exclusive sales agent of two packing and canning corporations over which he, together with his wife Florence Funsten, exercises financial control, namely, the San Xavier Fish Packing Company of Monterey, Calif., and the Pacific Marine Products Company of Astoria, Oreg. As exclusive sales agent for these two corporations, the Funsten Company sells and distributes the canned salmon, tuna, sardines, fish oil and fish meal and other sea food products produced by them. These products are hereinafter frequently referred to as sea food products.

PAR. 2. Respondent, San Xavier Fish Packing Company, is a corporation, organized and existing under the laws of the State of California, with its principal office and place of business located at Monterey, Calif. This respondent is now engaged, and for many years last past has been engaged, in the business of packing, canning, distributing and selling sea food products. It sells and distributes its sea food products through its exclusive sales agent, Funsten Company. Respondent, James J. Funsten, and respondent's wife, Florence Funsten, own a controlling stock interest in this corporation.

PAR. 3. Respondent, Pacific Marine Products Company, is a corporation, organized and existing under the laws of the State of Oregon, with its principal office and place of business located at Astoria, Oreg. This respondent is now engaged, and for many years last past has been engaged, in the business of packing, canning, distributing and selling sea food products. It sells and distributes such products through its exclusive sales agent, Funsten Company. James J. Funsten and his wife, Florence Funsten, own a controlling stock interest in this corporation.

PAR. 4. (a) The respondents, San Xavier Fish Packing Company and Pacific Marine Products Company, sell and distribute their sea food products through Funsten Company by two separate and distinct methods: First, through intermediaries who act as the respective respondents' agents in negotiating the sale of their sea food products at respondents' price and terms, and for which services such intermediaries are customarily paid commissions or brokerage fees; Second, the respondents sell their sea food products through the Funsten Company directly to buyers on and for their own accounts. Some of such buyers designate themselves as brokers

but are paid, directly or indirectly, commissions or brokerage fees, usually in the amount of 5 percent of the net purchase price on their own purchases of sea food products.

(b) Respondent, Funsten Company, is paid by San Xavier Fish Packing Company and the Pacific Marine Products Company the sum of 10¢ per case for its services as sales agent in selling and distributing sea food products for and in behalf of these corporations.

(c) To distinguish their sea food products from the sea food products sold by competitors and to facilitate sales, each of the packer respondents utilizes registered and unregistered trade-marks and brands for the various sea food products it sells and distributes, which brands and trade-marks are generally known as packer's or seller's brands. Representative of such brands are: "Golden Eagle," "Silver Beauty," "Sierra," "San Xavier," "AAA," "Triple A," "Salaroc" and "Skipanon."

(d) The respondents also sell their sea food products unlabeled or unbranded, and under the labels or brands of some of their buyers, which labels or brands are generally known to the trade as private or buyer's brands. Some of such buyers who utilize registered and unregistered private labels and brands incorrectly designate themselves as brokers. Such private brand buyers are primarily engaged in the purchase and sale of sea food products in their own names and for their own accounts.

PAR. 5. Respondents, San Xavier Fish Packing Company and Pacific Marine Products Company, in the course and conduct of their said business since June 19, 1936, have sold and distributed a substantial portion of their sea food products through their exclusive sales agent, Funsten Company, directly to buyers who are located in States other than the States in which the respective respondents are located, and as a result of said sales and the respective respondents' instructions such sea food products are shipped and transported across State lines to buyers who are located in the various States of the United States.

PAR. 6. Respondent, Funsten Company, as sales agent for San Xavier Fish Packing Company and Pacific Marine Products Company, since June 19, 1936, in connection with the interstate sale and distribution of sea food products for and on behalf of the said two respective respondent principals has sold said sea food products in its own name to numerous buyers, and has been and is now paying, or has paid or granted, directly or indirectly, to such buyers commissions, brokerage fees or other compensation or allowances, or discounts in lieu thereof, sometimes under respondents' own labels, sometimes unlabeled, and sometimes under their respective buyers' labels. A representative, but by no means complete, list of buyers who since June 19, 1936, have purchased sea food products from the respondents for their own account and for resale, and who have received and accepted, and who are now receiving and accepting, directly or indirectly, from said seller respondents on their respective purchases of sea food products, commissions, brokerage fees or allowances and discounts in lieu of brokerage fees, is as follows:

William H. Stanley, Inc.,
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Griffith-Durney Company,
San Francisco, Calif.

James A. Seley & Company,
Los Angeles, Calif.

Walter M. Field & Company,
San Francisco, Calif.

Respondent, Funsten Company, customarily pays such buyers a commission or brokerage fee of 5 percent of the net price of the sea food products purchased by them, and charges to and collects said commission or brokerage fee from one or the other of the respective corporations whose product he has sold.

CONCLUSION

Under the facts and circumstances set forth in the foregoing findings as to the facts, the Commission finds that the paying and granting by respondents, San Xavier Fish Packing Company and Pacific Marine Products Company, directly or indirectly, through their sales agent, respondent, Funsten Company, and the transmission and payment by said Funsten Company of Commissions, brokerage or other compensation and allowances or discounts in lieu thereof, to the buyers of said sea food products on their own purchases, constitute violations by the respondents herein of subsection (c) of Section 2 of the Clayton Act, as amended.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer and supplemental answer of the respondents, which answers admit all material allegations of the complaint to be true and waive all other intervening procedure and further hearings as to said facts; and the Commission having made its findings as to the facts and conclusion that respondents, James J. Funsten, an individual, doing business as Funsten Company, San Xavier Fish Packing Company, a corporation, and Pacific Marine Products Company, a corporation, have violated the provisions of subsection (c) of Section 2 of an 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 an Act of Congress approved June 19, 1936, (the Robinson-Patman Act) (U.S.C. Title 15, Sec. 13).

It is ordered, That the respondent James J. Funsten, an individual, doing business as Funsten Company, his representatives, agents and employees, and respondents, San Xavier Fish Packing Company, a corporation and Pacific Marine Products Company, a corporation, their respective officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of sea food products or other commodities, in commerce as commerce is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying or granting anything of value as a commission or brokerage, or any compensation, allowance or discount in lieu thereof, to any purchaser upon purchases for his own account, or to any agent, representative or other intermediary acting in fact for or in behalf of or subject to the direct or indirect control of the purchaser to whom sale is made.

It is further ordered, That respondents shall, within 60 days after the 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 the order.

IN THE MATTER OF

DURAKOTE PAINT CORPORATION, AND PHILIP H. EISGRAU,
CELE EISGRAU, NATHAN PASHMAN, AND THEODORE
SHAPIRO, AS OFFICERS THEREOF

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

Docket 5018. Complaint, July 28, 1943—Decision, Feb. 24, 1945

Where a corporation engaged in the interstate sale and distribution of paint and paint products, and its four officers, who owned all its stock, and of whom two were engaged as partners under a trade name in the manufacture of paint and paint products which they sold to it; through advertisements circulated to purchasers and prospective purchasers in various states, including form letters—

- (a) Represented that they had for sale a limited quantity of their "Durakote Outside White Paint," worth \$3.25 a gallon, which was being offered at a special or sacrifice price of \$1.85 a gallon; that it was a high-grade paint, superior in quality to the most expensive brands of outside white paint; and was durable and dried to a hard finish within a few hours and was capable of enduring the severest exposure without cracking, chipping, or flaking; and that the supply thereof was limited to a few gallons stored in a warehouse;

The facts being that the quantity thereof was not limited as so specified, but orders received were filled by them in unlimited quantities; the price of \$1.85 a gallon was not a sacrifice or reduced price for said paint but was the usual price charged by them therefor; said paint was not of a quality similar to paint regularly sold at \$3.25 a gallon nor superior in quality and composition to the most expensive brands of outside paint; would not endure severest exposure without cracking, chipping, or flaking and did not dry hard within a few hours; and

- (b) Represented that the said corporation was a manufacturer of paints, enamels, varnishes, and allied specialties and manufactured the paint sold under the brand name "Durakote";

The facts being that said corporation was not a manufacturer but, instead, was a sales organization engaged solely in the sale and distribution of paint and paint products manufactured by its two stockholders above referred to; and orders for paint received by it were transmitted to said individuals, who filled them by shipping direct to purchasers and charged the cost of paint shipped, to the account of afore-said corporation;

With capacity and tendency to mislead a substantial portion of the purchasing public into the mistaken belief that said representations were true, and thereby induce purchase by it of said product:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. John L. Hornor*, trial examiner.

Mr. Merle P. Lyon and *Mr. Clark Nichols* for the Commission.
Kaplan & Kaplan, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Com-