

IN THE MATTER OF

CHARLES P. HALFHILL, THEODORE A. HALFHILL, HARRY J. HALFHILL AND HARRY J. HALFHILL, JR. DOING BUSINESS AS THE HALFHILL COMPANY AND AS OCEAN FOOD PRODUCTS COMPANY

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

Docket 5267. Complaint, Jan. 26, 1945—Decision, May 12, 1945

Where four partners engaged in buying and in selling and distributing canned salmon, tuna, mackerel, sardines and other canned food products for their own account for resale, (1) to buyers through brokers who acted as said partners' agents and to whom they customarily paid commissions or brokerage fees based on a percentage of the invoice sales prices; and (2) to direct buyers who bought said products in their own names and for their own account for resale, including so-called "buying brokers," chain stores, large wholesalers, members of buying groups and others—Paid to such direct buyers—to whom they invoiced and shipped their food products directly and from whom they collected the purchase price and who, contrary to the manner in which brokers operate, were traders for profit, who purchased and resold such food products in their own names and for their own accounts, took title thereto, assumed all risk incident to ownership, and warehoused and insured the same, and financed their dealing therein—commissions or brokerage fees on their purchases by deducting or allowing from the invoice price an amount approximating the commissions paid by them to their legitimate brokers, or by selling to them at a net price which reflected the same:

Held, That such paying and granting of commissions, brokerage, or other compensation, and allowances or discounts in lieu thereof, to the buyers of said food products 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.

Tapper & Tapper, of Los Angeles, 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 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. Respondents, Charles P. Halfhill, Theodore A. Halfhill, Harry J. Halfhill, and his son, Harry J. Halfhill, Jr., are partners, engaged in business under the registered fictitious trade names of The Halfhill Company and Ocean Food Products Company, in accordance with the laws of the State of California, having their principal office and place of business located at 714 West Olympic Boulevard, Los Angeles, Calif.

PAR. 2. The respondents, doing business as The Halfhill Company and Ocean Food Products Company, since June 19, 1936, have been and are now engaged in the business of buying, selling and distributing canned salmon, canned tuna, canned mackerel, canned sardines and other canned food products (all of which are hereinafter designated as "food products") for their own account for resale.

The respondents, since June 19, 1936, in the course and conduct of their said business, have sold and distributed a substantial portion of their food products, directly and through brokers, to buyers located in States other than the State in which the respondents are located, and as a result of said sales and the respondents' instructions, such food products are shipped and transported across State lines to such buyers so located.

PAR. 3. All food products sold by respondents bear a label upon which appears a brand, trade-mark, or trade name. Such labels are attached to such food products to identify and distinguish them as the products of the persons owning the brands from the products of competitors.

A brand, trade-mark, or trade name may be defined as a symbol of business goodwill. Goodwill is an attitude in people which causes them to continue to patronize a certain place or person or to purchase a definite commodity. Upon the brand used depends to whom the goodwill created by the product accrues. Thus, when respondents sell goods which bear their own brand, the goodwill accrues to them; whereas, when they sell goods bearing the brand of another, the goodwill accrues not to the respondents but to the person who owns the brand. That such is the purpose and effect of the use of brands is well known in the industry.

The respondents' food products are sold and distributed under two distinct brand classifications, namely, (1) sellers' brands and (2) distributors' brands.

A seller's brand may be defined as a brand, owned and controlled by the original seller, and as referred to herein designates brands owned and utilized by respondents in the promotion and sale of its products, which brand identifies the particular products for which respondents assume the responsibility all the way through the channels of distribution to the consumer, and whatever goodwill is established thereby accrues to respondents. Respondents determine the sales and price policies with reference to such food products. Among the brands so used by respondents are:

San Nicholas, Halfhill's, Sea Prize, Halfhill's Best Buy, LaFavorita Tonno, Best Buy, Blue Band, Beach Club, Better than Chicken, Cal-Prize, Mediterraneo, Red Sun, Roma, Serenity, Summer Sea, Westminster.

Distributors' brands may be defined as brands owned and controlled by other than the original sellers and as referred to herein designate brands utilized by distributors other than the respondents which identify the food products with the particular distributor and permit such distributors to promote the sale of those food products independently of respondents; and distributors rather than respondents assume the responsibility all the way through the channels of distribution to the consumer, and whatever goodwill is established accrues to the distributors and not to the respondents. Distributors and not respondents determine the sales and price policies with reference to such food products.

PAR. 4. Respondents sell and distribute food products by two separate and distinct methods.

First: The first method is by selling to buyers through brokers of food products.

A broker of food products may be defined as a sales agent who negotiates the sale of food products for and on account of the seller as principal and whose compensation is a commission or brokerage fee paid by the seller. A broker of food products does not buy food products from his principal and sell such products for his own account.

Such brokers act as respondents' sales agents, soliciting and obtaining orders for respondents' food products at respondents' prices and on respondents' terms. Such brokers transmit such purchase orders to respondents who thereafter invoice and ship the food products to the customer. The respondents pay such brokers for their service in negotiating and making such sales for respondents' account, commissions or brokerage fees, which are customarily based on a percentage of the invoice sales prices of the food product sold.

The food products so sold by brokers always bear the brand or label of the respondents or of the buyers to whom respondents sell. Therefore, none of the goodwill established by the products accrues to the brokers. Such brokers are not traders for profit and do not take title to or have any financial interest in the product sold, and neither make a profit nor suffer a loss on the transaction.

Second: The second method is by the sale of food products by the respondents direct to buyers. All such buyers referred to herein are "direct buyers." In transactions between respondents and such buyers, respondents do not use brokers.

There are in fact two separate and distinct classifications of direct buyers. One class is known as "buying brokers" (who designate themselves as brokers but who are not in fact brokers). The other class of direct buyers consists, among others, of chain stores, large wholesalers and members of buying groups.

The food products sold by respondents to such direct buyers principally bear brands or labels owned by such buyers, and as to such food products, all the goodwill established by the products accrues to such direct buyers.

Respondents also sell to other direct buyers (some of whom also incorrectly designate themselves as "brokers") who purchase respondents' food products exclusively under respondents' brands or labels in their own respective names and for their own accounts for resale.

Respondents pay such buyers of their food products, directly or indirectly (regardless of whether such food products are purchased under respondents' labels or distributors' labels), commissions or brokerage fees, or allowances or discounts in lieu thereof on such purchases.

Such direct buyers transmit their own purchase orders for food products directly to the respondents. The respondents thereafter invoice and ship such food products directly to such buyers from whom respondents collect the purchase price of the merchandise. The respondents, among their several methods of sales, pay such buyers commissions or brokerage fees on such purchases by deducting or allowing from the invoice price of the good products purchased an amount which is equal or approximately equal to the commissions or brokerage fees paid by the respondents to their brokers (as illustrated in method one), or by selling to such buyers at a net price which reflects brokerage.

Contrary to the manner in which brokers operate (as described in method one above) such buyers are traders for profit purchasing and reselling such food products in their own names and for their own accounts, taking title to the food products and assuming all risk incident to ownership.

Such resales are not made at the prices, and on the terms dictated by respondents, but at the prices and on the terms determined by the buyer who makes a profit or suffers a loss thereon, as the case may be.

Said direct buyers shop the market, and purchase food products from several sellers, including respondents, and purchase where they are able to secure the most favorable prices and terms, including the payment of commissions and brokerage fees.

Said buyers pay the price of the food products purchased from respondents, as a condition precedent to delivery of such food products by the carrier to them. If the food products shipped by respondent to the buyers are lost or damaged in transit, such buyers file claim with the carrier and collect damages from the carrier for their own accounts.

Such buyers, upon receipt of such food products from respondents, warehouse them in their own warehouses or in public warehouses and insure the products at their own expense and in their own names and for their own accounts against contingent loss or damage. Subsequently, said buyers pledge warehouse receipts and insurance contracts covering these products they have purchased as security for loans from banks.

PAR. 5. The respondents, since June 19, 1936, in connection with the interstate sale of their food products by the second method set forth in paragraph 4 have paid or granted, and are now paying or granting, directly and indirectly, commissions, brokerage, or other compensation, or discounts in lieu thereof, to buyers of their food products, and such acts and practices 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 January 26, 1945, issued and thereafter served its complaint in this proceeding upon the respondents 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, the respondents filed their answer admitting all material allegations of fact set forth in said complaint and waiving all intervening procedure, further hearings as to said facts, and expressly waiving the filing of briefs and oral argument. The respondents further stated in their answer that they are not now paying or granting, directly or indirectly, commissions, brokerage, or other compensation, or discounts in lieu thereof, to buyers of their food products, as alleged in the complaint, and that they have not done so since January 1, 1944. Thereafter this matter came on for final hearing before the Commission on said complaint and 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. Respondents, Charles P. Halfhill, Theodore A. Halfhill, Harry J. Halfhill, and the latter's son Harry J. Halfhill, Jr., are, and since

November 1, 1943, have been, copartners trading as The Halfhill Company and Ocean Food Products Company, with their principal office and place of business located at 714 West Olympic Boulevard, Los Angeles, Calif. Prior to November 1, 1943, respondents were stockholders in The Halfhill Company, Ltd., a Nevada corporation, which was dissolved on October 31, 1943.

PAR. 2. The respondents, doing business as The Halfhill Company and Ocean Food Products Company, for a period of time since June 19, 1936, have been, and are now, engaged in the business of buying, selling, and distributing canned salmon, canned tuna, canned mackerel, canned sardines, and other canned food products (all of which are hereinafter designated as "food products") for their own account for resale.

The respondents, for a period of time since June 19, 1936, in the course and conduct of their said business, have sold and distributed a substantial portion of their food products, directly and through brokers, to buyers located in States other than the State in which the respondents are located, and as a result of said sales such food products are shipped and transported across State lines to such buyers, who are located in various States of the United States.

PAR. 3. The respondents, to distinguish their food products from the food products sold by competitors and to facilitate sales, utilize brand or trade names for the various food products sold by them. Respondents also sell their products under the label or brand of their buyers. Among the brands used by respondents are:

San Nicholas, Halfhill's, Sea Prize, Halfhill's Best Buy, LaFavorita Tonno, Best Buy, Blue Band, Beach Club, Better than Chicken, Cal-Prize, Mediterraneo, Red Sun, Roma, Serenity, Summer Sea, Westminster.

PAR. 4. Respondents sell and distribute their food products by two separate and distinct methods:

1. By selling to buyers through brokers of food products, who act as respondents' agents in negotiating the sale of their food products, and for which services such brokers customarily are paid commissions or brokerage fees, which are usually based on a percentage of the invoice sales prices of the food product sold; and

2. By the sale of food products by the respondents direct to buyers, who are paid, directly or indirectly, commissions or brokerage fees on their own purchases of such food products from the respondents.

There are in fact two separate and distinct classifications of direct buyers. One class is known as "buying brokers" (who designate themselves as brokers but who are not in fact brokers). The other class of direct buyers consists, among others, of chain stores, large wholesalers, and members of buying groups. The food products sold by respondents to such direct buyers principally bear brands or labels owned by such buyers. Respondents also sell to other direct buyers who purchase respondents' food products exclusively under respondents' brands or labels in their own respective names and for their own account for resale.

Such direct buyers transmit their own purchase orders for food products directly to the respondents. The respondents thereafter invoice and ship such food products directly to such buyers from whom respondents collect the purchase price of the merchandise. The respondents, among their several methods of sales, pay such buyers commissions or brokerage fees on such purchases by deducting or allowing from the invoice price of the

food products purchased an amount which is equal or approximately equal to the commissions or brokerage fees paid by the respondents to their legitimate brokers or by selling to such buyers at a net price which reflects brokerage.

Contrary to the manner in which brokers operate, such buyers are traders for profit purchasing and reselling such food products in their own names and for their own accounts, taking title to the food products and assuming all risk incident to ownership.

Such buyers, upon receipt of such food products from respondents, warehouse them in their own warehouses or in public warehouses and insure the products at their own expense and in their own names and for their own accounts against contingent loss or damage. Subsequently, said buyers pledge warehouse receipts and insurance contracts covering these products they have purchased, as security for loans from banks.

CONCLUSION

The paying and granting by the respondents, Charles P. Halfhill, Theodore A. Halfhill, Harry J. Halfhill, and Harry J. Halfhill, Jr., partners doing business as The Halfhill Company and as Ocean Food Products Company, directly or indirectly, of commissions, brokerage, or other compensation, and allowances or discounts in lieu thereof, to the buyers of said food products on their own purchases, as herein found, 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 of the respondents, which answer admits all material allegations of the complaint to be true and waives 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, Charles P. Halfhill, Theodore A. Halfhill, Harry J. Halfhill, and Harry J. Halfhill, Jr., partners doing business as The Halfhill Company and as Ocean Food Products Company, 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 respondents, Charles P. Halfhill, Theodore A. Halfhill, Harry J. Halfhill and Harry J. Halfhill, Jr., partners doing business as The Halfhill Company and as Ocean Food Products Company, their respective officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of 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, brokerage, or other compensation, or any allowance or discount in lieu thereof, to any purchaser upon purchases for his own account, or to any agent, represen-

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tative, 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.

Syllabus

IN THE MATTER OF

MILITARY ORDER OF THE PURPLE HEART, NATIONAL
PROGRESS LEAGUE, FRANK J. MACKEY AND HAROLD C.
SHERMAN

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

Docket 4721. Complaint, Mar. 5, 1942—Decision, May 26, 1945

Where a corporation and its president and secretary, engaged in the interstate sale and distribution, among other publications and pamphlets, of a twelve-volume set of history books entitled "Progress of Nations," and a two-volume set of history and war pictures entitled "Forward March";

Following adoption of a plan which involved the use, for a consideration, of the name and prestige of the "Military Order of the Purple Heart" in connection with the sale and distribution of said books, in furtherance of which—

- (1) Said president caused to be cancelled a prior contract between another corporation of which he was likewise president, namely, the "Disabled American Veterans of the World War Rehabilitation Department," and the Disabled American Veterans of the World War, whereby latter was to receive a certain income from the sale of publications including said "Progress of Nations" and "Forward March";
 - (2) Said corporate Rehabilitation Department through said president contracted with said "Military Order" to publish aforesaid sets and said other publications and sell the same to the order or its authorized agent at a specified price for a 5-year period and as long thereafter as was mutually satisfactory;
 - (3) Said corporation or National Progress "League" through its said president agreed with said Order to finance and assume complete control of the publications to be supplied by said corporate "Rehabilitation Department" and to use in connection with the sale thereof the name, letterheads, emblem, and official seals of the said Order, and the signature of its National Commander and that of its Americanism Legislative Chairman, to take contracts for the purchase of said books in the name of said Order, to accept checks payable to its order, and to endorse and deposit such checks in a bank account under the sole control of said League, over the funds of which received from the sale of the books said Order had no control except for the right of inspection of its books;
 - (4) Said League agreed to pay over to the said Order certain fixed sums for 11 months, and thereafter amounts ranging from 5 percent to 10 percent on orders depending upon the size thereof, with the further understanding that at the expiration of the contract or the complete liquidation of the business the League would pay over to the Order any profits shown on its books, without liability on the part of said Order for any loss—whereby said League and its said officers were placed in a position to act with full freedom as though they were in fact the Military Order of the Purple Heart; and,
 - (5) The opening of an office in the name of said Order by said League, and officers at the League offices in Chicago, and the employment of salesmen, who were approved by the Americanism Legislative Chairman of the Military Order of the Purple Heart, and were issued a credential letter by it on its stationery—
- (a) Carried out said plan of procedure involving the use of the name and prestige of said Military Order of the Purple Heart, which was designed to, and enabled them to induce the purchasing public to purchase said books in belief they were dealing directly with said Order; and did not through their various salesmen advise pro-