

Complaint

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IN THE MATTER OF

CARL RUBENSTEIN ET AL.

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

Docket 5279. Complaint, Feb. 12, 1945—Decision, Mar. 25, 1946

Where two partners, two corporations, and a third individual, an official and large stockholder thereof, with offices and places of business in common and a community of interest, engaged in the packing and interstate sale and distribution, under their own brand names and also under brands of their buyers, of canned salmon, canned tuna, canned mackerel, and other canned sea food products, (1) through legitimate intermediaries who acted as their agents and were paid commissions and brokerage fees for so doing; and also, (2) direct to large buyers, who might be either so-called "buying brokers" or chain stores, large wholesalers, and members of buying groups, who purchased in their own names and for their own accounts for resale at prices and terms dictated by them, and who, contrary to brokers, were traders for profit, shopping the market, taking title, assuming risks, filing claims, warehousing, etc., and making a profit or suffering a loss, as the case might be—

Paid or granted to such direct buyers, directly or indirectly, commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof, on such purchases, by means of permitting deduction from invoice price of amount equal or approximately equal to commissions or brokerage fees paid by them to their brokers, or by selling such buyers at a net price reflecting the same:

Held, That such paying and granting, directly or indirectly, of commissions, brokerage, or other compensation, and allowances or discounts in lieu thereof, to buyers purchasing in their own names and for their own accounts for resale, under the circumstances set forth, were in violation of subsection (c) of section 2 of the Clayton Act, as amended.

Mr. Edward S. Ragsdale for the Commission.

Medley & Haugland, of Seattle, Wash., 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. Respondent Carl Rubenstein, an individual residing in the city of Seattle, State of Washington, is a partner with his son,

Samuel Rubenstein, in a firm which operates under the trade name of "Carl Rubenstein." The individual respondent Carl Rubenstein and the firm of "Carl Rubenstein" have their principal offices and place of business at 3001 Smith Tower Building, Seattle, Wash.

Respondent Carl Rubenstein is a partnership composed of the individual respondent Carl Rubenstein and his son, Samuel Rubenstein. The partnership does business under the registered trade name of "Carl Rubenstein" (although this partnership is sometimes and for some purposes known as Rubenstein & Rubenstein).

Respondent Whitney & Co. is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 3001 Smith Tower Building, Seattle, Wash.

Samuel Rubenstein, the son of the individual respondent Carl Rubenstein, is an official of the hereinafter named respondents Whitney & Co. and Puget Sound & Alaska Trading Co., Inc., and is a large stockholder in each of said companies. Samuel Rubenstein is in the United States Army and, prior to his departure for the Army several years ago, executed and delivered to his father, Carl Rubenstein, a general power of attorney whereby the respondent Carl Rubenstein as an individual was empowered to act for and did act in behalf of said Samuel Rubenstein in connection with the business conducted as "Carl Rubenstein." partnership, Whitney & Co. and Puget Sound & Alaska Trading Co., Inc.

The officials of the respondent Whitney & Co. on July 7, 1941, organized Puget Sound & Alaska Trading Co., Inc., for the specific purpose of conducting certain of the business of Whitney & Co. which the officers of Whitney & Co. did not believe should be conducted under Whitney & Co.'s name. This business can best be described as the sale of sea-food products directly to large buyers at net prices which reflected brokerage.

Respondent Puget Sound & Alaska Trading Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal office and place of business located at 3001 Smith Tower Building, Seattle, Wash. Respondent Puget Sound & Alaska Trading Co., Inc., is owned by and is a subsidiary of Whitney & Co.

Respondent James R. O'Brien is an individual residing in the city of Seattle, State of Washington, and has his office and principal place of business located at 3001 Smith Tower Building, Seattle, Wash. Said respondent James R. O'Brien is also an official and a large stockholder in Whitney & Co. and Puget Sound & Alaska Trading Co., Inc.

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PAR. 2. Respondents Carl Rubenstein, individually, and Carl Rubenstein (the partnership), together with James R. O'Brien, individually and as an official of Whitney & Co. and Puget Sound & Alaska Trading Co., Inc., together with Whitney & Co., a corporation, and Puget Sound & Alaska Trading Co., Inc., a corporation, all occupy jointly and severally a suite of offices located at 3001 Smith Tower Building, Seattle, Wash., which offices are the principal offices and place of business of each of the respective respondents.

PAR. 3. Each of the respondents since June 19, 1936, has been and is now engaged in the business of buying, selling, and distributing canned salmon, canned tuna, canned mackerel, and other canned sea-food products (all of which are hereinafter designated as sea-food products) for their own account for resale.

The respondents since June 19, 1936, in the course and conduct of their said businesses, have sold and distributed a substantial portion of their sea-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 sea-food products are shipped and transported across State lines to such buyers so located.

PAR. 4. All sea-food products sold by respondents bear a label upon which appears a brand, trade-mark, or trade name. Such labels are attached to such sea-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 good will. Good will 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 good will created by the product accrues. Thus, when respondents sell goods which bear their own brand, the good will accrues to them; whereas, when they sell goods bearing the brand of another, the good will 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' sea-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 designated 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 good will is established thereby accrues to respondents. Respondents determine the sales and price policies with reference to such sea-food products. Among the brands so used by respondents are:

Bestred, Farbest, Blue Bird, Best Yet, Red Rambler, Sprite, Whitney's Best, Whitworth, Golden Shore, Sea Run, Northern Gem, North View.

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 sea-food products with the particular distributor and permit such distributors to promote the sale of those sea-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 good will 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 sea-food products.

PAR. 5. Respondents sell and distribute sea-food products by two separate and distinct methods.

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

A broker of sea-food products may be defined as a sales agent who negotiates the sale of sea-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 sea-food products does not buy sea-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' sea-food products at respondents' prices and on respondents' terms. Such brokers transmit such purchase orders to respondents who thereafter invoice and ship the sea-food products to the customers. 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 sea-food product sold.

The sea-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 good will established by the products accrues to the brokers. Such brokers are not traders for profit and do not

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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 sea-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 sea-food products sold by respondents to such direct buyers principally bear brands or labels owned by such buyers, and as to such sea-food products, all the good will 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' sea-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 sea-food products, directly or indirectly (regardless of whether such sea-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 sea-food products directly to the respondents. The respondents thereafter invoice and ship such sea-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 sea-food 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 sea-food products in their own names and for their own accounts, taking title to the sea-food products and assuming all risk incident to ownership.

Such resales are not made at the prices, and on the terms indicated

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 sea-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 sea-food products purchased from respondents as a condition precedent to delivery of such sea-food products by the carrier to them. If the sea-food products shipped by respondents 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 sea-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. 6. The respondents, since June 19, 1936, in connection with the interstate sale of their sea-food products by the second method set forth in paragraph 5, 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 (Clayton Act), as amended by an act of Congress approved June 19, 1936 (Robinson-Patman Act), and by virtue of the authority vested in the Federal Trade Commission by the aforesaid act, the Federal Trade Commission on February 12, 1945, issued and subsequently served its complaint in this proceeding upon the respondents, Carl Rubenstein, individually and acting as agent for and in behalf of his son, Samuel Rubenstein, Carl Rubenstein (partnership), Whitney & Co., a corporation, Puget Sound & Alaska Trading Co., Inc., a corporation, and James R. O'Brien, charging them with the violation of subsection (c) of section 2 of the

Clayton Act as amended by the Robinson-Patman Act. After the issuance of said complaint and the filing of respondents' answer thereto, the respondents withdrew said answer and filed in lieu thereof an answer admitting all the material allegations of fact set forth in said complaint and waiving intervening procedure and further hearing as to said facts. Thereafter, this proceeding regularly came on for final hearing before the Commission upon said complaint and substitute answer filed by the respondents; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Carl Rubenstein, an individual residing in the city of Seattle, State of Washington, is a partner with his son, Samuel Rubinstein, in a firm which operates under the trade name of "Carl Rubenstein." The individual respondent Carl Rubenstein and the firm of "Carl Rubenstein" have their principal offices and place of business at 3001 Smith Tower Building, Seattle, Wash.

Respondent Carl Rubenstein is a partnership composed of the individual respondent Carl Rubenstein and his son, Samuel Rubenstein. The partnership does business under the registered trade name of "Carl Rubenstein" (although this partnership is sometimes and for some purposes known as "Rubenstein & Rubenstein").

Respondent Whitney & Co. is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 3001 Smith Tower Building, Seattle, Wash.

Samuel Rubenstein, the son of the individual respondent Carl Rubenstein, is an official of the hereinafter named respondents Whitney & Co. and Puget Sound & Alaska Trading Co., Inc., and is a large stockholder in each of said companies. Samuel Rubenstein is in the United States Army and, prior to his departure for the army several years ago, executed and delivered to his father, Carl Rubenstein, a general power of attorney whereby the respondent Carl Rubenstein as an individual was empowered to act for, and did act in behalf of, said Samuel Rubenstein in connection with the business conducted as "Carl Rubenstein," partnership, Whitney & Co., and Puget Sound & Alaska Trading Co., Inc.

The officials of the respondent Whitney & Co. on July 7, 1941, organized Puget Sound & Alaska Trading Co., Inc., for the specific purpose of conducting certain of the business of Whitney & Co. which

the officers of Whitney & Co. did not believe should be connected under Whitney & Co.'s name. This business can best be described as the sale of seafood products direct to large buyers at net prices which reflected brokerage.

Respondent Puget Sound & Alaska Trading Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 3001 Smith Tower Building, Seattle, Wash. Respondent Puget Sound & Alaska Trade Co., Inc., is owned by, and is a subsidiary of, Whitney & Co.

Respondent James R. O'Brien is an individual residing in the city of Seattle, State of Washington, and has his office and principal place of business located at 3001 Smith Tower Building, Seattle, Wash. Said respondent James R. O'Brien is also an official of, and a large stockholder in, Whitney & Co. and Puget Sound & Alaska Trading Co., Inc.

PAR. 2. Respondents, Carl Rubenstein, individually and as a copartner with Samuel Rubenstein trading as "Carl Rubenstein," together with James R. O'Brien, individually and as an officer of Whitney & Co. and of Puget Sound & Alaska Trading Co., Inc., a corporation, together with Whitney & Co., a corporation, and Puget Sound & Alaska Trading Co., Inc., a corporation, all occupy jointly and severally a suite of offices located at 3001 Smith Tower Building, Seattle, Wash., which offices are the principal offices and place of business of each of the respective respondents.

PAR. 3. Each of the respondents, since June 19, 1936, has been engaged in the business of packing, and in the sale and distribution of, canned salmon, canned tuna, canned mackerel, and other canned seafood products, all of which are hereinafter referred to as "food products."

PAR. 4. Respondents cause said food products, when sold by them, to be transported from their aforesaid place of business in the State of Washington to purchasers thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said food products in commerce among and between the various States of the United States.

PAR. 5. Respondents sell said food products through legitimate intermediaries who act as their agents and to whom are paid commissions and brokerage fees for the services so rendered. In addition, the respondents also sell their food products to direct buyers, who may be either so-called "buying brokers" or chain stores, large wholesalers.

and members of buying groups. In so selling their food products the respondents use their own brand names, such as "Bestred," "Farbest," "Blue Bird," "Best Yet," "Red Rambler," "Sprite," "Whitney's Best," "Whitworth," "Golden Shore," "Sea Run," "Northern Gem," and "North View." In addition, respondents also sell such food products under brands of their buyers, which brand names are different from those of the respondents' brands and which identify the food products with the particular buyer or distributor.

PAR. 6. The respondents, since June 19, 1936, in connection with the sale of their food products in interstate commerce, have sold their food products under their own brands or under the brands of their buyers to direct buyers who purchase respondents' food products in their own names and for their own accounts for resale. During the time mentioned herein respondents have paid or granted to such direct buyers, directly or indirectly, commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof, on such purchases made in their own names and for their own accounts for resale.

Such direct buyers transmit their own purchase orders for food products direct to respondents, who invoice and ship such food products direct to such buyers and collect the purchase price from them. 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 respondents to their brokers or by selling 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 the risk incident to ownership. The resale of such merchandise is not made at prices and on 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. Such 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. If the food products shipped by the respondents to the buyers are lost or damaged in transit, such buyers file claim with the carrier and collect damage from such 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 and 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, directly or indirectly, of commissions, brokerage, or other compensation, and allowances or discounts in lieu thereof, to buyers of their food products who purchase such food products in their own names and for their own accounts for resale, as hereinabove found, are in violation 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 substitute answer of the respondents, which substitute answer admits all the material allegations of fact set forth in said complaint and waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of subsection (c) of section 2 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 an act of Congress approved June 19, 1936 (Robinson-Patman Act.)

It is ordered, That the respondents, Whitney & Co., a corporation, and Puget Sound & Alaska Trading Co., Inc., a corporation, and their respective officers, and Carl Rubenstein, individually and as a co-partner trading as Carl Rubenstein, and James R. O'Brien, and their respective representatives, agents, and employees, directly or through any corporate or other device in connection with the sale and distribution of canned salmon, canned tuna, canned mackerel, and other canned sea-food products in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, upon purchases made for such buyer's own account.

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

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IN THE MATTER OF

PAUL PANKEY & COMPANY

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

Docket 5282. Complaint, Feb. 16, 1945—Decision, Mar. 25, 1946

Where an individual engaged both as a broker, and as a direct buyer, of food products and, in latter capacity, in buying and selling from various packers, producers, canners, and other sellers located in other States, canned fish products, canned fruits, and vegetables and other commodities for his own account for resale, as a direct buyer and trader for profit, shopping the market, taking title, warehousing, assuming risks of ownership, filing claims, etc., and invoicing customers in his own name and making a profit or sustaining a loss, as case might be, on such buying and selling at his own prices and terms—

Received and accepted, directly or indirectly on such purchases for his own account from such sellers, commissions or brokerage fees customarily paid by them by permitted deduction by him from the invoice price of the food products purchased, of an amount equal to, or approximately equal to, the commissions or brokerage fees they paid their brokers:

Held, That such receipt and acceptance by said individual of commissions or brokerage, or compensation, allowance, or discount in lieu thereof from sellers of food products on purchases made for his own account as above set forth, were in violation of subsection (c) of section 2 of the Clayton Act as amended.

Mr. Edward S. Ragsdale for the Commission.

Mr. William P. Smith, of Washington, D. C., and *Mr. Francis H. Hare*, of Birmingham, Ala., for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936, has violated and is 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 Paul M. Pankey, is an individual, doing business as Paul Pankey & Co. with his principal office and place of business located at 2413 First Avenue, North, Birmingham, Ala. Respondent since June 19, 1936, has been and is now engaged in business as a broker of food products, and as a direct buyer of food products. The respondent as a direct buyer of food products has engaged in the busi-