

Complaint

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IN THE MATTER OF

CUSTOM HOUSE PACKING CORPORATION 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 5404. Complaint, Nov. 27, 1945—Decision, Sept. 23, 1946

Where a Pacific Coast packer of sardines and other sea-food products—

- (a) Paid and granted, along with others, to its exclusive corporate distributor, commissions or brokerage fees which latter, acting as its agent, paid over in part to so called "buying brokers" or "brokers" who in fact purchased for resale for their own account and did not, in transactions concerned, function as brokers or subbrokers; and

Where said distributor, which—with principal office and place of business in San Francisco and branches in Seattle, Chicago and New York—was engaged in distribution of food products, including those packed for it by the aforesaid packer and others,

- (b) Paid over remainder of such commissions or brokerage, after retaining part, to so-called "buying brokers", or "brokers" who purchased for resale for their own account where sales were made direct to them and without the intervention of subbrokers, (1) through deducting commissions from the invoice price of food products purchased, or (2) by selling to such buyers at a net price which reflected such amount, or (3) by remitting such amount by check after such buyers had accepted and honored draft for the purchase price:

Held, That such paying and granting of commissions, brokerage fees, or allowances or discounts in lieu thereof, under the circumstances set forth, to buyers of food products on purchases for their own account, constituted violations of subsection (c) of section 2 of the Clayton Act as amended.

Mr. Edward S. Ragsdale for the Commission.

Mr. Walter Slack, 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 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 Custom House Packing Corp., is a corporation, organized and existing under the laws of the State of California, with its principal office and place of business located at 608 Ocean View Avenue, Monterey, Calif., and is engaged in the

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business of packing, selling, and distributing sea-food products, principally sardines, hereinafter designated food products.

PAR. 2. Respondent Julian G. Burnette is an individual residing in Los Altos, Calif. He is now president of Custom House Packing Corp. and has been a substantial stockholder, and an officer of said corporation, since some time after June 19, 1936. After becoming an officer, and at the present time and for some time past as president, respondent Burnette has exercised, and still exercises, a substantial degree of authority and control over the business conducted by said corporation, including the direction of its distribution and sales policies.

PAR. 3. Respondent Frank J. Leard is an individual residing in Monterey, Calif. He is now vice president of Custom House Packing Corp., and has been a substantial stockholder, and an officer of said corporation, since some time after June 19, 1936. After becoming an officer, and at the present time and for some time past as vice president, respondent Leard has exercised, and still exercises, a substantial degree of authority and control over the business conducted by said corporation, including the direction of the distribution and sales policies.

PAR. 4. Respondent Wilbur-Ellis Co. is a corporation, organized and existing under the laws of the State of California, with its principal office and place of business located at 430 California Street, San Francisco, Calif. Respondent has branch offices and places of business located in New York, N. Y., Chicago, Ill., Los Angeles, Calif., and Seattle, Wash. Said respondent is engaged in the business of distributing food products canned or packed by a number of sellers, including Custom House Packing Corporation.

The stockholders of said respondent and the members of their respective families now own, and since June 19, 1936, have owned a controlling stock interest in respondent Custom House Packing Corporation.

Said respondent organized Connell Bros. Co., Ltd., some time prior to June 19, 1936, as a wholly owned subsidiary to engage and which did thereafter engage in the business of distributing food products until it was legally dissolved on or about December 1941. The offices and places of business of said subsidiary were the same as those of said respondent. Shortly after such dissolution said respondent registered the words "Connell Bros. Company, Ltd." as a trade name and conducted some of its business under said trade name.

The business done by Wilbur-Ellis Co. under its own name, as well as that done by and through its said subsidiary or under said trade

name, is hereinafter referred to as having been done by respondent Wilbur-Ellis Co.

PAR. 5. Respondent Brayton Wilbur is an individual residing in San Francisco, Calif. He is now president of Wilbur-Ellis Co., and has been a substantial stockholder, and an officer of that company, since some time after June 19, 1936. After becoming an officer, and at the present time and for some time past as president, respondent Wilbur has exercised, and still exercises, a substantial degree of authority and control over the business conducted by said company, including the direction of its distribution and sales policies.

Respondent Wilbur, together with several members of his family and other relatives, now owns, and for a considerable period of time since June 19, 1936, has owned, a substantial stock interest in Custom House Packing Corporation.

PAR. 6. Respondent Thomas G. Franck is an individual residing in San Francisco, Calif. He is vice president and treasurer of Wilbur-Ellis Co., and has been a substantial stockholder, and officer of that company, since some time after June 19, 1936. After becoming an officer, and at the present time and for some time past as vice president and treasurer, respondent Franck has exercised, and still exercises, a substantial degree of authority and control over the business conducted by said company, including the direction of its distribution and sales policies.

Respondent Franck, together with several members of his family and other relatives, now owns, and for a considerable period of time since June 19, 1936, has owned, a substantial stock interest in Custom House Packing Corp.

PAR. 7. Respondent Custom House Packing Corp., since June 19, 1936, has sold its food products to buyers exclusively by and through respondent Wilbur-Ellis Co. as broker or agent.

Respondent Wilbur-Ellis Co., as exclusive broker and agent for respondent Custom Packing House Corporation, and as broker or agent for other packers of food products, sells its principals' food products to buyers by two separate and distinct methods: (1) by selling some such food products to buyers through other brokers or agents, hereinafter designated subbrokers, which method of doing business is not challenged herein; and (2) by selling some such food products directly to other buyers, without the intervention of subbrokers, which method of doing business is challenged herein.

Such buyers who purchase direct from respondents are generally known to the trade as "buying brokers." These buyers designate themselves as brokers, but in such transactions do not function as

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brokers or subbrokers but purchase for resale on their own account.

A representative but by no means complete lists of respondents' "buying brokers" or direct buyers are:

Southgate Brokerage Co., Inc., Norfolk, Va.

James & Harwell, Houston, Tex.

Christian Brokerage Co., Inc., Atlanta, Ga.

Fridge & Nichols, Jackson, Miss.

Koehler-Spalding Co., Inc., Louisville, Ky.

J. A. Campbell Co., Savannah, Ga.

Such 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 the respondents collect the purchase price of the merchandise.

Respondent Custom House Packing Corporation and such other packers of food products grant and allow to respondent Wilbur-Ellis Co. commissions or brokerage fees which respondent Wilbur-Ellis Co. receives and accepts. Part of such commission or brokerage fees paid to respondent Wilbur-Ellis Co. is retained by it as compensation for the brokerage services it performs and the remainder of which in those cases where subbrokers are used is transmitted by respondent Wilbur-Ellis Co. to such subbrokers, and is received and retained by them as compensation for the brokerage services rendered in assisting respondent Wilbur-Ellis Co.; and, in those cases where respondent sells directly to buyers without the intervention of subbrokers, the remainder of such commissions or brokerage fees is transmitted by respondent Wilbur-Ellis Co., to such buyers who purchase such food products for resale on their own account.

The respondents pay such buyers who purchase food products direct from them commissions or brokerage fees on such purchases in an amount which is equal or approximately equal to the commissions or brokerage fees paid by the respondents to their subbrokers by (a) deducting or allowing such amount from the invoice price of the food products purchased; (b) selling to such buyers at a net price which reflects such amount; and (c) remitting such amount by check after such buyers have accepted and honored respondents' draft for the purchase price.

PAR. 8. The respondent Custom House Packing Corp., and various other sellers, since June 19, 1936, through their duly appointed and legally constituted agent Wilbur-Ellis Co., in the course and conduct of their respective businesses, have directly or indirectly sold and distributed a substantial portion of their food products to buyers, located

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in States other than the States in which 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. 9. The paying and granting of brokerage fees, directly or indirectly, by respondent Custom House Packing Corp., acting by and through its president, respondent Julian G. Burnette, its vice president, respondent Frank J. Leard, to its agent and broker, respondent Wilbur-Ellis Co., for transmittal by the latter to buyers, and the direct or indirect receipt and transmittal of such brokerage fees to such buyers by respondent Wilbur-Ellis Co., acting as said agent and broker by and through its president, respondent Brayton Wilbur, and its vice president and treasurer, respondent, Thomas G. Franck, in the manner and under the circumstances hereinabove set forth, are in violation of subsection 2 (c) of the Clayton Act as amended by the Robinson-Patman Act.

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 November 27, 1945, issued and subsequently 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 Clayton Act as amended. After the issuance of the complaint and the filing of an answer by respondents admitting all material allegations of fact set forth in said complaint and waiving all intervening procedure, further hearing as to said facts, the filing of briefs, and oral argument, this matter came on for final hearing before the Commission on said complaint and answer, and the Commission, having duly considered the matter 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. (a) Respondent Custom House Packing Corp., now dissolved, was a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 608 Ocean View Avenue, Monterey, Calif. It engaged

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in packing, selling, and distributing sardines and other sea food products, hereinafter designated "food products."

(b) Respondent Julian G. Burnette is an individual residing in Los Altos, Calif. For a number of years preceding the issuance of complaint in this proceeding he was president of, and a substantial stockholder in, Custom House Packing Corp. and exercised a substantial degree of authority and control over the business of said corporation, including the direction of its distribution and sales policies.

(c) Respondent Frank J. Leard is an individual residing in Monterey, Calif. For a number of years preceding the issuance of complaint in this proceeding he was vice president of, and a substantial stockholder in, Custom House Packing Corp. and exercised a substantial degree of authority and control over the business of said corporation, including the direction of its distribution and sales policies.

(d) Respondent Wilbur-Ellis Co. is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 430 California Street, San Francisco, Calif. It is engaged in the business of distributing food products packed by various sellers, including Custom House Packing Corp., and for the conduct of its business maintains branch offices or places of business in New York, N. Y.; Chicago, Ill.; Los Angeles, Calif.; and Seattle, Wash. Its stockholders and members of their respective families have, since June 19, 1936, owned a controlling stock interest in Custom House Packing Corp. Respondent Wilbur-Ellis Co. had a wholly owned subsidiary, Connell Bros. Co., Ltd., from sometime prior to June 19, 1936, until this concern was dissolved about December 1941. After the dissolution of this subsidiary, respondent Wilbur-Ellis Co. registered the words "Connell Bros. Company, Ltd." as a trade name. During its corporate existence this subsidiary engaged in the distribution of food products, and subsequent to its dissolution respondent Wilbur-Ellis Co. conducted some of its business under the registered trade name Connell Bros. Co., Ltd. The business done by Wilbur-Ellis Co. under its own name, as well as that done by and through its aforesaid subsidiary or under said registered trade name, is hereinafter referred to as the business of the Wilbur-Ellis Co.

(e) Respondent Brayton Wilbur is an individual residing in San Francisco, Calif. He is now, and for a number of years last past has been, president of, and a substantial stockholder in, Wilbur-Ellis Co., and has exercised, and still exercises, a substantial degree of authority and control over the sales and distribution policies of said com-

pany. For a number of years preceding its dissolution in 1945 respondent Wilbur, together with several members of his family, owned a substantial stock interest in Custom House Packing Corp.

(f) Respondent Thomas G. Franck is an individual residing in San Francisco, Calif. He is now, and for a number of years last past has been, vice president and treasurer of, and a substantial stockholder in, respondent Wilbur-Ellis Co. and exercised, and still exercises, a substantial degree of authority and control over the sales and distribution policies of said company. For a number of years last past he, together with several members of his family and other relatives, owned a substantial stock interest in Custom House Packing Corp.

PAR. 2. In the course and conduct of their respective businesses, respondents Custom House Packing Corp. and Wilbur-Ellis Co. have directly or indirectly sold and distributed a substantial portion of their food products to buyers located in States other than the States in which said respondents are located and have caused said food products when sold to be transported to the purchasers thereof at their points of location in States other than that in which said shipments originated and have maintained a course of trade in said products in commerce as "commerce" is defined in the Clayton Act as amended.

PAR. 3. Respondent Wilbur-Ellis Co. was exclusive broker and sales agent for Custom House Packing Corp., and as such exclusive broker and sales agent for said respondent and for other packers of food products sold the food products of its principals to buyers in two separate and distinct ways: (1) by selling some such food products to buyers through other brokers or agents, hereinafter designated as "subbrokers," and (2) by selling some of said food products directly to buyers without the intervention of subbrokers. Buyers who purchase directly from respondents are generally known in the trade as "buying brokers" and designate themselves as "brokers" but do not in such transactions function as brokers or subbrokers and simply purchase for resale on their own account. Among the buying brokers who have made direct purchases for their own account from respondents are Southgate Brokerage Co., Inc., Norfolk, Va.; Christian Brokerage Co., Inc., Atlanta, Ga.; J. A. Campbell Co., Savannah, Ga.; Kochler-Spalding Co., Inc., Louisville, Ky.; Fridge & Nichols, Jackson, Miss.; and James & Harwell, Houston, Tex.

PAR. 4. In connection with sales of food products in commerce as aforesaid, respondent Custom House Packing Corp. granted and allowed, and other packers of food products grant and allow, commissions or brokerage fees to respondent Wilbur-Ellis Co. in its capacity as sales agent. Where sales are made through subbrokers, said

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Wilbur-Ellis Co. retains a portion of such commissions or fees as compensation for the brokerage services it performs and transmits the remainder to subbrokers as compensation for their services in assisting said respondent, and in instances where sales are made directly to buyers without the intervention of subbrokers, the remainder of such commissions or brokerage fees is transmitted by said Wilbur-Ellis Co., as agent for its principals and for and on behalf of itself and its principals, to such buyers who purchase food products for their own account. The amount of the commissions or brokerage fees paid or allowed by respondents to buyers who purchase food products directly from them is equal or approximately equal to the commissions or brokerage fees paid by said respondents to their subbrokers. Such payments or allowances are made to direct buyers by (1) deducting, or allowing such amount to be deducted, from the invoice price of food products purchased; or by (2) selling to such buyers at a net price which reflects such amount, or by (3) remitting such amount by check after such buyers have accepted and honored respondents' draft for the purchase price.

CONCLUSION

The paying and granting by respondents herein, under the circumstances and in the manner aforesaid, of commissions, brokerage fees, or allowances or discounts in lieu thereof, to buyers of food products on purchases for their own account, constitute violations by respondents 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 respondents, which answer admits all material allegations of fact 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 conclusion that respondents named in the caption hereof 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):

It is ordered, that respondents Custom House Packing Corp., a corporation, Julian G. Burnette, and Frank J. Leard as president and vice president, respectively, of Custom House Packing Corp., Wilbur-Ellis Co., a corporation, and Brayton Wilbur and Thomas G. Franck

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as president and vice president, respectively, of Wilbur-Ellis Co., their respective 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 as amended, 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 made 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 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

HIGH SEAS TUNA PACKING COMPANY, INC.

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 5428. Complaint, Mar. 27, 1946—Decision, Oct. 2, 1946

Where a corporation engaged in the packing of fish and fish products, particularly tuna and mackerel, and in the interstate sale and distribution thereof, in part through brokers or intermediaries who acted as its agents and to whom it paid commissions or brokerage fees for such services—

Granted and paid commissions or brokerage fees on purchases by direct buyers who purchased from it in their own names and for their own accounts for resale, assuming all rights and risks of ownership:

Held, That such acts and practices in paying or granting commissions or brokerage fees to purchasers of its products, constituted violations of subsection (c) of section 2 of the Clayton Act as amended.

Mr. Edward S. Ragsdale for the Commission.

Mr. John V. Morris, of Terminal Island, Calif., 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 11, 1941, 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 High Seas Tuna Packing Co., Inc., is a corporation, organized and existing under the laws of the State of California, with its principal office and place of business located at 2802 Canon Street, Point Loma, San Diego, Calif.

PAR. 2. Respondent is now engaged and since 1941 has been engaged in the business of buying, packing, selling, and distributing fish, particularly tuna and mackerel, and fish products in its own name and for its own account. Respondent sells and distributes these products principally through brokers or intermediaries who act as respondent's agents in finding buyers for respondent's products, in negotiating their sale at respondent's prices and for such services respondent pays such brokers or intermediaries commissions or brokerage fees. Such transactions are not challenged by this complaint. Respondent, however, also sells its products directly to other