

Complaint

IN THE MATTER OF
TOPCO ASSOCIATES, INC.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2
(C) OF THE CLAYTON ACT AS AMENDED*Docket 6160. Complaint, Feb. 2, 1954—Decision, Aug. 17, 1954*

Consent settlement order requiring a cooperative of 27 super markets and grocery chains, to cease accepting from any seller, commissions or brokerage in connection with the purchase of merchandise for its own account or when acting for a purchaser.

Before *Mr. Abner E. Lipscomb*, hearing examiner.
Mr. Edward S. Ragsdale and *Mr. Cecil G. Miles* for the Commission.
Bell, Boyd, Marshall & Lloyd, of Chicago, Ill., 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, has been and is now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U. S. C. Title 15, Section 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. Topco Associates, Inc., hereinafter sometimes referred to as the respondent and as Topco, is a cooperative corporation, organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 30 West Washington Street, Chicago, Illinois. It was incorporated on October 10, 1944 under the name of Food Co-operative, Inc. However, on or about June 14, 1949 the name was changed to Topco Associates, Inc. Its membership is composed of twenty-seven super markets and grocery chains located in various cities throughout the United States, which members in turn own or control approximately four thousand smaller stores. The respondent is a substantial factor in the purchase and distribution of food products.

PAR. 2. Respondent is authorized to issue 13,000 shares of 3% noncumulative preferred stock with a par value of \$100 per share and 2,000 shares of common stock with a similar par value per share. As of August 16, 1951, it had issued and outstanding 7,040 shares of pre-

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ferred stock and 1,400 shares of common stock. To be eligible for membership in the association, each member is required to subscribe to a minimum of 50 shares of the common stock which entitles it to one vote. In addition to the common stock each member is required to purchase preferred stock of the association in proportion to its reported sales volume, as described in Article 3, Sections 3 and 5 of the association's By-Laws amended to November 30, 1950.

PAR. 3. Topco was organized to engage principally in food procurement and to render advisory service to its members. It maintains facilities for procurement, research and quality control programs. Until about 1947 the respondent dealt almost exclusively in dairy products, principally cheese and butter. However, since that time it has expanded its operations to include frozen foods and canned fruits and vegetables. Topco's purchases for the fiscal year ended March 31, 1951 amounted to approximately \$22,000,000. These purchases consisted principally of frozen foods such as fruit juices, berries, fruits, vegetables, chickens and sea foods, and nonfrozen foods consisting principally of corn, peas, tomatoes, green beans, peaches, coffee, cheese, butter, rice, and various other dry grocery food items, all of which are hereinafter referred to as food products.

Respondent is one of the largest distributors of food products in the Middle West. It purchases these products from a number of competitive sellers and has these products shipped or transported to its members located in various cities throughout the United States. The food products purchased by respondent are purchased principally, but not entirely, under the several private brands of respondent. Representative of such private brands are:

Food Club	Bo-Peep	Kol
Elna	Gaylord	Dog Club
Mel-O-Sweet	Top Frost	Top Speed
Hampshire	Baby Soft	Dartmouth

Top Frost, Hampshire and Dartmouth apply only to frozen foods.

Private brands, as referred to herein, designate brands utilized by respondent buyer as distinguished from those of the original sellers. These private brands identify the food products with the respondent buyer and permit the respondent buyer to promote the sale of these food products independently of manufacturers or sellers. Under such arrangement, the respondent buyer, as distributor, rather than the packers, manufacturers or original sellers, assumes the responsibility all the way through the channels of distribution to the consumer, and whatever good will is established for the product accrues to the respondent buyer and not to the original sellers. Respondent buyer

determines the sales and pricing policies with reference to the sale and distribution of such food products purchased for its own account for resale, and makes a profit or suffers a loss on each transaction, as the case may be.

PAR. 4. In the course and conduct of its business from 1948 to the present time, the respondent has purchased direct from a large number of sellers at lower net prices, and one of the major items which determined these lower net prices was the elimination of the cost of brokerage and other sales expense. Normally, these sellers sold their products through brokers but in all, or substantially all, of their dealings with respondent, and at respondent's request and insistence, they sold it direct, and the savings in the cost of brokerage was reflected in the lower net prices granted respondent.

The brokerage customarily paid by the sellers to their brokers for effecting sales for them usually ranged from 2 to 5 percent, except on certain items such as rice on which the rate was 10 cents per hundred-weight.

Topco was never at any time an agent of any of the sellers but acted at all times for or in behalf of itself or its members in the outright purchase of its food products for resale. In all or substantially all instances, the seller negotiated the sale with Topco direct without the aid of brokers, but shipped the products of the various members of Topco as instructed by respondent. The seller invoiced the goods to respondent, who remitted to the seller. Topco in turn invoiced or billed its respective members.

Among the methods employed by respondent in obtaining these lower net prices which reflect brokerage are the following:

(1) One method respondent devised in obtaining and arriving at these lower net prices was on the basis of what respondent termed a "cost plus" arrangement whereby the seller would furnish the respondent a break-down of the costs of his raw materials plus the cost of manufacture, cost of cans, cartons, packaging, etc., but excluding all sales expenses which included the cost of brokerage.

(2) Another method used in arriving at these lower net prices was by taking the seller's regular published price list at which he sold his products to his other customers and deducting the cost of brokerage therefrom.

An example of the manner in which respondent received a lower net price in lieu of, or which reflects, brokerage by buying direct was in the purchase of rice from Wonder Rice Mills, Inc. (formerly Adolphus Rice Mills, Inc.), of Houston, Texas. Respondent was for a time in 1950 receiving a base price 10 cents per hundredweight lower than the

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seller was charging its other customers who were buying through brokers, and this difference in price was the same, or approximately the same, the seller was paying its brokers who usually negotiated sales for it. It was customary for the seller to price and sell its rice at a specified amount per hundred-weight, plus a certain amount for packaging, usually referred to as "packaging mark-ups." In the early part of March 1951, however, the seller discontinued this difference in base price to respondent, but about the same time he continued this very same brokerage allowance to respondent by reducing his packaging mark-ups by an equal amount. The seller notified the respondent of the change in the method of allowing brokerage at the time the change was made.

Representative of a few of the suppliers from whom respondent made substantial purchases during 1950 and/or 1951 and from whom respondent received lower net prices in lieu of, or which reflect brokerage, are:

G. S. Suppiger Company, St. Louis, Missouri.	Purity Cheese Company, Mayville, Wisconsin.
Wonder Rice Mills, Inc. (formerly Adolphus Rice Mills, Inc.), Houston, Texas.	Butterfield Canning Company, Muncie, Indiana.
Meeter Brother & Company, Union Grove, Wisconsin.	Fireside Marshmallow Company, Chicago, Illinois.
	Marshall Canning Company, Marshalltown, Iowa.

PAR. 5. In the course and conduct of its business the respondent purchased food products for resale from the above-named vendors, and many others, who, at respondent's direction, transported these food products from the several vendors' places of business located in various States of the United States to respondent's members located in many States different from the States in which the vendors were located. Such purchases and transportation of these food products were made during the three or four years last past.

PAR. 6. In receiving and accepting lower prices in lieu of, or which reflect, brokerage as hereinbefore alleged and described, the respondent in the course and conduct of its business in commerce, as "commerce" is defined in the aforesaid Clayton Act, has received and accepted something of value as a commission, brokerage or other compensation or allowance or discount in lieu thereof from numerous vendors in connection with the purchase of food products for its own account for resale during the three or four years last past.

PAR. 7. The acts and practices of the respondent as hereinabove alleged and described violate subsection (c) of Section 2 of the Clay-

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ton Act, as amended by the Robinson-Patman Act (U. S. C. Title 15, Section 13).

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated August 17, 1954, the initial decision in the instant matter of hearing examiner Abner E. Lipscomb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On February 2, 1954, the Federal Trade Commission issued its complaint against Topco Associates, Inc., charging that corporation with acts and practices in violation of the Clayton Act, as amended. Subsequent to service of this complaint upon the respondent, respondent, by its president and its attorney, entered into an agreement with counsel in support of the complaint, and, pursuant thereto, submitted to the hearing examiner a Stipulation For Consent Order.

In this stipulation respondent is identified as a corporation organized under the laws of the State of Wisconsin, with its office and principal place of business located at 431 South Dearborn Street, Chicago, Illinois. Respondent admits all the jurisdictional allegations set forth in the complaint and stipulates that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. The filing of an answer to the complaint and all further procedure before the hearing examiner and the Commission are expressly waived. Respondent agrees that the order hereinafter set forth shall have the same force and effect as if made after full hearing, presentation of evidence, findings and conclusions thereon, and specifically waives all right, power or privilege to contest the validity of said order. Said stipulation recites that it was executed for settlement purposes only; that its execution does not constitute an admission by respondent of the violations of law alleged in the complaint; that said complaint may be used in construing the terms of the order herein; and that said order may hereafter be altered, modified or set aside in the manner prescribed by law.

It is further agreed therein that said Stipulation For Consent Order, together with the complaint, shall constitute the entire record of this proceeding, and that the order contained therein may be entered upon the record, in disposition of this proceeding, without further notice.

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In view of the provisions of the Stipulation For Consent Order as outlined above, it appears that the order contained therein will resolve all the issues arising by reason of the complaint in this proceeding, and will safeguard the public interest to the same extent as could be accomplished by full hearing and other adjudicative procedure waived in said stipulation. Accordingly, the hearing examiner, in consonance with the terms of said agreement, accepts the Stipulation For Consent Order submitted herein, and issues the order contained therein, as follows:

ORDER

It is ordered that the respondent, Topco Associates, Inc., a corporation and its officers, directors, associates or employees, directly or through any corporate or any other device, in connection with the purchase of food products or any other merchandise in interstate commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from: Receiving or accepting from any seller, directly or indirectly, anything of value as a commission, brokerage, or other compensation, reflected in a lower price, or otherwise, or any allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account or for the account of any of its members, or while acting for or in behalf of a purchaser as an intermediate agent, or subject to the direct or indirect control of such purchaser.

It is further ordered that the respondent shall, within sixty (60) days after service upon it of notification that this order has become the decision of the Commission, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

Order

IN THE MATTER OF

KAY WINDSOR FROCKS, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (D) OF THE CLAYTON ACT AS AMENDED*Docket 5735. Complaint, Jan. 25, 1950—Decision, Aug. 18, 1954*

Order requiring two associated corporate manufacturers of women's and misses' dresses, with factories in Boston and Fall River, Mass., respectively, and common New York show rooms and a common manager, to cease violating Sec. 2 (d) of the Clayton Act as amended, by granting credits to certain customers as compensation for advertising services without advising their competitors that any advertising credit plan was in effect, and by granting credits to other customers at disproportionate unit rates and upon unequal minimum purchases.

Before *Mr. Clyde M. Hadley*, hearing examiner.

Mr. William H. Smith, Mr. Peter J. Dias, and Mr. Richard E. Ely for the Commission.

Mr. Bernard E. Singer, of New York City, and *Mr. J. J. Spiegel*, of Boston, Mass., for respondents.

ORDER ADOPTING INITIAL DECISION AS THE DECISION OF THE
COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This case having come on for hearing before the Commission upon the appeal filed by the respondents from the initial decision of the hearing examiner; and

The Commission, for reasons stated in its opinion which is separately issuing herein, having determined that the appeal should be denied and that the findings as to the facts, conclusion and order contained in the initial decision are appropriate:

It is ordered that the respondents' appeal be, and it hereby is, denied.

It is further ordered that the initial decision of the hearing examiner, a copy of which is attached, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered that the respondents shall, within sixty (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 the order to cease and desist.

Commissioner Carretta not participating.

Said initial decision, thus adopted by the Commission as its decision, follows: