

Complaint

IN THE MATTER OF

DRUGGISTS' SUPPLY CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (c) OF THE CLAYTON ACT*Docket 6420. Complaint, Sept. 22, 1955—Decision, Jan. 17, 1956*

Consent order requiring over 100 wholesale druggists to cease violating Sec. 2 (c) of the Clayton Act, as amended, through receiving brokerage from sellers (1) based upon percentage of sales, (2) in lump sums, and (3) as "functional discounts" on purchases made for them by their own corporate agent.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Rice E. Schrimsher for the Commission.

Appel, Austin & Gay, of New York City, for respondents, generally.

Weaver & Glassie, of Washington, D. C., and *Ballard, Spahr, Andrews & Ingersoll*, of Philadelphia, Pa., for Smith, Kline & French Laboratories and Smith, Kline & French, Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named and referred to in the caption hereof, and more specifically described hereinafter, have been and are 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. Respondent Druggists' Supply Corporation, hereinafter referred to as respondent D.S.C., is a corporation organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 26 West 40th Street, New York, N. Y.

PAR. 2. Respondent Brunswick Drug Company is a corporation organized, existing and doing business under the laws of the State of California, with its principal office and place of business located at 4701 South Santa Fe Avenue, Los Angeles, California. It maintains branch offices in San Francisco, San Jose, San Diego, Sacramento and San Bernardino, California, Phoenix and Tucson, Arizona, and Salt Lake City, Utah.

Respondent Durr Drug Company is a corporation organized, existing and doing business under the laws of the State of Alabama, with

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its principal office and place of business located at 207-11 Commerce Street, Montgomery, Alabama. It maintains a branch office in Birmingham, Alabama.

Respondent Gilman Brothers, Inc., is a corporation organized, existing and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 108-12 Shawmut Avenue, Boston, Massachusetts.

Respondent Kauffman-Lattimer Company is a corporation organized, existing and doing business under the laws of the State of Ohio, with its principal office and place of business located at 263-83 North Front Street, Columbus, Ohio. It also does business through a wholly-owned subsidiary, Kauffman-Lattimar Company, Inc., Parkersburg, West Virginia.

Respondent Kiefer-Stewart Co. is a corporation organized, existing and doing business under the laws of the State of Indiana, with its principal office and place of business located at 141-55 West Georgia Street, Indianapolis, Indiana. It controls another corporation engaged in the same business, Walding, Kininan & Marvin Company, Toledo, Ohio.

Respondent McPike, Inc. is a corporation organized, existing and doing business under the laws of the State of Missouri, with its principal office and place of business located at 618 Central Street, Kansas City, Missouri.

Respondent Ohio Valley Drug Co. is a corporation organized, existing and doing business under the laws of the State of West Virginia, with its principal office and place of business located at 1305-07 West Main Street, Wheeling, West Virginia.

Respondent Owens, Minor & Bodeker, Inc., is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at 1000-08 East Cary Street, Richmond, Virginia.

Respondent Scott Drug Co., Inc., is a corporation organized, existing and doing business under the laws of the State of North Carolina, with its principal office and place of business located at 2923 South Tryon Street, Charlotte, North Carolina.

Respondent Smith, Kline & French Laboratories is a corporation organized, existing and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 1530 Spring Garden Street, Philadelphia, Pennsylvania.

Respondent Smith, Kline & French, Inc., is a corporation organized, existing and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 1011 West Butler Street, Philadelphia, Pennsylvania. It is a wholly-owned subsidiary of respondent Smith, Kline & French Laboratories.

It also has a wholly-owned subsidiary, Mercer Wholesale Drug Co., 1880 Princeton Avenue, Trenton, New Jersey.

Respondent Southwestern Drug Corporation is a corporation organized, existing and doing business under the laws of the State of Texas, with its principal office and place of business located at 1108-10 Jackson Street, Dallas, Texas. It maintains branch offices in Dallas, Fort Worth, Waco, Corpus Christi, Midland, Amarillo, Houston, Wichita Falls, and San Antonio, Texas.

Respondent Walsh-Lumpkin Drug Company is a corporation organized, existing and doing business under the laws of the State of Arkansas, with its principal office and place of business located at 217 Hazel Street, Texarkana, Arkansas.

The respondents named in this paragraph are engaged in the wholesale drug business selling primarily to drug retailers numerous products, including drugs, proprietaries and sundries. Each of said respondents is a stockholder member of respondent D.S.C. An official of each of said respondents is also a member of the board of directors of respondent D.S.C.

Respondent D.S.C. has a total of approximately 104 stockholder members engaged in the wholesale drug business. During the period covered by the complaint, the number of such stockholder members has varied from year to year. The stockholder members of respondent D.S.C. constitute a class so numerous as to make it impracticable to specifically name them all as parties respondent herein, and those stockholder members named and designated herein are fairly representative of the whole. The various stockholder members of respondent D.S.C., hereinbefore specifically named in PARAGRAPH TWO hereof, are herewith and hereby made respondents individually, as stockholder members of respondent D.S.C. and as representative of all of the stockholder members of respondent D.S.C., whose principal places of business are located in the continental United States. The stockholder members of respondent D.S.C., as represented by the respondent Stockholder members of D.S.C., hereinbefore specifically named in PARAGRAPH TWO hereof, are hereby made parties respondent as though specifically named herein. All the stockholder members included in this paragraph are sometimes hereinafter referred to as "buyer respondents."

PAR. 3. Respondent D.S.C. was first organized in 1913. Its stock was and is owned by full-line service wholesale druggists who sell primarily to retail druggists such products as drugs, proprietaries and sundries. Currently in 1955 respondent has approximately 104 stockholder members who actually operate approximately 166 wholesale drug concerns, the latter figure including affiliates and subsidiaries in which the members own more than 51% of the stock. Each

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member, together with all its affiliates or subsidiaries, owns only 10 shares of stock. The policies and management of respondent D.S.C. are controlled by the board of directors, composed of 15 members elected by stockholders. Thus, respondent D.S.C. is a corporation organized, controlled and directed by wholesale druggists who are named as buyer respondents in this proceeding.

PAR. 4. Respondent D.S.C. is now and for more than ten years last past, has been engaged in the business of providing purchasing and other services to the buyer respondents. In its certificate of incorporation, respondent D.S.C. is empowered, among other things, to carry on the business of a broker and commission merchant and to act as a purchasing agent. Purchases made by respondents have resulted in the shipment of products such as drugs, proprietaries and sundries from the State in which the seller is located into and through the various other States of the United States direct to each of said buyer respondents.

PAR. 5. Respondent D.S.C. urges its stockholder members to buy from certain sellers and otherwise promotes the sale of their products to said members. In consideration of the services of respondent D.S.C. in promoting the sale of their products to its members said sellers pay or grant to respondents herein and respondents receive or accept commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof.

PAR. 6. The following methods are illustrative, but not all inclusive, of the manner in which respondents receive or accept commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof:

(1) Respondent D.S.C. receives from various sellers payments of money based upon a percentage of net sales made by the seller to the buyer respondents. Respondent D.S.C. promotes the sale of said seller's products to said buyer respondents. During the 6-year period from 1949 to 1954 respondent D.S.C. received such payments at one time or another from 323 sellers. For any one year the number of sellers ranged from a minimum of 155 in 1951 to a maximum of 199 in 1949, and the payments were based upon percentage of sales ranging from 1% to 10%. During said period, respondent D.S.C. received total payments from said sellers in the following amounts:

1949	-----	\$ 449,149.00
1950	-----	447,585.00
1951	-----	472,182.00
1952	-----	488,874.00
1953	-----	547,651.00
1954	-----	505,597.00
Total	-----	2,911,038.00

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(2) During the same period respondent D.S.C. also received similar payments of money from some seven sellers who sold their products to the buyer respondents, such payments being a lump sum each year agreed upon between respondent D.S.C. and each seller. The total of said payments received by respondent D.S.C. during the period is as follows:

1949	-----	\$ 7,400.00
1950	-----	7,400.00
1951	-----	8,056.50
1952	-----	8,120.00
1953	-----	9,220.00
1954	-----	11,920.00
Total	-----	52,116.50

(3) Respondent D.S.C. has placed orders for goods with certain sellers on behalf of the buyer respondents. For example, in the case of one seller of drug proprietaries, the buyer respondents would submit orders for the seller's goods to respondent D.S.C., which, in turn, forwarded each order upon receipt to the seller. The seller billed respondent D.S.C. at the regular price less "a functional discount" of 20% and at the same time would drop ship the order to the individual buyer respondent. Respondent D.S.C., after paying the seller, billed the buyer respondent direct, allowing a discount of 15%, retaining the differential of 5% for its own work. The regular cash discount was also passed along by respondent D.S.C. to the buyer respondent. Purchases from this seller in this manner amounted to \$316,000.00 in 1952 and \$249,832.00 in 1953.

Respondent D.S.C. receives most of its income from the sellers with which it has the arrangements described above in subparagraphs (1) through (3). Each stockholder member (buyer respondent) is also charged \$150.00 each year as its share of the operating expenses of respondent D.S.C. Once each year, after deducting the expenses of its operations, respondent D.S.C. distributes to its stockholder members a sum of money determined by its directors and the amount paid to each member is in proportion to the member's annual purchases from said sellers. In 1954 for example, said members received individual payments ranging from a minimum of approximately \$100.00 to a maximum of approximately \$8500.00. The total of such payments made during the period 1950 through 1954 is as follows:

1950	-----	\$150,000.00
1951	-----	160,000.00
1952	-----	125,000.00
1953	-----	150,000.00
1954	-----	125,000.00
Total	-----	710,000.00

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PAR. 7. The acts and practices of the respondents, as above alleged, violate subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On September 22, 1955, the Federal Trade Commission issued its complaint in this proceeding, alleging that the Druggists' Supply Corporation is now and for more than ten years last past has been engaged in the business of providing purchasing and other services to approximately 104 stockholder members engaged in the wholesale drug business, of whom the other respondents named in the caption hereof are representative. The stockholder members of Respondent Druggists' Supply Corporation are alleged to constitute a class so numerous as to make it impractical specifically to name them all as parties respondent herein, and those stockholder members named and designated herein are alleged to be representative of the entire stockholding membership. All stockholder members are, however, made parties respondent as though specifically named herein, and all such stockholder members are hereinafter referred to as Buyer Respondents.

Each of the Buyer Respondents is described as being in the wholesale drug business, selling numerous drug products, including drugs, proprietaries and sundries, primarily to drug retailers.

All of the respondents are charged with engaging in acts and practices violative of the brokerage provisions of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

On November 9, 1955, all respondents except Respondent Smith, Kline & French Laboratories entered, through their counsel, into an agreement with counsel supporting the complaint, and, pursuant thereto, submitted to the Hearing Examiner an Agreement Containing Consent Order To Cease And Desist, disposing of all the issues involved in this proceeding as to them.

On November 14, 1955, counsel for Respondent Smith, Kline & French Laboratories submitted a motion to dismiss the complaint as to that respondent. This motion was supported by the affidavit of Orlando J. May, Executive Vice President of Smith, Kline & French, Inc., a subsidiary corporation of Respondent Smith, Kline & French Laboratories, both of which are named as Buyer Respondents herein. The affidavit states that the two corporations are independently operated, and that Respondent Smith, Kline & French Laboratories is exclusively engaged in the manufacture of pharmaceuticals and, unlike Respondent Smith, Kline & French, Inc., is not engaged in the wholesale drug business and is not a stockholder-member of

Respondent Druggists' Supply Corporation. Counsel's motion to dismiss is unopposed by counsel supporting the complaint, and it appears, therefore, that the motion should be granted as to Respondent Smith, Kline & French Laboratories. Accordingly, as used hereinafter, the term "Buyer Respondents" will refer only to those respondents who signed the Agreement Containing Consent Order To Cease And Desist. The respondents are identified therein as follows:

Respondent Druggists' Supply Corporation is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 24 West 40th Street, New York, New York.

Respondent Brunswig Drug Company is a corporation existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4701 Santa Fe Avenue, Los Angeles, California.

Respondent Durr Drug Company is a corporation existing and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 207-11 Commerce Street, Montgomery, Alabama.

Respondent Gilman Brothers, Inc. is a corporation existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 100-12 Shawmut Avenue, Boston, Massachusetts.

Respondent The Kauffman-Lattimer Company is a corporation existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 263-283 North Front Street, Columbus, Ohio.

Respondent Kiefer-Stewart Company is a corporation existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 141-55 West Georgia Street, Indianapolis, Indiana.

Respondent McPike, Inc. is a corporation existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 618 Central Street, Kansas City, Missouri.

Respondent Ohio Valley Drug Company is a corporation existing and doing business under and by virtue of the laws of the State of West Virginia, with its office and principal place of business located at 1305-07 West Main Street, Wheeling, West Virginia.

Respondent Owens, Minor & Bodeker, Inc. is a corporation existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 1000-08 East Cary Street, Richmond, Virginia.

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Respondent Scott Drug Company is a corporation existing and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 2923 South Tryon Street, Charlotte, North Carolina.

Respondent Smith, Kline & French, Inc. is a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1011 West Butler Street, Philadelphia, Pennsylvania.

Respondent Southwestern Drug Corporation is a corporation existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1108-10 Jackson Street, Dallas, Texas.

Respondent Walsh-Lumpkin Drug Company is a corporation existing and doing business under and by virtue of the laws of the State of Arkansas, with its office and principal place of business located at 217 Hazel Street, Texarkana, Arkansas.

Respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record herein may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Each of said respondents waives any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. The agreement further provides that respondents' answer to the complaint shall be considered as having been withdrawn and the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement. The agreement also provides that it is for settlement purposes only and does not constitute an admission by respondents that they or any of them have violated the law as alleged in the complaint; that the order entered in accordance with this agreement shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; and that the complaint, except as to subparagraph (3) of Paragraph Six thereof, may be used in construing the terms of the order.

Counsel supporting the complaint, in his memorandum transmitting to the hearing examiner the Agreement Containing Order To Cease And Desist, explains that the reason for agreeing to the exclusion of subparagraph (3) of Paragraph Six of the complaint from further consideration is that the discounts received on purchases made for Buyer Respondents by Respondent Druggists' Supply Corporation, described in that paragraph, do not constitute illegal brokerage as therein alleged.

After consideration of the charges set forth in the complaint the facts above agreed to, and the provisions of the proposed order contained in the agreement, it appears that such order will safeguard the public interest to the same extent as could be accomplished by the issuance of an order after full hearing and all other adjudicative proceedings waived by said agreement. Accordingly, in consonance with the terms of the aforesaid agreement, the hearing examiner accepts the Agreement Containing Consent Order To Cease And Desist, and finds that the Commission has jurisdiction over the respondents and all their acts and practices as alleged in the complaint, and that this proceeding is in the public interest. Accordingly,

It is ordered, That Respondent Druggists' Supply Corporation, its officers, directors, agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase of drugs, proprietaries, and sundries, in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, upon any purchase made by Respondent Druggists' Supply Corporation for resale to its stockholder members, or upon any purchases made by any of said members.

It is further ordered, That Buyer Respondents Brunswick Drug Company, Durr Drug Company, Gilman Brothers, Inc., The Kauffman-Lattimer Company, Kiefer-Stewart Company, McPike, Inc., Ohio Valley Drug Company, Owens, Minor & Bodeker, Inc., Scott Drug Company, Smith Kline & French, Inc., Southwestern Drug Corporation and Walsh-Lumpkin Drug Company, individually and as representative of all stockholder members of Respondent Druggists' Supply Corporation, their respective officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of drugs, proprietaries, and sundries, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller or from Respondents Druggists' Supply Corporation, or from any other agent, representative, or other intermediary, acting for or in behalf or subject to the direct or indirect control of said Buyer Respondents, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon any purchase made by said Buyer Respondents or for them by Respondent Druggists' Supply Corporation or by any other such intermediary.

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It is further ordered, That the complaint herein, insofar as it relates to Buyer Respondent Smith, Kline & French Laboratories, be, and the same hereby is, dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 17th day of January, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That Respondent Druggists' Supply Corporation, a corporation, and Buyer Respondents Brunswig Drug Company, Durr Drug Company, Gilman Brothers, Inc., Kauffman-Lattimer Company, Kiefer-Stewart Co., McPike, Inc., Ohio Valley Drug Co., Owens, Minor & Bodeker, Inc., Scott Drug Co., Inc., Smith, Kline & French, Inc., Southwestern Drug Corporation and Walsh-Lumpkin Drug Company, corporations, 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.

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IN THE MATTER OF
THE ORLOFF COMPANY, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6184. Complaint, Feb. 24, 1954—Decision, Jan. 27, 1956

Order requiring an assembler and distributor of its "Geneva" brand watches to cease affixing to them tags printed with fictitious and excessive prices, thereby furnishing retailers with means of deceiving members of the purchasing public as to the usual retail prices.

Mr. Frederick McManus for the Commission.

Mr. Sydney C. Orlofsky, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 24, 1954, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with use of unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of the provisions of said Act. Said respondents appeared by counsel and filed their joint answer to the complaint. Thereafter, counsel in support of the complaint and counsel for respondents entered into a stipulation as to the facts dated November 12, 1954,¹ in which it was stipulated and agreed that, subject to the approval of the hearing examiner, the statement of facts therein set forth may be made part of the record and may be taken as the facts in this proceeding in lieu of evidence in support of the charges stated in the complaint, or in opposition thereto, and that the hearing examiner may proceed upon said statement of facts to make his initial decision, stating his findings as to the facts, including inferences which he may draw from said stipulation, and his conclusion based thereon, and enter his order disposing of the proceeding without the filing of proposed findings and conclusions or the presentation or oral argument, but reserving to counsel the right to file briefs in support of their respective positions. There-

¹ Prior to the above-mentioned stipulation as to the facts, the parties entered into a stipulation as to the facts dated July 12, 1954. Said stipulation was thereafter rejected by order of the hearing examiner, dated September 22, 1954, for the reason that it was characterized by such ambiguity and lack of clarity as not to afford a proper basis for the issuance of an initial decision based thereon.