

Complaint

IN THE MATTER OF

FOOD MART, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2(c) OF THE CLAYTON ACT

Docket 6910. Complaint, Oct. 7, 1957—Decision, May 6, 1958

Consent order requiring a large Southwest grocery chain operating some 60 retail stores in Texas and New Mexico, along with its two subsidiaries—a frozen foods distributor and a broker of frozen food products—to cease violating section 2(c) of the Clayton Act through receiving payments of brokerage from suppliers as an independent broker through said broker-intermediary acting in fact for said grocery chain.

Mr. Fredric T. Suss for the Commission.

Sullivan & Cromwell, by *Mr. Howard T. Milman*, of New York, N.Y.,
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 have been, and are 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 Food Mart, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 1000 Valley View Road, El Paso, Tex. It is directed and controlled by the respondents J. Spencer Weed, Gordon W. Foster, Robert H. Hoy, and Lawrence M. Davis, who are responsible for its acts and practices and who own or control more than 20 percent of its outstanding shares of stock. Respondent Food Mart, Inc. is engaged in the operation of a large chain of retail grocery stores, selling all types of grocery products to the consuming public. It purchases all of the grocery products, including all types of canned goods, frozen foods, fresh vegetables, all types of meats, canned, fresh and frozen, dairy products and numerous other food items and household articles, which it resells, from a large number of manufacturers, processors and handlers of such products. Sales made by Food Mart, Inc. are substantial, being approximately \$35 million for the 53-week period ending

March 31, 1956. Respondent Food Mart, Inc. has approximately 60 retail grocery stores located in the States of Texas and New Mexico.

Respondent Del Norte Frozen Foods, Inc. is a corporation organized and existing under the laws of the State of Texas, with its principal office and place of business located at 1000 Valley View Road, El Paso, Tex. Its capital stock consists of 500 shares, 497 of which are owned by the respondent Food Mart, Inc. and 1 share each is owned by the respondents J. Spencer Weed and Lawrence M. Davis, which stockholders direct and control the respondent Del Norte Frozen Foods, Inc. and are responsible for its acts and practices. Respondent Del Norte Frozen Foods, Inc. is a wholesale distributor of frozen vegetables, fruits, poultry, and fish with 85 percent of its sales being made to the respondent Food Mart, Inc. For the 53-week period ending March 31, 1956, respondent Del Norte Frozen Foods, Inc. made sales in the amount of approximately \$784,000 to Food Mart, Inc. and approximately \$105,000 to others.

Respondent Davis Brokerage Co., Inc., is a corporation organized and existing under the laws of the State of Texas with its official office located at 1529 Howze Avenue, El Paso, Tex., but with its actual office and place of business located at 1000 Valley View Road, El Paso, Tex. The capital stock of the respondent Davis Brokerage Co., Inc. consists of 25 shares of common stock, 15 of which are held by respondent J. Spencer Weed, 6 of which are held by respondent Gordon W. Foster, 2 of which are held by respondent Robert H. Hoy, and 2 of which are held by respondent Lawrence M. Davis, which stockholders direct and control Davis Brokerage Co., Inc. and are responsible for its acts and practices. Respondent Davis Brokerage Co., Inc. is engaged in business as a broker in connection with the sale to wholesalers and retailers of frozen food products. During the year ending September 30, 1956, respondent Del Norte Frozen Foods, Inc. purchased through the respondent Davis Brokerage Co., Inc. approximately \$508,869 in frozen foods.

Respondent J. Spencer Weed is an individual, with an office located at 233 Broadway, New York, N.Y., and is chairman of the board and director of respondent Food Mart, Inc.

Respondent Gordon W. Foster is an individual residing at 1619 Elm Street, El Paso, Tex., and is president and director of respondent Food Mart, Inc. and vice president and director of Del Norte Frozen Foods, Inc.

Respondent Robert H. Hoy is an individual residing at 4208 Altura Boulevard, El Paso, Tex., and is executive vice president and director of respondent Food Mart, Inc.

Respondent Lawrence M. Davis is an individual residing at 1529 Howze Avenue, El Paso, Tex., and is president and director of respondent Del Norte Frozen Foods, Inc. and of Davis Brokerage Co. Inc.

PAR. 2. In the course and conduct of their business as grocery retailers, respondents Food Mart, Inc., J. Spencer Weed, Gordon W. Foster, and Robert H. Hoy have been engaged in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act, purchasing products from vendors whose places of business are located in States other than Texas and New Mexico and causing them to be shipped to their places of business within the States of Texas and New Mexico.

In the course and conduct of their business as a frozen foods distributor, respondents Del Norte Frozen Foods, Inc., Lawrence M. Davis and Gordon W. Foster have been engaged in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act, purchasing products from vendors whose places of business are located in States other than Texas and causing them to be shipped to their place of business within the State of Texas.

In the course and conduct of their business as frozen foods broker, respondents Davis Brokerage Co., Inc. and Lawrence M. Davis are and have been engaged in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act, arranging sales of products from vendors whose places of business are located in States other than Texas and causing them to be shipped to their place of business within the State of Texas.

PAR. 3. In the course and conduct of their said business in commerce, the respondents are receiving and accepting something of value as a commission, brokerage, or other compensation on purchases for their own account from the other party to the transaction. Said compensation is paid to and received by intermediaries who are acting in fact for or in behalf of, or are subject to the direct or indirect control of, a party to the transaction other than the person by whom such compensation is so granted or paid.

PAR. 4. For example, during the year 1956, respondent Food Mart, Inc. has made substantial purchases of food products from its suppliers through its subsidiary, respondent Del Norte Frozen Foods, Inc., and through its controlled intermediary, respondent Davis Brokerage Co., Inc., on which purchases respondent Davis Brokerage Co., Inc. and, through their ownership of said brokerage company, those officers and stockholders of Food Mart, Inc. and Del Norte Frozen Foods, Inc., which are named as respondents herein, received something of value as a commission, brokerage or other compensation,

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or allowance or discount in lieu thereof. In these transactions respondent Davis Brokerage Co., Inc. received and accepted payments of brokerage from said suppliers as an independent broker, whereas, said respondent was acting, in fact, for or in behalf of, or was subject to, the direct or indirect control of the buyer respondents Food Mart, Inc. and its subsidiary Del Norte Frozen Foods, Inc.

PAR. 5. The acts and practices of Food Mart, Inc., and its subsidiary Del Norte Frozen Foods, Inc., the buyer respondents, Davis Brokerage Co., Inc., the broker respondent, and the individual respondents acting in behalf of said buyer respondents as their officers, in receiving and accepting something of value as a commission, brokerage or other compensation on their purchases of food products through a brokerage company owned and controlled by said individual respondents, as herein alleged and described, are in violation of subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, sec. 13).

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with violation of subsection (c) (relating to brokerage) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act. An agreement for disposition of the proceeding by means of a consent order has now been entered into by respondents and their attorney and counsel supporting the complaint.

With respect to respondent Robert H. Hoy, the agreement states that he has had no part in the organization, management or policies of respondent Davis Brokerage Co., Inc., the statement being supported by an affidavit executed by respondent Gordon W. Foster. The agreement and proposed order therefore provide for the dismissal of the complaint as to respondent Robert H. Hoy, and in the circumstances such action appears appropriate.

As to all of the other respondents, the agreement states, among other things, that these respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any other procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding as to these respondents, such order to have the same force and effect as if entered

after a full hearing, said respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by said respondents that they have violated the law as alleged in the complaint.

The hearing examiner being of the view that the agreement and proposed order provide an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Food Mart, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 1000 Valley View Road, El Paso, Tex.

Respondent Del Norte Frozen Foods, Inc., is a corporation organized and existing under the laws of the State of Texas, with its principal office and place of business located at 1000 Valley View Road, El Paso, Tex., and is a subsidiary of respondent Food Mart, Inc.

Respondent Davis Brokerage Co., Inc., is a corporation organized and existing under the laws of the State of Texas with its official office located at 1529 Howze Avenue, El Paso, Tex.

Respondent J. Spencer Weed is an individual, with an office located at 233 Broadway, New York, N.Y., and is chairman of the board and director of respondent Food Mart, Inc.

Respondent Gordon W. Foster is an individual residing at 1619 Elm Street, El Paso, Tex., and is president and director of respondent Food Mart, Inc., and vice president and director of respondent Del Norte Frozen Foods, Inc.

Respondent Lawrence M. Davis is an individual residing at 1529 Howze Avenue, El Paso, Tex., and is president and director of respondent Del Norte Frozen Foods, Inc., and of respondent Davis Brokerage Co., Inc.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

ORDER

It is ordered, That the respondent Food Mart, Inc., a corporation, Del Norte Frozen Foods, Inc., a corporation, the respondent J. Spencer Weed, individually and as an officer of Food Mart, Inc., the respondent Gordon W. Foster individually and as an officer of Food Mart, Inc., and of Del Norte Frozen Foods, Inc., and respondent Lawrence M.

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Davis, individually and as an officer of Del Norte Frozen Foods, Inc., their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the purchase of food products in commerce, as "commerce" is defined in the aforesaid 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 of food products for their own account or for the account of any of the named corporations with which they are then directly or indirectly related as officer, employee, agent, representative, intermediary or controlling stockholder.

It is further ordered, That the respondents Davis Brokerage Co., Inc., a corporation, and Lawrence M. Davis, individually and as an officer of the said Davis Brokerage Co., Inc., and their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the purchase of food products in commerce, as "commerce" is defined in the aforesaid 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 of food products where the individual respondent Lawrence M. Davis or the Davis Brokerage Co., Inc., is the agent, representative or intermediary acting for or in behalf of, or is subject to the direct or indirect control of the buyer, or of any of the officers of said buyer.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent Robert H. Hoy.

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 6th day of May 1958, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents Food Mart, Inc., a corporation; Del Norte Frozen Foods, Inc., a corporation; Davis Brokerage Co., Inc., a corporation; J. Spencer Weed, individually and as chairman of the board and director of Food Mart, Inc.; Gordon W. Foster, individually and as president and director of Food Mart, Inc., and vice president and director of Del Norte Frozen Foods, Inc.; and Lawrence M. Davis, individually and as president and director of Del Norte Frozen Foods, Inc., and as president and director of Davis Brokerage

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Co., Inc., 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.

IN THE MATTER OF
GROVETON PAPER CO.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF
THE CLAYTON ACT

Docket 6592. Complaint, July 19, 1956—Decision, May 7, 1958

Order requiring a manufacturer in Groveton, N.H., of paper napkins and other paper products selling to independent grocers and grocery chain stores, to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying broadcasting companies for time furnished to certain favored grocery chains for their own advertising purposes in return for which the participating chains gave in-store promotions to respondent's products in their stores located in the trade area reached by the radio or TV station utilized, without making compensation for such benefits available on proportionally equal terms to all the competitors of the favored customers.

Mr. William R. Tincher, Mr. J. Wallace Adair, Mr. Eugene Kaplan and Mr. Daniel A. Austin, Jr., for the Commission.

Appell, Austin & Gay, by Mr. Cyrus Austin, of New York, N.Y.; Willkie, Owen, Farr, Gallagher & Walton, by Mr. Sumner S. Kittelle, of New York, N.Y.; and Cann, Taylor, Lamb and Long, by Mr. George P. Lamb, of Washington, D.C., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE PLEADINGS

The complaint in this proceeding charges the respondent with having paid money to certain broadcasting companies for the benefit of certain of its chain-store customers, thereby providing broadcasting time "through such broadcasting companies to the favored customers for said customers' own advertising purposes." The payments thus made by respondent are alleged to have been made as compensation or in consideration for services or facilities furnished it by these favored customers in connection with the offering for sale and sale of respondent's products. It is further averred that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the provision of subsection (d) of section 2 of the Clayton Act, as amended.

The complaint then describes in some detail the sales-promotion plans through which respondent favored certain of its customers.

Respondent in its answer denies that any broadcasting company served as a medium or intermediary between respondent and any of