

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

VENUS FOODS

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

Docket 7212. Complaint, Aug. 21, 1958—Decision, Oct. 28, 1960

Order requiring a manufacturer of food products in Los Angeles, Calif., with sales of bakery items in 1957 in excess of \$2,400,000, to cease violating Sec. 2(c) of the Clayton Act by granting a discount of 5% in addition to its prevailing wholesale price to new customers in the New York-New England area purchasing its fruit bars for their own accounts for resale.

Mr. Cecil G. Miles and Mr. Franklin A. Snyder for the Commission.

Gibson, Dunn & Crutcher, of Los Angeles, Calif., by Mr. John J. Hanson and Mr. Julian O. von Kalinowski, for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is based upon a complaint charging the respondent with making payments of commissions, brokerage, or allowances, or

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discounts in lieu thereof, to certain buyers who purchase for their own account for resale in violation of subsection (c) of Section 2 of the Clayton Act, as amended.

This proceeding is now before the undersigned hearing examiner for final consideration on the complaint, answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions, together with briefs presented by counsel.

The hearing examiner has given consideration to the proposed findings as to the facts and conclusions submitted by both parties, and briefs in support thereof, and all findings of facts and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner, having considered the record herein and being now fully advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom, and order.

FINDINGS AS TO THE FACTS

1. Respondent Venus Foods, Inc., a California corporation, located at 3317 East 50th Street, Los Angeles, California, is engaged in the sale and distribution in interstate commerce of food products and bakery items.

2. Among the bakery items sold by respondent are various fruit bars, which are the only items involved in this proceeding. Respondent generally sold its fruit bars to distributors, either directly or through brokers, at list price, less 24 percent, delivered, subject to 1 percent cash discount, 10 days. When sold through brokers, the brokerage fee was generally 5 percent of distributor net price. Respondent's prices were generally the same throughout the United States. In some localities respondent did sell its fruit bars at special prices. The extent to which these special or off-scale prices may have differed from respondent's prices generally are not material to the issues in this proceeding.

3. For the purpose of obtaining wider distribution for its fruit bars, the respondent on March 22, 1956, appointed Henry M. Samplin Associates, Inc., its exclusive broker for the New York and New England area, with a commission of 5 percent on net sales. On May 26, 1956, the respondent cancelled this arrangement with said Samplin, and at approximately the same time the respondent entered into negotiations with Frito New York, Inc., New England Frito Corporation, and Frito Tri-State Corporation, which negotiations were formalized in a written contract dated July 1, 1956, between respondent and Frito New York, Inc., granting to them the sole and exclusive right to sell respondent's Venus brand fruit bars in the

New England States and portions of the States of New York and New Jersey, as specified. By the terms of said contract, respondent agreed to sell Frito its fruit bars at list price, less a distributor discount of 24 percent, less cash discount of 1 percent, and a further discount of 5 percent for "warehousing, handling and freight out". The term "freight out" refers to the delivery costs in transferring merchandise from Frito warehouse to Frito distributor.

4. It is the contention of the respondent that the additional 5 percent paid to Frito does not constitute a payment of commission or brokerage for the reason that this payment was made for warehousing, handling and cost of freight from Frito warehouse to Frito distributor, and constitutes a functional discount to Frito for acting as a regional distributor, and does not involve any discrimination in price.

5. The transaction between respondent and Frito was a purchase and sale agreement subject to certain discounts or allowances off list price. The merchandise was purchased by Frito for its own account, and upon delivery became the sole property of Frito. The payment by respondent to Frito for warehousing, handling and delivery to its own customers was a payment to Frito for doing its own work, and is a mere gratuity, and does not constitute compensation for any service rendered to respondent.

CONCLUSIONS

1. The facts in this proceeding do not support respondent's contention that the additional 5 percent was allowed as a functional discount. The respondent has never set up a regional distribution organization as part of its distribution system, and did not do so with Frito. At or about the time that negotiations with Frito were started, respondent was dealing with a broker in the territory involved, and respondent cancelled its brokerage contract with him and entered into a sales agreement with Frito. In the course of the negotiations, Frito demanded an additional discount from respondent's wholesale price, which was granted by the respondent and described in the contract as "a further discount of 5 percent for warehousing, handling and freight out". This was not the establishment of a regional distributor, but simply an agreement to pay for services rendered by Frito to itself as purchaser, owner and subsequent seller of the goods purchased.

2. Frito performed no services for the respondent such as might bring this case within the exception of Section 2(c) by reason of services rendered. The law is well settled that services rendered by a purchaser, after delivery of merchandise and passage of title, are

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services rendered to itself as purchaser, owner and subsequent seller of the goods purchased and not to the seller from whom purchase was made. All of the services upon which respondent relies are services rendered by Frito in connection with its own purchase, ownership and resale of the merchandise, and such services are rendered by Frito not to respondent, but to itself. *Southgate Brokerage Co., Inc., vs. Federal Trade Commission*, C.C.A. 4, 150 F. 2d 607.

3. The law is well settled that price discrimination which is covered by Section 2(a) of the Clayton Act is not necessary to a violation of Section 2(c), which specifically forbids the payment of brokerage by the seller to the buyer or the buyer's agent. *Southgate Brokerage Co., Inc., vs. Federal Trade Commission, supra; Oliver Bros. vs. Federal Trade Commission*, C.C.A. 4, 102 F. 2d 763.

4. Respondent cannot claim termination of practice because of cancellation of Frito's contract in October 1958, since it immediately returned to the use of a broker in the New York-New England area, paying him the regular brokerage of 5 percent on sales at the prevailing wholesale price, and a lesser percentage where a larger discount was granted to the customer. The Frito transaction was offered in evidence as an example of the practices of respondent, and did not purport to be all-inclusive of the acts and practices alleged to be in violation of Section 2(c) of the Clayton Act. Furthermore, the alleged termination was subsequent to the issuance of the complaint and after evidence in support of the complaint had been substantially completed, and respondent still maintains that the practices charged are not in violation of the Clayton Act.

5. It is further concluded that the acts and practices of respondent, as herein found, constitute the making of payments of commissions, brokerage or allowances, or discounts in lieu thereof, to certain buyers who purchase for their own account for resale in violation of subsection (c) of Section 2 of the Clayton Act, as amended.

ORDER

It is ordered, That Venus Foods, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of bakery products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Paying, granting or allowing, directly or indirectly, to any buyer or to anyone acting for, or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance, or

discount in lieu thereof, upon or in connection with any sale of bakery products to such buyer for his own account.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

The complaint in this matter charges respondent, Venus Foods (erroneously referred to in the complaint and in the initial decision as Venus Foods, Inc.), with violating Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. The hearing examiner held in his initial decision that the charge was sustained by the evidence and ordered respondent to cease and desist from the practice. Respondent has appealed from this decision.

In substance, it is the respondent's contention that a 5% discount which it granted in connection with its sale of fruit bars to three organizations, Frito New York, Inc., New England Fritos Corporation and Frito Tri-State Corporation, did not constitute the payment of brokerage or a commission or a discount in lieu thereof.

Respondent is located in Los Angeles, California, and prior to 1956 sold its fruit bars throughout most of the country with the exception of a territory generally defined as the New York-New England area. It desired to gain distribution in that area, and on March 22, 1956, appointed Henry M. Samplin Associates, Inc., New York City, its exclusive broker for the area. As Venus' broker, Samplin received a commission of 5% of the purchasers' net price. Sales of respondent's fruit bars were made by Samplin to distributors at a delivered price of \$4.70 per case, less 24%, less 1% cash discount, if paid within 10 days. Respondent's sales manager, Mr. Thorpe, made a trip to New York City and terminated the arrangement with Samplin on May 26, 1956. While in New York and at about the same time Samplin's services were discontinued, Thorpe entered into negotiations with Frito New York, Inc., for distribution of Venus fruit bars. At the first meeting between these two, Thorpe offered to sell the fruit bars to Frito New York at the same price as sales had been made to distributors through Samplin. Frito New York stated that it would need a larger discount to cover the cost of getting the merchandise to its distributors. Thorpe then contacted his office in Los Angeles and discussed the Frito deal with the president of respondent corporation. The next day, at a meeting with representatives from Frito New York, which was also attended by a representative of New England Fritos Corporation, a deal was arrived at whereby respondent would sell to the Frito companies at a price of \$4.70, less 24%, less 5%, less 1% cash, 10 days. Although Frito Tri-State Corporation was not represented

at this meeting, it is clear from the record that it also purchased from respondent on the same basis. The agreement was confirmed in a letter from Frito New York to respondent, dated July 1, 1956, which specified the territory to be covered (substantially the same area formerly serviced by Samplin) and which provided in part as follows:

DISTRIBUTORSHIP: We are hereby granted the sole and exclusive right to sell the products within the territory. During the term of this agreement, you will not grant to any other person, firm or corporation the right or privilege of selling the products at wholesale within the territory.

OUR COST: You will sell us the products at your prevailing wholesale price, less a distributor discount of 24%, a further discount of 1% for prompt payment and a further discount of 5% for warehousing, handling and freight out.

The hearing examiner found that respondent sold its fruit bars at generally the same price throughout the United States and that when the products were sold through brokers, the brokerage fee was generally 5% of the distributor net price. Respondent does not seriously dispute these findings, but contends that the hearing examiner was in error in finding that it generally sold its fruit bars to distributors at list price, less 24% delivered and that, in some localities, it sold the products at special or off-scale prices. Respondent argues that its method of quoting prices to distributors varies in different marketing areas and that the prices in the various areas are the regular prices established for those areas. In support of this argument, respondent introduced evidence showing that its method of quoting prices varied from an f.o.b. Los Angeles price to different delivered prices in different areas, the difference in delivered prices resulting from freight differentials. However, this evidence is weakened considerably by a statement in a letter from respondent to its broker, Samplin, dated April 30, 1956, wherein respondent stated that "Our terms will be the same as all over the United States, less 24% and 1% delivered, * * *." In addition, the marketing areas used by respondent to show its different pricing methods are generally in the western part of the country (California, Nevada, Washington, Arizona and Texas). There are in the record invoices of sales through brokers to distributors in Wisconsin, Ohio and Michigan which reflect the price of \$4.70, less 24%. Respondent's price list for its distributors in the southeastern section of the United States quotes this same price. Moreover, this was the price at which sales were made to distributors in the New York-New England area through Samplin. We think the record clearly shows, at the very least, that respondent had established a price of \$4.70, less 24% for its fruit bars, whether sold

through brokers or not, in the eastern portion of the country, the area with which this proceeding is concerned. That respondent may have had a different method of pricing in the western section is immaterial.

The record contains no direct evidence that the 5% discount to the Frito companies constituted a brokerage payment or commission or was a discount in lieu thereof. Accordingly, any finding that such was the case rests on inferences to be drawn from the evidence. In our view, there are sufficient facts of record to support such a finding. In summary, these facts show that the 5% granted to the Frito companies was exactly the same as respondent allowed its broker for sales in the same area; the price, less the 5% discount, was the same at which respondent formerly sold its fruit bars to distributors in the same area through its broker and was currently selling other distributors in surrounding areas through brokers; the 5% discount was granted Frito within a few days after cancellation of respondent's brokerage arrangement for the same area; and, in the terms of the agreement between Frito and respondent, the price at which respondent agreed to sell to Frito is designated as a "wholesale price," with respondent also agreeing not to grant any other company the right of selling the fruit bars at "wholesale" within the territory. Thus, the facts in this case go far beyond those present in the *Robinson* case¹ cited by respondent, in which the facts showed that the seller after eliminating a broker, sold directly to all purchasers, and in which plaintiff pleaded only his unsupported conclusion that a reduction in price granted to a buyer from a manufacturer constituted a discount in lieu of brokerage.

Respondent's principal argument on this appeal is that the evidence shows that the additional 5% granted to the Frito companies was a functional discount, thus rebutting any other inferences that may be drawn from the surrounding circumstances. It is respondent's contention that the Frito companies operated as regional distributors, warehousing the products and selling and transporting them to distributors who in turn sold to retailers, whereas respondent's usual distribution chain consisted of sales to distributors who sold direct to retailers. In support of this argument, respondent points out that New England was a new territory and claims that its attempt to gain distribution through a broker in that area was unsuccessful. Respondent's general manager testified that after termination of the brokerage arrangement, he made a survey of the market to find the best means of distribution, in the

¹ *Robinson v. Stanley Home Products, Inc.*, 272 F. 2d 601 (1st Cir. 1959).

course of which he contacted other distributors who advised him that they could not handle the products for a discount of less than 35%; and that in the negotiations with the Frito companies, their method of distribution was explained. In addition, respondent points to the terms of its agreement with Frito which provides that the 5% discount is for "warehousing, handling and freight out." (Freight out refers to Frito's cost of delivering the goods from its warehouse to distributors.)

It is our opinion that the record does not support respondent's contention. Although respondent's general manager, Thorpe, testified at the second hearing in this matter in November 1959 that the Frito companies informed him that they sold to independent distributors, the following testimony by respondent's president at the first hearing in October 1958 indicates that the Frito companies also sold directly to retailers:

Q. Mr. Nussbaum, to what type customers do the Frito Company sell?

A. A *great portion* of their business is to independent distributors to whom they have contracts.

Q. What control do you have over the prices at which they sell?

A. At which they sell to *stores* and independent distributors?

Q. Yes, sir.

A. Only the control of how much you can price the merchandise for. There is a limit that you can sell a 49-cent item. (Emphasis supplied.)

This is further borne out by the testimony of Thorpe in the second hearing when, in relating his discussion with the Frito officials leading up to the agreement, he stated:

* * * we discussed the problems that their men possibly might run into in trying to integrate a foreign item. When I say foreign, foreign to their type of items on the trucks, and the sales problems that they would have with the individual groceries, and that type of thing.

Another fact which militates against respondent's argument that the 5% discount was not in lieu of brokerage is the provision in the contract resulting from the negotiations with the Frito companies that "You (Venus Foods) will also hold us (Frito) harmless with regard to any claims which may be made against us by any broker or former broker of yours in this territory."

Evidence which respondent attempted to introduce concerning its methods of distribution in the area after termination of the Frito contract was properly held to be immaterial by the hearing examiner. The question of whether or not a discount to a buyer constituted a brokerage payment or discount in lieu thereof depends upon the facts surrounding that particular transaction and cannot be related to sales methods subsequently employed by the seller.

Moreover, the evidence shows that respondent did not attempt to classify the Frito companies functionally, but in fact considered them to be the same type of distributor as those to whom it usually sold. As previously stated, the price quoted by Thorpe to Frito at their first meeting was the same as that to which respondent sold its regular distributors in the eastern part of the country. Also, Thorpe made no mention in his testimony concerning his telephone discussion with respondent's president about the proposed Frito deal, that they planned to establish a regional distributor. In the written agreement between the parties, Frito is obviously classified as a wholesaler. In addition, the circumstance that the Frito companies did not account to respondent as to the names of the customers to whom they sold the merchandise and that respondent did not have a policy requiring them to furnish this information, stipulated to by respondent, tends to negate any argument that this was the action of seller establishing a regional distributor.

Respondent sells to approximately 300 distributors. It attempted to show that the 5% granted to the Frito companies was a functional discount by showing that it had previously granted discounts in that amount to two of its customers to enable them to function as regional distributors. One such transaction involved an individual named Shelby who was respondent's exclusive distributor in southern Texas. Respondent introduced evidence showing that Shelby purchased its fruit bars f.c.b. Los Angeles at a price of \$3.25 per case, less 5%, less 1%. Thorpe testified that Shelby has a main plant, a branch in Beaumont, Texas, a sub-distributor in the Waco area, and a sub-distributor that handles part of Louisiana. He further stated that the 5% discount was granted to Shelby to put him in a competitive position in the market plus getting the merchandise distributed to outlying areas, and that respondent never employed a broker in the area covered by Shelby.

In order to establish that the 5% received by Shelby was a functional discount, we think the most significant evidence respondent could have adduced would have been that Shelby sold exclusively to distributors and did not sell directly to retailers from its own branch or plant. In the absence of such a showing, this record will not support a conclusion that Shelby actually functioned as a regional distributor or that the 5% was given to him solely for that purpose.

The other transaction referred to by respondent involved its Milwaukee, Wisconsin, distributor, Milwaukee Biscuit Company. The evidence shows that respondent sold to this distributor at a delivered price of \$4.70 per case, less 24%, less 1%. Regarding this

transaction, Thorpe testified that in 1957 respondent received an inquiry from a distributor in Green Bay, Wisconsin. Respondent had a problem getting merchandise to this distributor because of the small area and small quantity ordered. Thorpe entered into an arrangement with Milwaukee Biscuit Co. whereby that company would ship Venus fruit bars to the Green Bay distributor out of its own stock. Thorpe agreed to pay Milwaukee Biscuit Co. 5% or allow it to charge respondent back 5% for the cost of handling and shipping the merchandise to Green Bay. This arrangement was terminated in 1958.

It is not clear from the record whether the Green Bay distributor placed its order with and made payment to Milwaukee Biscuit Co. or to respondent. However, regardless of whether the Green Bay distributor was a customer of respondent or of Milwaukee Biscuit Co., we do not think this single exception to respondent's usual pricing system in that area is indication of any policy on the part of respondent to classify its distributors functionally.

Giving full weight to respondent's testimony concerning its dealings with Shelby and Milwaukee Biscuit Co., it is our opinion that two isolated instances of the granting of a discount, in the amount usually accorded brokers, to distributors who sell to other distributors, would not serve to rebut the inference arising from the facts present in this case.

As respondent has failed to show that the 5% granted to the Frito companies was a functional discount, the *Whitney* case² which it cites, is obviously not in point. The court there pointed out that the record before it showed that interpacker (functional) discounts were customary in the transaction under consideration, that the particular discount in question was intended as such, and assumed this to be the case in making its decision.

On the basis of the foregoing facts, we conclude that the respondent in its sale of fruit bars to the Frito companies for their own account, granted those companies a discount in lieu of brokerage. It is well settled that Section 2(c) of the Clayton Act contains an absolute prohibition of payments or allowances of brokerage or sums in lieu of brokerage from sellers to buyers. *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F.2d 667 (3d Cir. 1939), *cert. denied* 308 U.S. 625 (1940); *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F.2d 687 (2d Cir. 1938), *cert. denied* 305 U.S. 634 (1938). Furthermore, it is our view that the facts fully support the hearing examiner's conclusion that the discount was for services rendered by Frito to itself as purchaser,

² In re *Whitney & Company*, 273 F. 2d 211 (9th Cir. 1959).

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owner and subsequent seller of the goods purchased and that such services do not bring this case within the exception of Section 2(c) by reason of services rendered. *Great Atlantic & Pacific Tea Co., supra; Southgate Brokerage Co., Inc. v. Federal Trade Commission*, 150 F.2d 607 (4th Cir. 1945). Likewise, we agree with the hearing examiner that price discrimination which is covered by Section 2(a) of the Clayton Act is not necessary to a violation of Section 2(c). *Southgate Brokerage Co., Inc. v. Federal Trade Commission, supra*.

The appeal of respondent is denied. To the extent the findings of the hearing examiner are deficient, the initial decision is modified to include the factual findings together with the reasons and basis therefor embodied in this opinion. Also, the initial decision is modified by substituting the name Venus Foods for the name Venus Foods, Inc., wherever the latter name appears in the findings, conclusions and order of the hearing examiner. As so modified, the initial decision is adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having denied the aforementioned appeal, and having modified the initial decision to the extent necessary to conform to the views expressed in the said opinion:

It is ordered, That the initial decision of the hearing examiner, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondent, Venus Foods, a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

IN THE MATTER OF
EXQUISITE FORM BRASSIERE, INC.

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

*Docket 6966. Complaint, Nov. 29, 1957 *—Decision, Oct. 31, 1960*

Order requiring an industry leader in the manufacture and sale of brassieres, with annual sales in excess of \$10 million, to cease discriminating in price between competing customers in violation of Secs. 2(d) and 2(e) of the Clayton Act by paying advertising allowances and furnishing "stylists" to certain large retailer customers while not making either available on proportionally equal terms to competing smaller customers.

Peter J. Dias, Esq., and Robert G. Cutler, Esq., for the Commission.

James W. Cassedy, Esq.; Robert B. Dawkins, Esq., and Peyton Ford, Esq., of Washington, D.C., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On November 29, 1957, the Federal Trade Commission issued its complaint against Exquisite Form Brassiere, Inc., a corporation (hereinafter called respondent), alleging that respondent had violated Section 2(d) of the Clayton Act (hereinafter called the Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act. Copies of said complaint together with a notice of hearing were duly served on respondent.

Respondent appeared by counsel and filed an answer admitting the corporate, commerce, and most of the factual allegations of the complaint but denying any violation of the Act. Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at various times and places from June 9, 1958, to December 29, 1958.

At the conclusion of the case-in-chief, counsel supporting the complaint moved the undersigned to certify to the Commission their motion to amend the complaint to also allege a violation of Section 2(e) of the Act, in view of the proof received. Counsel for both parties and the undersigned being of the opinion that such an amendment was not "reasonably within the scope" of the original complaint, as required by Section 3.9 of the Commission's Rules

* Amended and Supplemental Complaint, Aug. 1, 1958.