

the allegation is supported and that the order should contain a prohibition against such practice.

In view of the foregoing, respondents' appeal is denied and the appeal of counsel supporting the complaint is granted. The initial decision is set aside and we are entering our own findings as to the facts, conclusions and order to cease and desist in conformity with this opinion.

Commissioner Elman did not participate in the decision of this matter.

IN THE MATTER OF
SMITH GRAIN COMPANY, INC., ET AL.

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

Docket 7641. Complaint, Oct. 29, 1959—Decision, June 8, 1961

Consent order requiring wholesale distributors of a variety of products, including grain, animal feed ingredients, citrus fruit products, sugar, and phosphate, with office in Limestone, Tenn., to cease violating Sec. 2(c) of the Clayton Act by such practices as accepting illegal allowances on direct purchases of citrus fruit products from Southern Fruit Distributors, Inc., of Orlando, Fla., on which they received "trade discounts" or price reductions in lieu of brokerage of 2% to 3% or more and totaling over \$8,000; and requiring said wholesalers and their two controlled corporate brokers in Tampa, Fla., and Atlanta, Ga., respectively, to cease receiving from sellers commissions on transactions where said brokers were acting for the buyer 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 as amended (U.S.C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Smith Grain Company, Inc., hereinafter sometimes referred to as buyer respondent, is a corporation organized, existing and doing business under and by virtue of the

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laws of the State of Tennessee with its office and principal place of business located at Limestone, Tennessee. Since April 1, 1955, aforesaid buyer respondent has been engaged primarily in business as a wholesale distributor handling a variety of products and commodities, including grain, animal feed ingredients, citrus fruit products, sugar and phosphate.

PAR. 2. Respondent William F. Smith is, and has been, at all times mentioned herein, President and Treasurer of buyer respondent. Respondent James J. Smith, the brother of respondent William F. Smith, is and has been, at all times mentioned herein, Vice President and Secretary of buyer respondent. The capital stock of buyer respondent is owned as follows:

Respondent William F. Smith: 1,250 shares
Florence C. Smith,
wife of respondent
William F. Smith: 950 shares
Respondent James J. Smith: 1,250 shares

At all times mentioned herein the aforesaid individual respondents exercised substantial, if not complete, authority and control over the business conducted by respondent Smith Grain Company, Inc., including the formulation and direction of its purchase, sales and distribution policies hereinafter referred to. The individual respondents have their offices and principal places of business located at the same address as the buyer respondent.

PAR. 3. Respondent Alexander-Smith, Inc., hereinafter in Count I sometimes referred to as broker respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at 915 South Water Street, Tampa 2, Florida. Since April 1, 1955, aforesaid broker respondent has been engaged in the brokerage business dealing primarily in sales of grain and animal feed ingredients.

PAR. 4. Respondent William F. Smith is and has been, at all times mentioned herein, President and Treasurer of broker respondent. The capital stock of broker respondent is owned as follows:

Respondent William F. Smith: $7\frac{1}{2}$ shares
Florence C. Smith, wife of respondent William F. Smith: $7\frac{1}{2}$ shares
Respondent James J. Smith: 15 shares
Robert K. Alexander: 15 shares
Marie S. Alexander: 15 shares

At all times mentioned herein, the aforesaid individual respondents exercised substantial, if not complete, authority and control over the business conducted by respondent Alexander-Smith, Inc.,

including the formulation and direction of policies relating to its transactions for or with respondent Smith Grain Company, Inc., as hereinafter referred to.

PAR. 5. During the period April 1, 1955, to the present, aforesaid individual respondents, through corporate respondents, and each of them, continuously made purchases of products and commodities from, or sales of products and commodities for, sellers located in various states of the United States. In the course of such transactions, said respondents, both individual and corporate, directly or indirectly, caused such products and commodities, so purchased or sold, to be transported from various states of the United States to various other states. There has been at all times mentioned herein a continuous course of trade in commerce, as "commerce" is defined in the Clayton Act, in such products and commodities, across state lines between individual respondents through corporate respondents, and each of them, and the sellers of such products and commodities.

PAR. 6. In the course and conduct of the businesses of the broker respondent and buyer respondent, as aforesaid, the buyer respondent, acting through the broker respondent, made numerous and substantial purchases of products and commodities, including purchases of grain and animal feed ingredients, from sellers. Aforesaid sellers paid and broker respondent, or the individual respondents herein, received commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof, on transactions where the broker respondent was acting for or on behalf of the buyer respondent, or where the broker respondent was subject to the control of buyer respondent or the individual respondents herein. For example, during the period July 1957 to November 1958, buyer respondent purchased through broker respondent quantities of grain and animal feed ingredients from The Sherwin-Williams Company, on which sales aforesaid seller paid commissions to the broker respondent amounting to in excess of \$400.00, at least a part of which was received by the individual respondents in the form of salaries and dividends by virtue of employment and stock ownership as hereinbefore alleged.

PAR. 7. The acts and practices of respondents, and each of them, as hereinbefore alleged, are in violation of subsection (c) of Section 2 of the amended Clayton Act.

COUNT II

PAR. 8. The allegations of Paragraphs One and Two of Count I of this complaint are hereby adopted and incorporated herein by

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reference and made a part of this Count II the same as if they were repeated herein verbatim.

PAR. 9. Respondent Heard-Kinard-Smith, Inc., hereinafter in Count II sometimes referred to as broker respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia with its office and principal place of business located at 3240 Peachtree Road, Northeast, Atlanta 5, Georgia. Since September 1, 1956, aforesaid broker respondent has been engaged in the brokerage business dealing primarily in sales of grain and animal feed ingredients.

PAR. 10. Respondent William F. Smith is and has been, at all times mentioned herein, President of broker respondent. The capital stock of broker respondent is held as follows:

Respondent William F. Smith: 15 shares
Respondent James J. Smith: 15 shares
Will I. Kinard: 30 shares
J. Luke Heard: 30 shares

At all times mentioned herein, the aforesaid individual respondents exercised substantial, if not complete, authority and control over the business conducted by respondent Heard-Kinard-Smith, Inc., including the formulation and direction of policies relating to its transactions for or with respondent Smith Grain Company, Inc., as hereinafter referred to.

PAR. 11. During the period September 1, 1956, to the present, aforesaid individual respondents, through corporate respondents, and each of them, continuously made purchases of products and commodities from, or sales of products and commodities for, sellers located in various states of the United States. In the course of such transactions, said respondents, both individual and corporate, directly or indirectly, caused such products and commodities, so purchased or sold, to be transported from various states of the United States to various other states. There has been at all times mentioned herein a continuous course of trade in commerce, as "commerce" is defined in the Clayton Act, in such products and commodities, across state lines between individual respondents through corporate respondents, and each of them, and the sellers of such products and commodities.

PAR. 12. In the course and conduct of the businesses of broker respondent and buyer respondent, as aforesaid, the buyer respondent, acting through the broker respondent, made numerous and substantial purchases of products and commodities, including purchases of grain and animal feed ingredients from sellers. Aforesaid sellers

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paid and broker respondent, or the individual respondents herein, received commissions, brokerage, or other compensations or allowances or discounts in lieu thereof, on transactions where the broker respondent was acting for or on behalf of the buyer respondent, or where the broker respondent was subject to the control of the buyer respondent or the individual respondents herein. For example, during the period January 1958 to December 1958, buyer respondent purchased through broker respondent quantities of grain and animal feed ingredients from the Graham Grain Company, on which sales aforesaid seller paid commissions to the broker respondent amounting to in excess of \$450.00, at least a part of which was received by the individual respondents in the form of salaries and dividends by virtue of employment and stock ownership, as hereinbefore alleged.

PAR. 13. The acts and practices of respondents, and each of them, as hereinbefore alleged, are in violation of subsection (c) of Section 2 of the amended Clayton Act.

COUNT III

PAR. 14. The allegations of Paragraphs One and Two of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count III the same as if they were repeated herein verbatim.

PAR. 15. During the period April 1, 1955, to the present, aforesaid individual respondents, through corporate respondents, and each of them, continuously made purchases of products and commodities from, or sales of products and commodities for, sellers located in various states of the United States. In the course of such transactions, said respondents, both individual and corporate, directly or indirectly, caused such products and commodities, so purchased or sold, to be transported from various states of the United States to various other states. There has been at all times mentioned herein a continuous course of trade in commerce, as "commerce" is defined in the Clayton Act, in such products and commodities, across state lines between individual respondents through corporate respondents, and each of them, and the sellers of such products and commodities.

PAR. 16. In the course and conduct of its business, as aforesaid, buyer respondent Smith Grain Company, Inc., and the individual respondents named herein, have made and are now making substantial direct purchases of citrus fruit juices, and other miscellaneous products and commodities, for their own account for resale from sellers, on which purchases said respondents have received and ac-

cepted, and are now receiving and accepting, directly or indirectly, from said sellers something of value as a commission, brokerage or other compensation or allowance or discount in lieu thereof, or have been given lower net prices which reflect the allowance of a commission or brokerage on said purchases.

For example, during the period January 1956 to December 1958, buyer respondent, and the individual respondents named herein, have purchased from, among others, Southern Fruit Distributors, Inc., of Orlando, Florida, substantial quantities of citrus fruit products. Aforesaid purchases have been made by respondents for their own account and in their own name and on these purchases respondents have received and are now receiving, a "trade discount," or other reductions in price, in lieu of brokerage. Aforesaid "trade discounts," or price reductions, range from 2% to 3% or more. From January 1956 through December 1958 respondent Smith Grain Company, Inc., received "trade discounts" in lieu of brokerage from Southern Fruit Distributors, Inc., in excess of \$8,000.00.

PAR. 17. The acts and practices of respondents, and each of them, as hereinbefore alleged, are in violation of subsection (c) of Section 2 of the amended Clayton Act.

Mr. Ross D. Young for the Commission.

Milligan, Silvers & Coleman, by *Mr. N. R. Coleman, Jr.*, of Greenville, Tenn., for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated October 29, 1959, the respondents are charged with violating the provisions of subsection (c) of section 2 of the Clayton Act, as amended.

On March 8, 1961, the respondents and their attorney entered into an agreement with counsel in support of the complaint for a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only, does not constitute an admission by the respondents that they have violated the law as alleged in the complaint, and that said complaint may be used in construing the terms of the order.

The hearing examiner finds that the content of the agreement meets all of the requirements of section 3.25(b) of the Rules of the Commission.

Respondent Heard-Kinard Sales Company, Inc., a corporation, consents that the service of a true copy of said complaint upon Heard-Kinard-Smith, Inc., shall have the same legal force and effect as though it were served upon said respondent; and said respondent will be, and is legally bound by said service upon corporate respondent Heard-Kinard-Smith, Inc., as though it were served upon it; and that Heard-Kinard Sales Company, Inc., be made a party respondent to this cause, so as to be fully and completely bound as respondent to the order as hereinafter set forth.

The agreement also provides that since respondent William F. Smith has disposed of all of his stock in Heard-Kinard-Smith, Inc. (now known as Heard-Kinard Sales Company, Inc.), the complaint be dismissed as to him as President of this corporation.

The hearing examiner being of the opinion that the agreement and the proposed order provide an appropriate basis for disposition of this proceeding as to all of the parties, the agreement is hereby accepted and it is ordered that the agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Corporate respondent Smith Grain Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at Limestone, Tennessee.

Corporate respondent Alexander-Smith, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 915 South Water Street, Tampa 2, Florida.

The named corporate respondent, Heard-Kinard-Smith, Inc., was a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business formerly located at 3240 Peachtree Road, Atlanta 5, Georgia. (The address was incorrectly stated in the complaint as 3240 Peachtree Road, Northeast, Atlanta 5, Georgia.) Prior to August 22, 1959, individual respondent William F. Smith was President and a principal stockholder in this corporation. Prior to August 22, 1959, individual respondent James J. Smith was a principal stockholder in this corporation.

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Attached to said agreement are affidavits attesting to the fact that on August 22, 1959, individual respondent William F. Smith transferred all of the shares of stock owned by him in Heard-Kinard-Smith, Inc., to that corporation and tendered his resignation as its President, said resignation being accepted; and on August 22, 1959, individual respondent James J. Smith transferred all of the shares of stock owned by him in Heard-Kinard-Smith, Inc., to that corporation.

Also attached to the agreement is an affidavit stating that on November 20, 1959, through an amendment of the corporate charter, the name of said corporation was changed from Heard-Kinard-Smith, Inc., to Heard-Kinard Sales Company, Inc., and J. Luke Heard was named as President of Heard-Kinard Sales Company, Inc. In the order contained in the agreement, Heard-Kinard Sales Company, Inc., is named as respondent, this being the correct present legal name of the corporation formerly known, before the amendment to its corporate charter, as Heard-Kinard-Smith, Inc.

Heard-Kinard Sales Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at 3240 Peachtree Road, Atlanta 5, Georgia. Heard-Kinard Sales Company, Inc., agrees to stand in the place and assume all obligations and rights of corporate respondent Heard-Kinard-Smith, Inc., and to be bound by the order contained herein when and if said order is issued by the Commission and becomes final.

Individual respondent William F. Smith is President and Treasurer of Smith Grain Company, Inc., and president and Treasurer of Alexander-Smith, Inc. Individual respondent James J. Smith is Vice President and Secretary of Smith Grain Company, Inc. Individual respondents exercise substantial, if not complete, authority and control over the business conducted by said corporate respondents, including the formulation and direction of policies.

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

ORDER

It is ordered, That respondents, Smith Grain Company, Inc., a corporation, and its officers, agents, representatives and employees, and William F. Smith and James J. Smith, individually and as officers of said corporation, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase or sale of any products or commodities

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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 or in connection with the purchase of any product or commodities for their own account, or on purchases where the broker respondents, Alexander-Smith, Inc., or Heard-Kinard-Sales Company, Inc. (the name to which corporate respondent Heard-Kinard-Smith, Inc., has been changed by charter amendment); or any other brokerage concern, are the agents, representatives or other intermediaries acting for, or in behalf of, or subject to the direct or indirect control of the buyer respondents.

It is further ordered, That respondents Alexander-Smith, Inc., a corporation, and Heard-Kinard Sales Company, Inc., a corporation (the name to which corporate respondent Heard-Kinard-Smith, Inc., has been changed by charter amendment), and their officers, agents, representatives and employees, directly or through any corporate or other device; and William F. Smith, individually and as an officer of Alexander-Smith, Inc., and James J. Smith, individually, in connection with the purchase or sale of any products or commodities 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 or in connection with any purchase of any products or commodities for their own account, or by or for the account of Smith Grain Company, Inc., so long as any relationship exists, either through ownership or control, between Smith Grain Company, Inc., or William F. Smith, or James J. Smith, as buyers; and Alexander-Smith, Inc., or Heard-Kinard Sales Company, Inc. (the name to which corporate respondent Heard-Kinard-Smith, Inc., has been changed by charter amendment), or William F. Smith or James J. Smith, as brokers; or 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 or in connection with any purchase of any products or any commodities made by any other buyer where the respondents are the agents, representatives or other intermediaries acting for, or in behalf of, or subject to the direct or indirect control of such buyer.

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It is further ordered, That the complaint be, and it hereby is, dismissed as to William F. Smith as President of Heard-Kinard-Smith, Inc. (now known as Heard-Kinard Sales Company, Inc.).

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 8th day of June, 1961, become the decision of the Commission; and, accordingly:

It is ordered, That all of the respondents herein, except William F. Smith as President of Heard-Kinard-Smith, Inc. (now known as Heard-Kinard Sales Company, Inc.) shall within sixty (60) days