

Regulations promulgated thereunder.

It is further ordered, That the respondents herein 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 this order.

IN THE MATTER OF
BILL THE DISTRIBUTOR, INC., ET AL.

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

Docket 7379. Complaint, Jan. 27, 1959—Decision, Nov. 13, 1961

Order requiring four affiliated concerns—two wholesale food distributors in Jackson, Miss., and two food brokers in New Orleans, La.—to cease accepting unlawful brokerage payments on purchases of food products, effectuated by the individual who was president of three and in control of the fourth, and who used the two brokerage concerns as intermediaries in obtaining brokerage fees from suppliers on purchases for the two wholesalers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly 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:

PARAGRAPH 1. Respondent Bill the Distributor, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Mississippi, with its principal place of business located at 431 South West Street, Jackson, Mississippi.

Respondent Winter Garden Sales Company, Inc., is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Mississippi, with its principal place of business located at 431 South West Street, Jackson, Mississippi.

Respondent Food Marketers, Inc. of Mississippi, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal place of business located at 3900 Tchoupitoulas Street, New Orleans, Louisiana.

Respondent Mid-South Food Products, Inc., also doing business under the name Food Marketers, Inc., of Louisiana, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its principal place of business located at 431 South West Street, Jackson, Mississippi.

Respondent William Thomas Hogg, an individual, is President of and majority shareholder in respondents Bill the Distributor, Inc., Winter Garden Sales Company, Inc., and Food Marketers, Inc. of Mississippi. His principal place of business is located at 431 South West Street, Jackson, Mississippi. As an officer of said corporate respondents, the individual respondent, acting for and through the corporate respondents, exercises authority and control over all of the corporate respondents' business operations, including their sales and distribution policies. Respondent William Thomas Hogg, while not an officer of nor shareholder in respondent Mid-South Food Products, Inc., exercises control over its policies and business operations.

PAR. 2. Respondents Bill the Distributor, Inc., and Winter Garden Sales Company, Inc., are wholesale food distributors, engaged, among other things, in the purchase and sale of canned goods, condiments, frozen foods and other food products. For the twelve month period ending June 30, 1957, the sales of respondent Bill the Distributor, Inc., constituted approximately \$1,501,651.00 while the sales of respondent Winter Garden Sales Company, Inc., for the year 1957, were approximately \$618,907.00

PAR. 3. Respondents Food Marketers, Inc., of Mississippi, and Mid-South Food Products, Inc., are brokers acting as intermediaries in the sale of food products from food suppliers to buyers thereof. As such, the food suppliers of food products pay to broker respondents for their services, a commission or brokerage fee which varies according to the food supplier and type product involved.

PAR. 4. In the course and conduct of the business as aforesaid, all the respondents named herein, directly or indirectly, cause said food products, when purchased, to be transported from the state of origin to destinations in another state. There had been at all times mentioned herein a continuous course of trade in commerce, as "commerce" is defined in the aforesaid Clayton Act, in said food

products across state lines between said respondents and the sellers of said food products.

PAR. 5. In the course and conduct of their said business in commerce respondents are receiving and accepting something of value as a commission, brokerage or other compensation paid by said food suppliers to the other party to the transaction, or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is 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. 6. For example, during the years 1957 and 1958, respondents Bill the Distributor, Inc., and Winter Garden Sales Company, Inc., have made substantial purchases of food products from their suppliers through their controlled intermediaries respondents Food Marketers, Inc., of Mississippi, and Mid-South Food Products, Inc., on which purchases said respondents and respondent William Thomas Hogg have received something of value as a commission, brokerage or other compensation, or allowance or discount in lieu thereof. In these transactions respondents Food Marketers, Inc. of Mississippi and Mid-South Food Products, Inc., received and accepted payments of brokerage from said suppliers as independent brokers, whereas, said respondents were acting, in fact, for or on behalf of the buyer respondents Bill the Distributor, Inc., and Winter Garden Sales Company, Inc., or were subject to the direct or indirect control of said buyer respondents through respondent William Thomas Hogg.

PAR. 7. The acts and practices of respondents Bill the Distributor, Inc., Winter Garden Sales Company, Inc., Food Marketers, Inc., of Mississippi, and Mid-South Food Products, Inc., and the individual respondent, acting through said corporate respondents, in paying, receiving, or accepting something of value as a commission, brokerage, or other compensation, or allowance or discounts in lieu thereof, 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, Section 13).

Mr. Cecil G. Miles for the Commission.

Mr. Vardaman S. Dunn, Jackson, Miss., for respondents.

INITIAL DECISION BY EVERETT F. HAYCRAFT,
HEARING EXAMINER

PRELIMINARY STATEMENT

On January 27, 1959, the Commission issued its complaint against the parties named in the above caption, Docket No. 7379, charging

each respondent with a violation of subsection (c) of Section 2 of the Clayton Act, as amended.

The complaint charged respondents, Bill the Distributor, Inc. and Winter Garden Sales Company, Inc., sometimes hereinafter referred to as Winter Garden, both located at 431 South West Street, Jackson, Mississippi, as being corporations organized under the laws of the State of Mississippi, wholesale food distributors, engaged, among other things, in the purchase and sale of canned goods, frozen foods and other food products.

The complaint also charged respondent Food Marketers, Inc. (erroneously described in the complaint as Food Marketers, Inc. of Mississippi) and Mid-South Food Products, Inc. hereinafter sometimes referred to as Mid-South, with being engaged in business as brokers, acting as intermediaries in the sale of food products from food suppliers to the buyers thereof; that as such, the food suppliers of food products paid to said broker respondents for their services a commission or brokerage fee.

The complaint further charged that respondent William Thomas Hogg, sometimes hereinafter referred to as respondent Hogg, was an individual who was President of, and majority stockholder in, respondents Bill the Distributor, Inc., Winter Garden Sales Company, Inc. and Food Marketers, Inc., with his principal place of business located at 431 South West Street, Jackson, Mississippi; that as an officer and majority stockholder in these three corporate respondents, acting for and through said corporate respondents, he exercised authority and control over their business operations, including their sales and distribution policies; that although he owned no stock in or was he an officer of respondent Mid-South, he exercised control over its policies and business operations.

The complaint further charged that all the respondents named herein, directly or indirectly, caused food products, when purchased, to be transported from the state of origin to a destination in another state, and that there had been at all times therein mentioned a continuous course of trade in commerce, as "commerce" is defined in the Clayton Act, in food products across state lines between the sellers of said food products and the respondents.

It was further alleged that in the course and conduct of their said businesses in commerce, respondents were receiving and accepting something of value as a commission, brokerage or other compensation paid by food suppliers to an agent, representative or other intermediary who, in fact, is acting for or in behalf of a party to the transaction other than the person by whom such compensation was so granted or paid. It was specifically alleged in this connection that

during the years 1957 and 1958, respondents, Bill the Distributor, Inc. and Winter Garden, had made substantial purchases of food products from their suppliers through their controlled intermediaries, respondents Food Marketers, Inc. and Mid-South, on which purchases said respondents and individual respondent Hogg had received something of value as a brokerage or other compensation or allowance in lieu thereof; that in these transactions, respondents, Food Marketers, Inc. and Mid-South, received and accepted payments of brokerage from said suppliers as independent brokers, whereas they were acting, in fact, on behalf of the buyer respondents, Bill the Distributor, Inc. and Winter Garden, or were subject to the direct or indirect control of said buyer respondents through individual respondent Hogg.

The complaint further alleged that the acts and practices of said corporate respondents and the individual respondent, acting through said corporate respondents, in paying, receiving or accepting something of value as a commission, brokerage or other compensation, or allowance or discount in lieu thereof, as therein alleged, were in violation of subsection (c) of Section 2 of the Clayton Act, as amended.

All respondents named in the complaint filed separate answers, in which they admitted the allegations with respect to their organization, business and location, and the further fact that the individual respondent, William Thomas Hogg, was President of, and a majority stockholder in, respondents, Winter Garden Sales Company, Inc., Bill the Distributor, Inc. and Food Marketers, Inc. Said respondents denied all the other material allegations of the complaint, including the jurisdiction of the Commission over their activities.

Hearings were held in this matter, at which oral testimony and other evidence were received in support of the allegations of the complaint, including a stipulation of facts dated May 12, 1960, with respect to the testimony of certain witnesses in Chicago, Illinois. Counsel for respondents waived the taking of testimony in opposition to the allegations of the complaint in a letter dated July 16, 1960. Proposed findings and conclusions were filed by counsel supporting the complaint on August 31, 1960. Counsel for respondents, in a letter dated November 4, 1960, advised the Hearing Examiner that he did not intend to file proposed findings and consented to the closing of the record.

Each of the proposed findings which has been accepted has been, in substance, incorporated into this initial decision. All proposed findings not so incorporated are hereby rejected.

Consideration having been given by the undersigned Hearing Examiner to all the reliable, probative and substantial evidence in the record upon all material issues of fact, law or discretion, his findings, conclusions and order are hereinafter set forth.

FINDINGS OF FACT

I. Description of Respondents

A. Respondent Bill the Distributor, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, engaged in the wholesale distribution of food products, including canned goods and frozen foods, with its office and principal place of business located at 431 South West Street, Jackson, Mississippi.

B. Respondent Winter Garden Sales Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, also engaged in the wholesale distribution of food products, with its office and principal place of business located at 431 South West Street, Jackson, Mississippi.

C. Respondent Food Marketers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, engaged in the business of acting as a broker, or intermediary, in the sale of food products from food suppliers to buyers thereof, collecting a brokerage fee therefor from the suppliers, with its office and principal place of business presently located at 124 Airline Highway, Metairie, Louisiana, Post Office address, Box 4102, New Orleans, Louisiana.

D. Respondent Mid-South Food Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its office and principal place of business presently located at the residence of its Secretary, Mary Eola Hogg, 8000 Nelson Street, New Orleans, Louisiana, and engaged as a broker, or an intermediary, in the sale of food products from food suppliers to buyers thereof, collecting a brokerage fee therefor from the suppliers. This respondent was originally incorporated about 1946 under the name of Bill the Distributor, Inc. of Louisiana by respondent Hogg, when he was doing business in New Orleans, Louisiana, before he moved to Jackson, Mississippi. In May 1954, the name was changed to Mid-South Food Products, Inc., but the corporation was inactive after respondent Hogg moved to Mississippi, until about February 1, 1958, when it was reactivated to take over the brokerage business conducted by one W. J. Biggs, an employee of respondent Bill the Distributor, Inc., which

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hereinafter will be more fully discussed. This business was conducted during the year 1958 out of the office of Bill the Distributor, Inc., Jackson, Mississippi, under the trade name Food Marketers, Inc. of Louisiana. An attempt was made in October 1958 to legally change the corporate name Mid-South to Food Marketers, Inc. of Louisiana, but this application was denied by the Secretary of the State because of the fact that respondent Food Marketers, Inc., a Mississippi corporation, was already doing business in the State of Louisiana.

At a meeting of the Board of Directors of the new corporation, held on February 1, 1958, at the office of respondent Bill the Distributor, Inc., in Jackson, Mississippi, Edward D. Hogg, a brother of respondent William Thomas Hogg, was elected President and his sister, Mary Eola Hogg, was elected Secretary. On February 11, 1958, suppliers of the W. J. Biggs Brokerage Company were notified, in a letter written by an employee of respondent Bill the Distributor, Inc., that "As of, February 1, 1958, W. J. Biggs Brokerage Company was incorporated under the new firm name 'Food Marketers, Inc.,' Jackson, Mississippi." (CX 87.)

On January 28, 1959, suppliers of the new "Food Marketers, Inc." were notified, in a letter written on a letterhead bearing that name, by an employee of respondent Bill the Distributor, Inc., who signed the name of the President, Edward D. Hogg, that:

Effective February 1st our brokerage firm doing business as Food Marketers, Inc., Jackson, Mississippi will change its name as follows:

Mid-South Food Products, Inc.

P.O. Box 553

Jackson 5, Mississippi

Please change your records accordingly and address future payments and correspondence to the new firm name. (CX 55.)

Sometime in April 1959, the principal office and place of business was moved from Jackson, Mississippi, to New Orleans, Louisiana, where it is now operated, as hereinbefore stated, from the home of its Secretary, Mary Eola Hogg, a sister of respondent William Thomas Hogg, who notified the same suppliers on April 29, 1959, on letterhead of "Mid-South Products, Inc." that "our street address is 8000 Nelson Street, New Orleans, Louisiana." (CX 47.)

E. Respondent William Thomas Hogg is President of, and majority stockholder in, respondents Bill the Distributor, Inc., Winter Garden Sales Company, Inc. and Food Marketers, Inc., with his principal office and place of business located at 431 South West Street, Jackson, Mississippi. As principal stockholder and officer of said corporate respondents, said individual respondent Hogg ex-

exercised authority and control over the corporate respondents' business operations, including their purchasing, sales and distribution policies. At the time testimony was taken in this case, he was President and owned 60% of the capital stock of Bill the Distributor, Inc.; he was President and owned 80% of the capital stock of respondent Winter Garden Sales Company, Inc.; and was President of and owned 90% of the capital stock of respondent Food Marketers, Inc. While not an officer or stockholder of record of respondent Mid-South Food Products, Inc., said respondent Hogg has exercised control from the beginning over said respondent corporation, as hereinafter set forth.

Respondent Hogg began business as a wholesaler and jobber of food products in New Orleans, Louisiana, about 1946 or 1947. He moved to Jackson, Mississippi, about 1954, where he continued his business as a wholesaler and jobber of food products under the name of Bill the Distributor, Inc. and since that time he has organized and operated respondent Winter Garden Sales Company, Inc. as a jobber and wholesaler of canned goods and frozen food products and also respondent Food Marketers, Inc. as a broker. This last named company is operated under the management of one Earl Graham, with its principal office in New Orleans, Louisiana. As the business of the two corporate respondent wholesalers and jobbers, Bill the Distributor, Inc. and Winter Garden, is operated by respondent Hogg, during the past few years at least, in buying through respondent Food Marketers, Inc. as a broker, on purchases of respondent Winter Garden of products sold in Louisiana, respondent Food Marketers Inc. gets the brokerage. Although some purchases are made by respondent Bill the Distributor, Inc. from suppliers through respondent Food Marketers, Inc., it is against the present avowed policy of respondent Hogg to place such orders and he testified that very few of such purchases were made and only through error.

The record contains evidence, however, that respondent Hogg had solicited accounts of suppliers as a representative of respondent Food Marketers, Inc. for the two respondent wholesalers, Bill the Distributor, Inc. and Winter Garden, and that respondent Food Marketers, Inc. received brokerage on purchases from such suppliers as early as 1955 and continuing on through 1956 and 1957, and it was not until after 1957 that an effort was made by respondent Hogg to require respondent Bill the Distributor, Inc. not to purchase through respondent Food Marketers, Inc. from such suppliers, and orders to such suppliers were placed through the new broker respondent Mid-South, as hereinafter set forth.

II. Interstate Commerce

Although all respondents in their answers denied that any of them were engaged in commerce as "commerce" is defined in the Clayton Act, as amended, the evidence in the record of shipments of food products from the suppliers of Bill the Distributor, Inc. and Winter Garden Sales Company, Inc., is quite conclusive that not only were the respondent wholesaler corporations engaged in commerce, the brokerage firms likewise were so engaged. For example, the record shows that respondent Bill the Distributor, Inc. made numerous purchases from Fox Deluxe Foods, Inc., Chicago, Illinois, through broker respondent Food Marketers, Inc. from approximately March 1955, when the original agreement was entered into, through 1958, and that a brokerage of 5% was allowed Food Marketers, Inc. on such purchases until September 1957, when the brokerage fee was then paid to W. J. Biggs Brokerage Company, hereinbefore mentioned as having operated out of the office of respondent Bill the Distributor, Inc. during the Fall of 1957.

Another supplier of respondent Winter Garden who paid brokerage to respondent Food Marketers, Inc. on purchases by these two wholesalers was The Winter Garden Freezer Co., Inc. of Bells, Tennessee, and shipments of such merchandise were made to respondents in Mississippi, or these respondents picked up the merchandise at Bells, Tennessee, and transported the same to Jackson, Mississippi, or to their customers located in other places within the State of Mississippi.

Another supplier of both respondents Bill the Distributor, Inc. and Winter Garden was the Coldwater Seafood Corporation, New York, New York, which entered into a brokerage contract with Food Marketers, Inc., signed by respondent Hogg, in November 1956 and revised through 1959. This firm sold and shipped food products to respondents Bill the Distributor, Inc. and Winter Garden from 1957 through 1959 and remitted brokerage on such sales to the respondent Food Marketers, Inc. as late as November 1959, when it discontinued making sales to both respondents Bill the Distributor, Inc. and Winter Garden and discontinued its relationship with respondent Food Marketers, Inc. as a broker.

There is also evidence in the record of suppliers located in states other than the State of Mississippi selling and shipping food products to respondent Bill the Distributor, Inc. in Jackson, Mississippi, through respondent Mid-South Food Products, Inc. as a broker and brokerage fees being paid to this respondent on such purchases.

III. The Brokerage Companies Organized and Controlled by Respondent William T. Hogg

In the course and conduct of their said businesses in commerce as herein described, respondent brokers Food Marketers, Inc. and Mid-South Food Products, Inc., and its predecessor, W. J. Biggs Brokerage Company, since about the year 1956 in some instances and certainly from 1957 through 1959, had been receiving and accepting something of value as a commission, brokerage or other compensation paid by food suppliers, during which time said respondents were acting as intermediary in behalf of, or subject to the direct or indirect control of, respondent Hogg, the principal stockholder of respondents Bill the Distributor, Inc. and Winter Garden.

There is substantial evidence in the record that respondent Winter Garden, acting through its principal stockholder, respondent Hogg, made purchases through respondent Food Marketers, Inc., upon which purchases the latter respondent received brokerage payments from the sellers. At the time of such transactions, respondent Hogg was in control of both respondents Winter Garden and Food Marketers, Inc. Also, despite the testimony of respondent Hogg that it was against his present policy to pay brokerage to Food Marketers, Inc. on purchases made from suppliers by respondent Bill the Distributor, Inc. through that company, there is evidence in the record to contradict such testimony in the form of an agreement which the respondent Hogg entered into, representing respondent Food Marketers, Inc., with a large supplier in 1955, pursuant to which agreement brokerage fees were paid to respondent Food Marketers, Inc. on purchases made by respondent Bill the Distributor, Inc. from that supplier.

Furthermore, under this same contract, W. J. Biggs, an employee of respondent Bill the Distributor, Inc., operating as the W. J. Biggs Brokerage Company, and which operated out of the office of respondent Bill the Distributor, Inc. in the latter part of 1957, was paid a brokerage fee by this supplier on purchases made beginning in September 1957 and continuing throughout the remainder of that year. This arrangement was made by respondent Hogg, who, while ostensibly allowing Mr. Biggs, his employee, to conduct an independent brokerage business, was, in fact, in control of the whole operation. This is indicated also by the fact that throughout the entire year of 1958, Mr. Biggs managed the operation of this business for respondent Hogg in the office of respondent Bill the Distributor, Inc. under the name Food Marketers, Inc. (of Louisiana). An employee of respondent Bill the Distributor, Inc. kept the records of all

brokerage transactions of this company operating under both names, in 1957 and 1958.

Respondent Hogg, in his apparent attempt to avoid responsibility for the conduct and operation of respondent Mid-South, transferred the capital stock of that company to his brother, Edward D. Hogg, and his sisters, Mary Eola Hogg and Mary Clair Hogg, all living in New Orleans, Louisiana, as of February 1, 1958, for a nominal consideration of \$100 each. However, as hereinbefore indicated, the records of the business were not transferred to New Orleans until April 1959. In the meantime, during the year 1958, the business of the company continued to be managed by Mr. W. J. Biggs, who was at that time an employee of respondent Bill the Distributor, Inc. At the end of the year the books of the company being kept by an employee of respondent Bill the Distributor, Inc. showed that a profit of approximately \$4500 had been realized from the brokerage business and a check for \$4000 was sent to Mr. Edward D. Hogg, who was a stockholder and President of the corporation, although he had done nothing with respect to the affairs of respondent Mid-South during that year and considered it as a gift. It is also significant that neither Edward D. Hogg nor his sister, Mary Eola Hogg, Secretary, has any knowledge of the details of the business of the company and they do not give much time to such business since both of them are employed full time in other occupations in the City of New Orleans. At the beginning of the year 1959, Mary Eola Hogg was given a set of accounts by the employee of respondent Bill the Distributor, Inc. who had been keeping the records of the company, as hereinbefore indicated, and since that time Miss Hogg has kept the records at her home and the only duties performed in connection with the business is for her to transmit orders received from respondent Bill the Distributor, Inc. and respondent Winter Garden to the suppliers of the food products from whom purchases are made, and to write an occasional letter advising the suppliers of brokerage due or when Mid-South was overcharged for samples.

Although Mr. Edward D. Hogg, President, is referred to by respondent Hogg as the Manager of the business of respondent Mid-South, he has done nothing since he became owner of the stock and President of the corporation in the way of management or operation of the business, either while it was being operated in Jackson, Mississippi, out of the office of respondent Bill the Distributor, Inc., or since the office has been transferred to the home of his sister in New Orleans. He has made no attempt to contact any of the suppliers, nor any of the customers except respondent Bill the Dis-

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tributor, Inc. and then only through his brother, respondent Hogg. It is estimated by the latter that 90 to 95 percent of the sales by respondent Mid-South since January 1959 has been to respondent Bill the Distributor, Inc. Miss Mary Eola Hogg concurs in this estimate and also has estimated that from 2 to 3 percent of the sales was to respondent Winter Garden and less than one percent to National Sales, Inc., another affiliated company owned by respondent Hogg.

From the foregoing facts, it is concluded that even though the capital stock of the respondent Mid-South is owned by the brother and sisters of respondent Hogg, the actual operation of the company is still subject to the latter's control and any brokerage payments received by that company will be in the same category as the brokerage payments to respondent Food Marketers, Inc., no service having been rendered by respondent Mid-South to the suppliers since it is under the control of respondent Hogg, who, as hereinbefore indicated, is the principal stockholder and in control of respondents Bill the Distributor, Inc. and Winter Garden, the principal customers of these suppliers. Furthermore, the account of at least one supplier was solicited and obtained in 1955 by respondent Hogg, representing respondent Food Marketers, Inc. Since that time this company, Fox Deluxe Foods, Inc., Chicago, Illinois, has paid brokerage to respondents Food Marketers, Inc., W. J. Biggs Brokerage Company, Food Marketers, Inc. of Louisiana and respondent Mid-South Food Products, Inc. all pursuant to the original contract negotiated by respondent Hogg.

CONCLUSION

The acts and practices of respondents Bill the Distributor, Inc., Winter Garden Sales Company, Inc., Food Marketers, Inc. and Mid-South Food Products, Inc. and the individual respondent, William Thomas Hogg, acting through said corporate respondents, in receiving or accepting something of value as a commission, brokerage or other compensation, or allowances in lieu thereof, as hereinabove found, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended, which provides:

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

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It is now well-established by decisions of the United States Courts of Appeals and the United States Supreme Court, in the interpretation of Section 2(c) of the Clayton Act, as amended, that it is unlawful for a buyer to receive brokerage on his own purchases. Likewise, it has been held by numerous cases that where both the brokerage concern and the buying organization are owned by the same person, or where an alleged broker is acting for or in behalf of the buyer or is under the control of the buyer and receives brokerage payments from the seller, Section 2(c) of the Clayton Act, as amended, is violated. For instance, in the case of *Great Atlantic & Pacific Tea Company v. F.T.C.*, 106 F.2d 667, 674, *certiorari denied*, 308 U.S. 625, the Court said:

At each stage of its enactment, paragraph (c) was declared to be an absolute prohibition of the payment of brokerage to buyers or buyers' representatives or agents. Such is the plain intent of the Congress and thus we construe the statute. Any other result would frustrate the intent of Congress. The Court in this same decision pointed out that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller:

The phrase "except for services rendered" is employed by Congress to indicate that if there be compensation to an agent, it must be for bona fide brokerage, viz, for actual services rendered to his principal by the agent. The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. While the phrase "for services rendered" does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. In short, a buying and selling service cannot be combined in one person.

In a case in which the facts were somewhat similar to the present case, the Commission's order to cease and desist "from accepting or receiving from sellers any fees or commissions or brokerage or any allowance in lieu thereof" was upheld by the United States Court of Appeals for the Fifth Circuit. In that case,¹ The Webb-Crawford Company was a corporation owned by three individuals, Ed D. Wier, E. L. Wier and Carter W. Daniel, who also operated a brokerage company as partners known as the Daniel Brokerage Company. Ed D. Wier was the corporation's President and salesman; E. L. Wier was its Vice-President and buyer; and Carter W. Daniel was Secretary and Treasurer and Financial Manager. These three men constituted the Board of Directors and completely controlled the corporation. The brokerage partnership was managed by one C. R. Daniel, brother of Carter W. Daniel, and a minor stockholder in the corporation. His brokerage office

¹ *The Webb-Crawford Company, et al. v. F.T.C.*, 109 F. 2d 268.

was in the warehouse of the corporation for which rent was paid. The brokerage partnership represented only the sellers of commodities and was paid brokerage by them. It had many other customers besides the corporation and the corporation bought not over 10 percent of its goods through the brokerage partnership. The Court found that the partners could and did control the corporation. The corporation did not get any of the brokerage fees.

The important factor upon which the Court decided the case was that one of the brothers, E. L. Wier, as Vice-President of The Webb-Crawford Company, did all of its buying, and at the same time he was one of the brokers and received one-fourth of the commission paid by the seller. Another brother, Ed D. Wier, who sold the purchased goods for the corporation and had a voice in determining what should be bought, also got one-fourth of the commission. Carter W. Daniel, the third partner who checked the bills and paid them, got the remainder of the commission. The Court said (at p. 270; see footnote 1):

* * * Without reflecting on the faithfulness or honesty of anyone here concerned, it is evident that the tendency and general results are precisely the same as if The Webb-Crawford Company, the buyer, had gotten the commissions. And the law equally condemns both things. Omitting the inapplicable alternatives, we quote from subsection (c): "It shall be unlawful for any person * * * to pay or grant, or to receive or accept, anything of value as a commission * * * in connection with the sale or purchase of goods * * *, either *to the other party* to such transaction [The Webb-Crawford Co.] *or to an agent, [or] representative*, [E. L. Wier, Ed D. Wier, Carter W. Daniel] * * * of any party to such transaction other than the person by whom such compensation is so granted or paid." Sellers who sell to The Webb-Crawford Company cannot pay brokers' commissions to these men who in fact act for and represent the buyer in making the purchases. The interposition of C. R. Daniel as manager for the brokers does not change the fact that the commissions are paid to his principals who are the officers and representatives of the buyer.

Applying the principle of the foregoing decision to the facts in this case, the individual respondent, William Thomas Hogg, corresponds to the three partners who were in control of the operations of The Webb-Crawford Company and the statements made by the Court to the effect that the tendency and general results are precisely the same as if The Webb-Crawford Company, the buyer, had gotten the commissions, would apply with equal force to the respondent corporations Bill the Distributor, Inc. and Winter Garden Sales Company, Inc., in the present case. Substituting the names of these two buying corporations controlled by respondent Hogg for the buying corporation in the Webb-Crawford decision, it follows that the sellers who sell to those companies cannot lawfully pay brokerage

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commissions to the brokerage companies under their control, that is, Food Marketers, Inc. and Mid-South Food Products, Inc. The attempt on the part of respondent Hogg to set up a situation which would change the relationship created by him when he first negotiated the contract between respondent Food Marketers, Inc. and suppliers, and which brokerage business he later transferred to the newly-created respondent Mid-South, was not successful for the reason that the newly-created Mid-South is equally under his control even though the capital stock is owned by his brother and sister.

It is therefore, concluded that under the circumstances disclosed herein, as shown by the evidence in the record, respondent Food Marketers, Inc. and respondent Mid-South Food Products, Inc. were created by the individual respondent, William Thomas Hogg, and used by him to obtain brokerage from the suppliers of the buyer-respondent corporations, Bill the Distributor, Inc. and Winter Garden Sales Company, Inc. for and in behalf of the said respondent-buyer corporations in violation of subsection (c) of Section 2 of the Clayton Act, as amended.

ORDERED

It is ordered, That respondent's Bill the Distributor, Inc., a corporation, and its officers, Winter Garden Sales Company, Inc., a corporation, and its officers, and William Thomas Hogg, individually and as an officer of said corporate respondents, and respondents' agents, representatives and employees, directly or through any corporate, partnership, or other device, in connection with the purchase of food products or other 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 the purchase of food products, or other commodities for their own account, or on purchases made through broker respondents, Food Marketers, Inc. or Mid-South Food Products, Inc., so long as any relationship exists either through ownership, control or management between the broker respondents, the buyer respondents, and the individual respondent, named herein.

It is further ordered, That respondent Food Marketers, Inc., a corporation, and its officers, doing business under this or any other name, and William Thomas Hogg, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate, partnership, or other device, in connection with the purchase or sale of food products or

other 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 food products or other commodities for their own account, or by or for the account of either respondents Bill the Distributor, Inc., Winter Garden Sales Company, Inc., or any other company or corporation owned in whole or in part by respondent William Thomas Hogg, so long as any relationship exists either through ownership, control or management between the said buyer respondents and the said broker respondents, through the individual respondent, William Thomas Hogg, or otherwise, or on any other purchases where the said broker respondent or respondent William Thomas Hogg individually are acting for or on behalf of any buyer as an intermediary, representative, or agent, or are subject to the direct or indirect control of such buyer.

It is further ordered. That respondent Mid-South Food Products, Inc., a corporation, and its officers, doing business under this or any other name, and respondent's agents, representatives and employees, directly or through any corporate, partnership, or other device, in connection with the purchase or sale of food products or other 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 food products or other commodities for its own account, or by or for the account of respondents Bill the Distributor, Inc. or Winter Garden Sales Company, Inc., or any other company or corporation owned in whole or in part by respondent William Thomas Hogg, so long as any relationship exists, either through control or management between respondent Mid-South Food Products, Inc., and the buyer corporation or the individual respondent, William Thomas Hogg, or any other officer thereof, or on any other purchases where respondent Mid-South is acting for or in behalf of any buyer as an intermediary, representative or agent, or is subject to the direct or indirect control of such buyer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision, filed on July 26,

1961, and the Commission having determined that said initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered, That the aforesaid initial decision be, and it hereby is, adopted as the decision of the Commission.