

Syllabus

IN THE MATTER OF

PAUL M. COOTER DOING BUSINESS AS THE COOTER COMPANY AND MART SALES COMPANY; AND RECORG SUPPLY CORPORATION ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (c) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5460. Complaint, Aug. 28, 1946—Decision, Dec. 13, 1951

Where an individual who (1) was engaged as a food broker and buying agent for a group of wholesale grocers; operated the "Cooter Plan" under which he offered brokerage service, market information, advertising counsel, merchandising assistance and controlled brands to some 200 wholesale food distributor customers in thirty-five states; solicited sellers' accounts on a brokerage basis; and on occasion made purchases on the same basis for his own account; and (2) in 1936, when the Robinson-Patman Antidiscrimination Act, with its brokerage section herein concerned was enacted, held office as general manager and otherwise, in Merchants Service Corporation, a corporate group-buying organization which distributed among its wholesale grocery shareholders in the form of patronage dividends the brokerage it collected from sellers, and in two other corporations closely identified therewith by common officers, wholesale grocer shareholders, interests and objectives, to wit, the Volunteer Stores of America, which it had organized and controlled, and its successor, the Recorg Supply Corporation, to which it assigned its controlled brands;

Following (1) Merchants' discontinuance of trading operations in 1936, and his employment by its successor, Recorg Supply, to supply the same range of services to it and its wholesale grocer shareholders; (2) his acquisition from Volunteer Stores of the "exclusive privilege to use the Volunteer Stores System of distribution," "together with all labels, trade-marks, insignia, store sign designs," etc., in numerous states, and subject to specific conditions as to maintenance of quality of products concerned, etc.; (3) his subsequent making of franchise arrangements with wholesalers designating each as exclusive distributor of Volunteer brands in a specified territory, to be purchased through or from him, or with his consent; and (4) the making of lease agreements with certain sponsoring wholesalers from whom said Volunteer Stores had acquired such "Volunteer" rights and who were shareholders of Volunteer Stores and of Recorg Supply, and appeared as members on said Cooter's group customer list—

- (a) Entered into advertising agreements, pursuant to aforesaid arrangements, whereunder a substantial portion of the brokerage, etc., received from sellers by Cooter on each wholesaler's purchases was returned to the wholesaler in the form of payments for advertising and promotional activities in connection with said merchandise; and
- (b) After the discontinuance of such payments on April 1, 1944, continued to receive brokerage payments from the sellers on merchandise packed under labels owned or controlled by him, by the seller, or by the buyer; and

Where said individual, following his said employment by said Recorg Supply and further agreement with it whereby he was granted "the exclusive right and privilege to use, develop and promote the distribution of all products, goods, wares or merchandise," which were the subject of specified "trade-marks, insignia," etc., subject to maintenance of specified standards of quality and other conditions; the making thereafter of exclusive franchise agreements with different wholesale grocer shareholders of Recorg whereby the particular wholesaler was designated as his exclusive distributor for the goods concerned, to be purchased from or through him or with his approval; and the obtaining of similar agreements from said Recorg and others with respect to other controlled private or buyer labels or brands—

- (c) Entered into similar advertising authorization with each of the wholesalers concerned to whom it had thus granted exclusive territorial distribution of the brands involved, whereby brokerage, etc. received from sellers by said individual on the particular wholesaler's purchases of the merchandise involved was returned to said wholesaler in the form of payments by said individual for such wholesaler's advertising and promotional activities in connection with said merchandise; and
- (d) After October 1, 1945, when such payments were discontinued, continued to receive brokerage payments from sellers on merchandise packed under aforesaid controlled labels; and

Where said individual, following (1) the acquisition during the year 1944 from Recorg Supply and others of certain private or buyers' labels or brands; (2) the making of further and superseding agreements with Recorg's wholesale grocer shareholders under which each wholesaler was given by him exclusive right to use the specified trade-marks and brands in specified territory subject to the purchase, through said individual or with his approval, of a minimum volume of merchandise under the different brands, ranging from \$250 to \$25,000 annually; and (3) the making of a similar lease agreement with a Minnesota concern, conditioned upon the annual volume purchase of \$46,500 of products under the brands there involved—

- (e) Entered into similar advertising authorizations with or for each of said leasing grocer wholesalers whereby a substantial portion of the commission or other compensation, etc., secured, received and accepted from sellers by said individual on each wholesaler's purchase of the merchandise involved in said lease arrangements was returned to or expended for each wholesaler in the form of payments by said individual for advertising and promotional activities or for such wholesaler in connection with said merchandise; and
- (f) After Oct. 1, 1945, when payments under said arrangements were discontinued, continued to receive brokerage payments from the sellers on purchases by said wholesalers of merchandise packed under labels owned or controlled as aforesaid; and

Where said individual, who had therefore also purchased merchandise from sellers for his own account, by virtue of his interest in a certain wholesale grocery concern and the interest of the latter in Merchants Service and Recorg Supply; and who, more recently engaged in operating said "Cooter Plan," in the course of which he emphasized "the value of selling merchandise under buyers' labels"; solicited the accounts of sellers on a brokerage basis; submitted a group list of wholesale grocers described as his customers; upon request of customers and otherwise contacted sellers named

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by the customers and canvassed the seller market in the customers' behalf and interest; employed subbrokers and furnished to his wholesale customers the purchasing, merchandising and other services described by him; and employed and paid missionary or field men, including those recommended by customers, to contact affiliated retail grocer groups in their behalf to promote the sale to such retailers of merchandise bearing the private or buyer labels or brands sponsored by said customers and owned and controlled by him—

- (g) Received and accepted commissions, brokerage or other compensation from the sellers (1) on purchase orders for his own account; (2) on orders originated by him for or received from his wholesale grocer customers located throughout the various states; and (3) on purchase orders transmitted directly by his wholesale grocer customers to the seller; and

Where said Recorg Supply Corporation, which, prior to about September 22, 1943, employed said individual and his corporations to supply it and its wholesale grocer shareholders with his aforesaid services—

- (h) Received and accepted commissions, brokerage, etc. from sellers on purchase orders initiated by it for or received from its wholesale grocer shareholders, from said individual or from his grocer wholesale customers; and, prior to about March 13, 1944, on transactions in which purchase orders were transmitted directly by its wholesale grocer shareholders to the sellers:

Held, That the receipt and acceptance from sellers by said individual directly and, prior to about September 22, 1943, indirectly through said Recorg Supply, of such commissions, etc., as a result of said purchase transactions in which said Cooter acted for himself, for the former wholesale grocer shareholders of Merchants Service, for respondent Recorg Supply and its shareholders, for the shareholders of Volunteer Stores, and for his own wholesale grocer customers, and in connection with which he rendered no service to the sellers, except for such incidental benefits as might have accrued to them in their not having to seek other outlets for merchandise sold through him, constituted violations of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act; and

That receipt and acceptance from sellers by said Recorg Supply Corporation and its officers and directors of commissions, etc., as a result of said purchase transactions in which Recorg and its officers and directors acted in fact for and in behalf of themselves, their shareholders, respondent individual and his said customers, and in connection with which no services were rendered to the sellers by said corporation and its officers and directors, likewise constituted violations of the aforesaid subsection (c) of said Act, as amended.

Mr. Eldon P. Schrup for the Commission.

Levinson, Becker & Peebles, of Chicago, Ill., for Paul M. Cooter.

Breed, Abbott & Morgan, of New York City, for all other 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, since June 19, 1936, have violated and are now violating the provisions of subsection (c), section 2

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of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. Title 15, section 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Paul M. Cooter is an individual doing business under the firm names and styles of The Cooter Company and Mart Sales Company, with principal office and place of business located at 228 North LaSalle Street, Chicago, Illinois, and branch office located at 16 California Street, San Francisco, California.

Respondent Paul M. Cooter formerly did business both in his own name and under the firm name and style of the Cooter Brokerage Company, and preceding that was the president, treasurer, controlling shareholder and the general manager of the Lakeshore Brokerage Company, Inc., and successor Lakeshore Marketing & Merchandise Company, Inc., all with principal office and place of business one time located at Room 904, Merchandise Mart, Chicago, Illinois, and branch office located at 16 California Street, San Francisco, California. The Lakeshore Brokerage Company, Inc., incorporated July 11, 1936, and renamed the Lakeshore Marketing & Merchandising Company, Inc., November 13, 1936, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. Said corporation's assets were sold and transferred January 8, 1938, to respondent Paul M. Cooter concurrently doing business under the firm name and style of the Cooter Brokerage Company and the aforesaid corporation was dissolved February 17, 1938.

Respondent Paul M. Cooter, prior to doing business as hereinbefore set out, was the assistant secretary, assistant treasurer and general manager of respondent Recorg Supply Corporation, the assistant secretary and assistant treasurer of Volunteer Stores, Inc., of America, and the assistant secretary, assistant treasurer and general manager of Merchants Service Corporation.

PAR. 2. Respondent Recorg Supply Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 201 North Wells Street, Chicago, Illinois. Said corporation, one time located at Room 904, Merchandise Mart, Chicago, Illinois, amongst other activities, does business as a group buying organization for its wholesale grocer shareholders. Respondent Recorg Supply Corporation was organized and is controlled by wholesale grocer shareholders formerly the controlling shareholders of Merchants Service Corporation.

Volunteer Stores, Inc., of America is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 201

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t, Chicago, Illinois. Said corporation, one time t, Merchandise Mart, Chicago, Illinois, was organ- Service Corporation to license and provide for Corporation sponsoring wholesale grocer share- trolled, private or buyers' label or brand "Volun- teer Stores system of retail distribution for led or branded.

e Corporation, one time located at Room 904, Mer- ago, Illinois, with branch office located at 16 Cali- rancisco, California, was a corporation organized, business under and by virtue of the laws of the

Said corporation, now dissolved, amongst other ess as a group buying organization for its whole- ders and in so doing received and accepted com- , and other compensation, allowances or discounts 1 sellers upon purchases from sellers for its said s.

Herscher, the president and a director of respond- Corporation, was formerly the president and a ants Service Corporation. Respondent J. W. president and a director of Volunteer Stores, Inc., ndent J. W. Herscher is associated with the Hub- any, Charleston, West Virginia. The Hubbard was a shareholder in Merchants Service Corpora- lder in both respondent Recorg Supply Corpora- Stores, Inc., of America. The Hubbard Grocery pears as a member on respondent Paul M. Cooter's d group customer list.

H. Tyler is the vice president and a director of Supply Corporation. Respondent Wm. H. Tyler Tyler & Simpson Company, Gainesville, Texas. ompany was a shareholder in Merchants Service a shareholder in respondent Recorg Supply Cor- Simpson Company further appears as a member on Cooter's group customer list.

A. McKay, the secretary, treasurer and a director g Supply Corporation, was formerly the treasurer erchants Service Corporation. Respondent Neil treasurer and a director of Volunteer Stores, Inc., ndent Neil A. McKay is associated with Bursley ne, Indiana. Bursley & Co., Inc., was a share- Service Corporation and is a shareholder in both pply Corporation and Volunteer Stores, Inc., of

America. Bursley & Co., Inc., further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent L. H. Joannes, a director of respondent Recorg Supply Corporation, was the secretary and a director of Merchants Service Corporation. Respondent L. H. Joannes is also the secretary and a director of Volunteer Stores, Inc., of America. Respondent L. H. Joannes is associated with Joannes Brothers Company, Green Bay, Wisconsin. Joannes Brothers Company was a shareholder in Merchants Service Corporation and is a shareholder in both respondent Recorg Supply Corporation and Volunteer Stores, Inc., of America. Joannes Brothers Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent Max A. Kuehn is a director of respondent Recorg Supply Corporation. Respondent Max A. Kuehn is associated with Andrew Kuehn Company, Sioux Falls, South Dakota. Andrew Kuehn Company was a shareholder in Merchants Service Corporation and is a shareholder in respondent Recorg Supply Corporation. Andrew Kuehn Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent H. L. Miller is a director of respondent Recorg Supply Corporation. Respondent H. L. Miller is associated with the New River Grocery Company, Hinton, West Virginia. New River Grocery Company was a shareholder in Merchants Service Corporation and is a shareholder in respondent Recorg Supply Corporation. New River Grocery Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent R. B. Wiltsee is a director of respondent Recorg Supply Corporation and also is a director of Volunteer Stores, Inc., of America. Respondent R. B. Wiltsee is associated with the Gilbert Grocery Company, Portsmouth, Ohio. Gilbert Grocery Company was a shareholder in Merchants Service Corporation and is a shareholder in both respondent Recorg Supply Corporation and Volunteer Stores, Inc., of America. Gilbert Grocery Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent Jas. A. Scowcroft is a director of respondent Recorg Supply Corporation. Respondent Jas. A. Scowcroft is associated with John Scowcroft & Sons Co., Ogden, Utah. John Scowcroft & Sons Co. was a shareholder in Merchants Service Corporation and is a shareholder in respondent Recorg Supply Corporation. John Scowcroft & Sons Co. further appears as a member on respondent Paul M. Cooter's group customer list.

PAR. 3. Merchants Service Corporation, amongst other activities, prior to its dissolution did business as a group buying organization

