

tingent claim for restitution which the Commission is requested to file must be filed by Jan. 24, 1974, if it is to be filed, the time by which respondents' answer to this request in the application must be filed shall be set at 9:00 a.m., Jan. 22, 1974. Respondents' answer to the request in the application that the complaint be amended shall, in view of the issues raised by the application, be due on Feb. 5, 1974. Therefore,

It is ordered, That respondents' request to strike the application of complaint counsel be, and it hereby is, denied.

It is further ordered, That respondents answer by 9:00 a.m., Jan. 22, 1974, complaint counsel's request that the aforementioned contingent claim be filed, and that respondents answer by Feb. 5, 1974, all other requests made in the application.

IN THE MATTER OF

FOOD FAIR STORES, INC., ET AL. D. 8786^{*}
 H. C. BOHACK CO., INC., ET AL. D. 8787
 JEWEL COMPANIES, INC., ET AL. D. 8788
 BORMAN FOOD STORES, INC. D. 8789^{*}
 FIRST NATIONAL STORES, INC., ET AL. D. 8790

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

Complaints, July 10, 1969—Decisions, Jan. 22, 1974

Orders dismissing the complaints issued against 10 corporations and certain individual officers thereof, engaged in various aspects of the food industry for alleged violations of Sec. 2(c) of the Clayton Act on the basis that the evidence relied upon by complaint counsel would not support the charges that respondent had violated Sec. 2(c) of the Clayton Act, amended.

Appearances

For the Commission: *Francis C. Mayer, James C. Donoghue, Martin A. Rosen, Lewis F. Parker, Louis R. Sernoff* and *Eliot G. Disner*.

For respondents: *Shipley, Akerman, Stein & Kaps*, Wash., D.C. and *Stein & Rosen*, New York, N.Y. for Food Fair Stores, Inc. and World-Wide Produce Co., Inc. *Subin, Shams & Rosenbluth*, Orlando, Fla. for Hallee-Boy Sales, Inc. and Ivin Arost. *Collier, Shannon, Rill & Edwards*, Wash., D.C. for John P. Storm, a corporation.

COMPLAINT IN DOCKET NO. 8786

The Federal Trade Commission, having reason to believe that th

^{*} For complaint in D. 8789 see 81 F.T.C. 201. By Commission decision dated Aug. 3, 1972, the complaint was dismissed as to respondents P & R Brokerage Co. and Frank V. Condello.

FEDERAL TRADE COMMISSION DECISIONS

Complaint

83 F.T.C.

parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are violating the provisions of Subsection (c) of Section 2 of the Clayton Act, as amended, (15 U.S.C. Section 13) hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Food Fair Stores, Inc., hereinafter referred to as "Food Fair," is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 3175 John F. Kennedy Boulevard, Philadelphia, Pa.

PAR. 2. Respondent World-Wide Produce Co., Inc., hereinafter referred to as "World-Wide," is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 10 Oregon Avenue, Philadelphia, Pa. Respondent World-Wide is a wholly-owned corporate subsidiary of respondent Food Fair.

PAR. 3. Respondent Food Fair has been and is now engaged primarily in the retailing of food products and other articles for personal and household use and operates a large number of retail stores, including supermarkets, discount supermarkets and department stores. Food Fair also manufactures and processes a variety of food products. In the operation of its retail food business, respondent Food Fair purchases directly and through respondent World-Wide large quantities of food products from numerous sellers located throughout the United States for resale to its customers. As of Apr. 27, 1968, Food Fair operated approximately 560 food units and 60 department stores in 16 States of the United States. Food Fair's volume of business is substantial, totaling in excess of \$1.3 billion annually, as of Apr. 27, 1968.

PAR. 4. Respondent World-Wide has been and is now engaged as a purchaser of food products solely on behalf of respondent Food Fair. Food products obtained for Food Fair by World-Wide are resold to consumers through Food Fair's retail outlets. Some of the officers and directors of respondent Food Fair have been and are now officers and directors of respondent World-Wide.

PAR. 5. In the course and conduct of its business for the past several years, respondent Food Fair has purchased, distributed and resold, and now purchasing, (both directly and through respondent World-Wide) distributing and reselling food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the Commonwealth of Pennsylvania in which respondent Food Fair is located. Food Fair purchases these food products, including fresh fruits

and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Food Fair's warehouses and retail stores in the Commonwealth of Pennsylvania and various other States in the United States. Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent Food Fair.

PAR. 6. In the course and conduct of its business for the past several years, respondent World-Wide has purchased and distributed and resold through respondent Food Fair, and is now purchasing and distributing and reselling through respondent Food Fair, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the Commonwealth of Pennsylvania in which respondent World-Wide is located. World-Wide purchases these food products, including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Food Fair's warehouses and retail stores in the Commonwealth of Pennsylvania and various other States in the United States. Thus, there has been and is now a continuous course of trade in commerce in the purchase of said food products by respondent World-Wide.

PAR. 7. *Respondent Hallee-Boy Sales, hereinafter referred to as "Hallee-Boy," is a partnership, composed of respondents Ivin Arost and Harold Arost, doing business under and by virtue of the laws of the State of Florida, with their office and principal place of business located at P.O. Box 7741, Orlando, Fla. These individual respondents formulate, direct and control the acts, practices and policies of the partnership, Hallee-Boy, including the acts and practices hereinafter described.

PAR. 8. Respondent Hallee-Boy has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Hallee-Boy in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

*On June 5, 1973, the administrative law judge amended the complaint as follows: substituting Hallee-Boy Sales, Inc., the successor corporation for Hallee-Boy Sales, a dissolved partnership, as respondent; retaining Ivin Arost individually as a respondent; dismissing Harold Arost.

PAR. 9. Respondent Hallee-Boy, in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent Hallee-Boy.

PAR. 10. Respondent John P. Storm, a corporation, hereinafter referred to as "John Storm," is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 314 East John Street, Salinas, Calif.

Respondent John P. Storm, an individual, is president of corporate respondent and owns all or substantially all of its stock. He formulates, directs and controls the acts, practices and policies of said corporate respondent, including the acts and practice hereinafter described.

PAR. 11. Respondent John Storm has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of California and purchases by buyers located in various States of the United States other than the State of California. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of John Storm in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

PAR. 12. Respondent John Storm, in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of California and purchases by buyers located in various States of the United States other than the State of California in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of fresh products by said respondent John Storm.

PAR. 13. In the course and conduct of their business, respondents Food Fair and World-Wide have been and are now utilizing the services of respondent Hallee-Boy as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Hallee-Boy performs valuable services for respondents Food Fair and World-Wide and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent Hallee-Boy, in performing the services enumerated above, has been and is now acting as an agent or representative of respondents Food Fair and World-Wide and other buyers. In such capacity, Hallee-Boy is subject to and under the direct or indirect control of Food Fair, World-Wide and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Hallee-Boy has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 14. In the course and conduct of their business, respondents Food Fair and World-Wide have been and are now utilizing the services of respondent John Storm as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent John Storm performs valuable services for respondents Food Fair and World-Wide and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent John Storm, in performing the services enumerated above, has been and is now acting as an agent or representative of respondents Food Fair and World-Wide and other buyers. In such capacity, John Storm is subject to and under the direct or indirect control of Food Fair, World-Wide and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, said respondent John Storm has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 15. In addition, respondents Food Fair and World-Wide have been and are now utilizing the services of Jack Stires, Inc., a Calif. corporation located at 795 Desert Gardens Drive, El Centro, Calif. as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. In such capacity, Jack Stires, Inc. performs the

same or substantially the same services for respondents Food Fair and World-Wide, as those performed by Hallee-Boy and John Storm for respondents Food Fair and World-Wide, described above in Paragraphs Thirteen and Fourteen, while acting as an agent or representative, and subject to the direct or indirect control, of respondents Food Fair and World-Wide in transactions with sellers. In connection with such transactions, Jack Stires, Inc. has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 16. Respondents Food Fair and World-Wide and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent John Storm without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent John Storm has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondents Food Fair and World-Wide and other buyers, or has been and is now subject to the direct or indirect control of respondents Food Fair and World-Wide and other buyers.

Respondents Food Fair and World-Wide and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Hallee-Boy without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Hallee-Boy has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondents Food Fair and World-Wide and other buyers, or has been and is now subject to the direct or indirect control of respondents Food Fair and World-Wide and other buyers.

Moreover, respondents Food Fair and World-Wide have received and are now receiving valuable "ground" or "field" broker services from Jack Stires, Inc. without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, Jack Stires, Inc. has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondents Food Fair and World-Wide or has been and is now subject to the direct or indirect control of respondents Food Fair and World-Wide.

PAR. 17. The aforesaid acts and practices of respondents and each of them in receiving and accepting, directly or indirectly, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof from sellers, are in violation of Subsection (c) of

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Commissioners Elman and Nicholson dissented and filed dissenting statements.*

Commissioners Dixon and MacIntyre filed separate statements.*

INITIAL DECISION [IN DOCKET 8786] ON RESPONDENTS' MOTION
FOR SUMMARY DECISION
UNDER SECTION 3.24 OF THE COMMISSION'S RULES OF PRACTICE
BY RAYMOND J. LYNCH, ADMINISTRATIVE LAW JUDGE

JULY 30, 1973

PRELIMINARY STATEMENT

On July 10, 1969, the Federal Trade Commission issued a complaint^{1,2,3} in the above-entitled proceeding, charging the respondents with violations of Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.⁴ Answers were filed by all the respondents named herein, denying the allegations contained in the complaint. Pretrial conferences and discovery proceedings were held both on and off the record from May 22, 1972 to May 14, 1973. On June 4, 1973, respondents filed a motion for summary decision pursuant to Section 3.24 of the Commission's Rules of Practice. Counsel supporting complaint, on June 18, 1973, filed a reply thereto. In addition, respondents' requests for admissions were answered by counsel supporting the complaint, briefs were filed and a stipulation entered into between the parties.

The Complaint

The complaint, as amended in the above-entitled proceeding, alleges that the respondent Food Fair Stores, Inc. engaged in a course of commerce, as commerce is defined in the Clayton Act, by purchasing from Hallee-Boy Sales, Inc., a corporation, Ivin Arost, an individual, and John P. Storm, a corporation, specified qualities and quantities of fresh fruits and vegetables, and that as a result of the transactions between Food Fair Stores, Inc., a buyer, and the other remaining respondent brokers, acted in such a manner as to violate Subsection (c)

* For reasons of economy, the text of the dissenting statements of Commissioners Elman and Nicholson, and the text of the separate statements of Commissioners Dixon and MacIntyre are not published herein. However, they appear at 81 F.T.C. 203-216, Docket 8789.

¹ By order of the administrative law judge, Hallee-Boy Sales, a partnership, was dismissed as a respondent and in lieu thereof, Hallee-Boy Sales, Inc., a corporation, was substituted.

² Harold Arost was dismissed as a respondent by order of the administrative law judge, based upon an agreement of the parties.

³ John P. Storm, individually, was dismissed as a respondent on motion of respondent's counsel because of his death in Dec. 1972.

⁴ This matter was pending in United States District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals from Aug. 11, 1969 to Mar. 29, 1972.

Initial Decision

of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The nature of the transactions between the parties will be discussed more fully in the following paragraphs.

Admissions by Counsel Supporting the Complaint

Pursuant to respondents' request for admissions of complaint counsel's contentions of law and fact, counsel supporting the complaint admit that:

1. Buyer respondent does not own or have any financial or other interest in the business of any of the broker respondents, and does not in any way share in the profits or losses of any of the broker respondents.
2. No director, officer or employee of buyer respondent owns all or any part of any of the broker respondents, or has any financial or other interest in the business of any of the broker respondents or shares in any way in the profits or losses of any of the broker respondents.
3. No broker respondent is a director, officer, manager or shareholder of buyer respondent is a director, officer, manager or employee of buyer respondent.
4. There are no common officers, directors, shareholders, employees or other personnel between respondent brokers and respondent sellers.
5. Broker respondents have not entered into any express contract or agreement to act as an agent, representative or other buyers.
6. The broker respondents were independently owned and managed direct or indirect control of buyer respondent or other buyers. The broker respondents performed *bona fide* brokerage functions of benefit to both buyers and sellers; and were not so-called "dummy brokers." Except as to words "bona fide" and "and is not a so-called 'dummy broker'." Neither admit or deny "bona fide" because term is not defined with specificity with respect to the words "brokerage functions" which it modifies. Admit "is not a so-called 'dummy broker' " as that term is defined in *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168-169 (1960).
7. Complaint counsel expect to prove that the broker respondents acted as agent or representative for, or in behalf of or subject to the direct or indirect control of respondent buyer and other buyers by inference from the following.
 - (a) That respondent buyer and other buyers have "utilized" the service of the respondent brokers as "ground" or "field" brokers in the purchase of fresh fruits and vegetables and usually not the services of other "ground" or "field" brokers.

(b) That the respondent brokers perform services which are valuable to respondent buyer and other buyers by (i) furnishing information concerning market conditions; (ii) maintaining contact with various sellers; (iii) inspecting and selecting specified qualities and quantities of fresh fruits and vegetables; and (iv) negotiating purchases of specified qualities and quantities of fresh fruits and vegetables.

8. Respondent buyer and other buyers have not paid brokerage or other compensation to the broker respondents and such brokerage has been paid by sellers.

9. Complaint counsel do not contend that the buyer respondent has received or accepted any monetary payments or anything of value other than benefits complaint counsel contend arise from broker respondents' performance of the functions referred to in Paragraph 7, *supra*.

10. Complaint counsel expect to offer no evidence that the acts and practices of respondents alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition. Complaint counsel do contend that the acts and practices alleged are unfair.

Stipulation of the Parties

In addition to the agreement of the parties with respect to the respondents' request for admissions and counsel supporting the complaint's reply thereto, for the purpose of presenting the legal issue, it was agreed that a stipulation would be entered into, which follows:

A. If, as a matter of law, complaint counsel must prove any one or more of the matters set forth in Paragraphs 1 through 6, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

B. If, as a matter of law, complaint counsel must prove that buyer respondent has received or accepted any monetary payments or anything of value other than the services described in Paragraph 7(b) then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

C. If, as a matter of law, complaint counsel must prove that the acts and practices of respondents have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition, then the proposed evidence of referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

D. If, as a matter of law, the proposed evidence of complaint counsel set forth in Paragraph 7 of the admissions of complaint counsel does not establish that the broker respondents acted as agent, representative or

