

Complaint

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IN THE MATTER OF
SIMON AND SCHUSTER, INC.

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

Docket 5963.¹ Settlement, findings and order, March 6, 1952

Where one of the largest publishers of "trade" or popular fiction and nonfiction adult books and juvenile books, ordinarily selling at a retail price of \$1.50 or more per copy, which was engaged in the direct or indirect publication of such books, and in the competitive interstate sale and distribution of its said publisher's edition to retail book sellers, and to wholesalers or jobbers for resale thereto, and to others, including public libraries and education institutions; and which included among its said purchasers many engaged in competition with one another in such wholesaling or retailing—

Long discriminated in price between different purchasers through pricing and selling its said publisher's editions to some under a discount schedule of 43 per cent regardless of the number of copies purchased, while allowing other purchasers discounts of from 46 to 50 per cent;

Effect of which discriminations, or any appreciable part thereof, had been or might be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which it and said jobbers or wholesalers were respectively engaged, or to injure, destroy or prevent competition with it or with said jobbers or wholesalers who received the benefit of said discriminations or with customers of either:

Held, That such acts and practices, under the circumstances set forth, were in violation of subsec. (a) of Sec. 2 of the Clayton Act as amended by the Robinson-Patman Act.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Robert F. Quinn* for the Commission.

Paul, Weiss, Rifkind, Wharton & Garrison, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), (U. S. C. Title 15, Sec. 13), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Simon and Schuster, Inc., hereinafter referred to as

¹For an explanatory statement setting forth the background of the settlement in question in this and in three other cases against Houghton-Mifflin Company, Little, Brown and Company, Inc., page 869, Random House, Inc., page 878, and the instant respondent, see footnote in the Houghton Mifflin proceeding on page 861.

respondent, has violated the provisions of subsection (a) of Section 2 of the Clayton Act, as amended, hereby issues its complaint stating its charges in these respects as follows:

PARAGRAPH 1. Respondent, Simon and Schuster, Inc., is a corporation organized and existing under the laws of the State of New York with its principal office and place of business located at 630 Fifth Avenue, New York City, New York.

PAR. 2. Respondent is now, and for many years last past has been, engaged, directly or indirectly, in the publication, distribution and sale of trade books, that is, popular fiction and non-fiction adult books and juvenile books ordinarily selling at a retail price of \$1.50 or more per copy.

Respondent commenced business in 1924 shortly after its incorporation and since then has become and is now one of the largest publishers of said trade books in the United States.

Respondent sells and distributes its trade books to retail book sellers for resale to the public, and to wholesalers or jobbers for resale to retail book stores and others, including public libraries and educational institutions. Editions of said trade books so sold and distributed are known as publisher's editions.

PAR. 3. In the course and conduct of its business for many years last past, respondent has been, and is now, engaged in commerce, as "commerce" is defined in the Clayton Antitrust Act, as amended by the Robinson-Patman Act, in that it ships or causes to be shipped publisher's editions of said trade books from the States in which the several places of production and business of the respondent are located, to purchasers thereof located in other States and in the District of Columbia; and there is, and has been at all times herein mentioned, a continuous current of trade and commerce in said books between and among the several States of the United States and in the District of Columbia.

PAR. 4. Except insofar as it has been affected, as alleged in Paragraph Six hereof, respondent, in the course and conduct of its said business in commerce, has been and is now in competition with persons, firms, and other corporations, some of which were and are engaged in similar businesses in commerce.

Also, except insofar as it has been affected, as alleged in Paragraph Six hereof, many of said jobbers or wholesalers were, and are, in competition, some in commerce, with each other, and many of said retail book sellers were, and are, in competition, some in commerce, with each other in the retail sale of said trade books.

PAR. 5. Respondent in the course and conduct of its said business, in commerce, has been for many years last past, and more particularly

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since June 19, 1936, and is now, either directly or indirectly discriminating in price between different purchasers of its said trade books by selling such books to some purchasers at higher prices than it sells such books of like grade and quality to other purchasers, and some of such other purchasers are engaged in active and open competition with the less-favored purchasers in the resale of such books within the United States, except as it has been affected as herein alleged.

Respondent has priced and sold its publisher's editions of trade books at list prices, less specific discounts allowed to each class of purchasers, among which are jobbers and wholesalers.

Respondent has so discriminated in that it has priced and sold said books to some jobbers or wholesalers at said list prices less a discount of 43%, irrespective of the number of copies of a title purchased while respondent has priced and sold said books to other jobbers or wholesalers, who are in competition in the resale of said books with those jobbers or wholesalers receiving the aforementioned discount, at list prices less discounts ranging from 46% to 50%.

PAR. 6. The effect of the aforesaid discriminations or of any appreciable part thereof has been or may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and said jobbers or wholesalers are respectively engaged, or to injure, destroy or prevent competition with respondent or with said jobbers or wholesalers who receive the benefit of said discriminations or with the customers of either of them.

PAR. 7. The aforesaid acts and practices of respondent as alleged in Paragraph V hereof are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. Title 15, Sec. 13).

CONSENT SETTLEMENT²

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monop-

² The Commission's "Notice of Acceptance of Consent Settlement and Order to File Report of Compliance" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was on March 6, 1952, accepted by the Commission, subject only to the condition that the respondent comply with the requirements of the following paragraph with respect to the filing of a report showing the manner and form in which it has complied with the order to cease and desist, and subject to such condition said consent settlement was ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

It is accordingly ordered, That the respondent, Simon and Schuster, Inc., a corporation, shall, within sixty (60) days after service upon it of this notice and order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the consent settlement entered herein.

olies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission, on the 12th day of March 1952, issued and subsequently served its complaint on the respondent named in the caption herein, charging it with violation of subsection (a) of section 2 of the Clayton Act, as amended.

The respondent, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint, hereby:

1. Admits all of the jurisdictional allegations set forth in the complaint.

2. Consents that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondent, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrains from admitting or denying that it has engaged in any of the acts or practices stated therein to be in violation of law or that such acts and practices, if engaged in, would be in violation of law.

3. Agrees that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which respondent consents may be entered in final disposition of this proceeding, are as follows:

COMMISSION'S FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Simon and Schuster, Inc., is a corporation organized and existing under the laws of the State of New York with its principal office and place of business located at 630 Fifth Avenue, New York, N. Y.

PAR. 2. Respondent is now, and for many years last past has been engaged, directly or indirectly, in the publication, distribution, and sale of trade books, that is, popular fiction and non-fiction adult books and juvenile books ordinarily selling at a retail price of \$1.50 or more per copy.

Respondent commenced business in 1924 shortly after its incorporation and since then has become and is now one of the largest publishers of said trade books in the United States.

Respondent sells and distributes its trade books to retail book sellers for resale to the public and to wholesalers or jobbers for resale to retail book stores and others, including public libraries and educational institutions. Editions of said trade books so sold and distributed are known as publisher's editions.

PAR. 3. In the course and conduct of its business, for many years last past, respondent has been and is now, engaged in commerce, as "commerce" is defined in the Clayton Antitrust Act, as amended by the Robinson-Patman Act, in that it ships, or causes to be shipped, publisher's editions of said trade books from the States in which the several places of production and business of the respondent are located, to purchasers thereof located in other States of the United States and in the District of Columbia; and there is, and has been at all times mentioned herein, a continuous current of trade and commerce in said books between and among the several States of the United States and in the District of Columbia.

PAR. 4. Except insofar as it is specified to the contrary in Paragraph Six hereof, respondent, in the course and conduct of its said business in commerce, has been and is now in competition with person, firms, and other corporations, some of which were and are engaged in similar businesses in commerce.

Also, except insofar as it is specified to the contrary, in Paragraph Six hereof, many of said jobbers or wholesalers were and are in competition, some in commerce, with each other, and many of said retail book sellers were and are in competition, some in commerce, with each other in the retail sale of said trade books.

PAR. 5. Respondent, in the course and conduct of its business, in commerce, has been for many years last past, and more particularly since June 19, 1936, and is now, discriminating in price between different purchasers of its trade books by selling such products to some purchasers at higher prices than it sells such products of like grade and quality to other purchasers, and some of such other purchasers are engaged in active and open competition with the less favored purchasers in the resale of such products within the United States, except as it has been affected, as herein found.

Respondent has priced and sold its publisher's editions at list prices less specific discounts allowed to each class of purchasers among which are jobbers or wholesalers.

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Respondent has so discriminated in that it has priced and sold said books to some jobbers or wholesalers at one discount schedule, to-wit, at list prices less a discount of 43% irrespective of the number of copies of a title purchased while respondent has priced and sold said books to other jobbers or wholesalers who are in competition in the resale of said books with those jobbers or wholesalers receiving the aforementioned discount at a different discount schedule, to-wit, at list prices less discounts ranging from 46% to 50%.

PAR. 6. The effect of these discriminations or any appreciable part thereof has been or may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and said jobbers or wholesalers are respectively engaged, or to injure, destroy, or prevent competition with respondent or with said jobbers or wholesalers who receive the benefit of such discriminations or with customers of either of them.

PAR. 7. The acts and practices of respondent herein stated in Paragraph Five hereof are in violation of subsection (a) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. Title 15, Sec. 13).

ORDER TO CEASE AND DESIST

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

Directly or indirectly discriminating in price between different purchasers of its trade books by selling such books to any of its purchasers at higher prices than it sells the same books by whatever titles, of like grade and quality, to others of its purchasers where such purchasers are in competition with each other in the resale or distribution of said books.

SIMON AND SCHUSTER, INC.,

By (sgd) ALBERT R. LEVENTHAL,
Vice President.
(Title)

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 6th day of March, 1952, subject only to the condition that the respondent shall, within sixty (60) days after service upon it of a copy of this consent settlement, file with the Commission a report in writing setting

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forth in detail the manner and form in which it has complied with the order to cease and desist contained in said consent settlement.³

NOTE.—Following the Commission's acceptance of the consent settlement, as reproduced above, the Commission dismissed count III of the complaint in Docket 5902, as follows:

This matter coming on to be heard by the Commission upon a joint motion of counsel for the respondent and counsel in support of the complaint, requesting that Count III of the complaint in this proceeding be dismissed without prejudice; and

It appearing from said motion and from the record that prior to the commencement of the taking of evidence herein, the respondent, pursuant to the provisions of Rule V of the Commission's Rules of Practice, moved the hearing examiner to suspend proceedings before him to permit negotiations by counsel upon a consent settlement dispositive of the proceeding, which motion was granted by said hearing examiner; and

It further appearing that the proposed consent settlement thereafter agreed upon would have disposed of Count III of the complaint only, and not the entire proceeding as required by said Rule V, whereupon the parties entered into a stipulation under the terms of which it was agreed to request the dismissal of Count III of the complaint and the simultaneous issuance of a new complaint embodying the substance of said Count III, with the understanding that the parties would at the same time submit to the Commission, through the hearing examiner, a proposed consent settlement of the new proceeding, which proposed consent settlement was submitted with the aforesaid joint motion; and

It further appearing to the Commission that Count III of the complaint states a cause of action entirely separate from those stated

³ The consent settlement is published as amended by the following:

AMENDMENT TO CONSENT SETTLEMENT

The Consent Settlement hereinbefore transmitted to the Commission by hearing examiner under date of January 17, 1952, in connection with the stipulation between counsel as to settlement regarding Count III in the complaint in Docket No. 5902, is amended on page 4 thereof as follows:

- (1) Eliminate the heading, including the words thereof, "COMMISSION'S CONCLUSION" as same appear on said page;
- (2) Insert at the beginning of the first line of the paragraph on said page which begins "The acts and practices * * *" the words "PARAGRAPH SEVEN."
- (3) In said first line of said paragraph strike out the word "found" as it appears therein, and insert in lieu thereof the word "stated."

SIMON & SCHUSTER INC.,
By (sgd) ALBERT N. LEVENTHAL,
Vice President.
(Title)

Date:

The foregoing amendment to the consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record this 6th day of March 1952.

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in Counts I and II of said complaint, and that dismissal of said Count III would not adversely affect this proceeding insofar as Counts I and II are concerned; and

The Commission having considered the proposed consent settlement tendered by the parties, and being of the opinion that said proposal is appropriate in all respects to dispose of the suggested new proceeding and that it should be accepted, subject only to the condition that the respondent shall, within sixty (60) days after service upon it of a notice of such acceptance, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in said consent settlement:

It is ordered, That Count III of the complaint in this proceeding be, and it hereby is, dismissed; it being understood, however, that simultaneously with this action a new complaint will be issued against the respondent embodying all of the allegations of said Count III, the issues raised by which will be disposed of by acceptance of the proposed consent settlement heretofore tendered; and it being further understood that this shall not affect in any way the continuation of this proceeding under Counts I and II of the complaint herein.

IN THE MATTER OF
INDEPENDENT GROCERS ALLIANCE DISTRIBUTING
COMPANY 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 5433. Complaint, Apr. 18, 1946—Decision, Mar. 7, 1952

Where four corporations, which were fairly typical members of a large class of manufacturers, processors and producers who sold a substantial amount of foodstuffs, groceries and allied products to wholesale grocery buyers who also purchased through the corporate agency below described—

- (a) Paid to said corporate service and purchasing agency brokerage or allowances upon purchases in connection with which said agency or intermediary acted in fact for its wholesale grocer stockholders and other wholesale grocer buyers; and

Where said agency, which was owned and controlled, directly and through two holding corporations, by wholesale grocery firms who bought through it and received the benefit of brokerage or commissions paid by sellers to it on their purchases; and which—

1. Through the operation of franchise agreements between it and its numerous affiliated wholesale grocers, received from them monthly fees as compensation for purchasing and other services rendered to them in connection with its purchase and sale of merchandise under its I. G. A. label, and, in connection with merchandise packed for sale thereunder, through the thousands of retail grocers affiliated with the I. G. A. movement, allotted and restricted the territory and channels through which said merchandise might be sold; and

2. Through contracts executed between it and aforesaid and other selected sellers, packers, manufacturers and producers, specified and controlled the quality of merchandise which they might pack and sell under said brands; controlled, restricted and designated the number and types of buyers to whom said merchandise might be sold; and through negotiation with said sellers, controlled the price at which it might be sold to said buyers;

- (b) Acting in its own behalf and in behalf of its wholesale grocer affiliates, received commissions or other compensation from sellers on purchases made by its said affiliated wholesale grocers, which it passed on to said buyer wholesalers in the form of services, including advertising allowances restricted to the promotion of said branded merchandise, known as "territorial advertising", and measured by the amount of brokerage it collected on the wholesaler's purchases of I. G. A. branded products, and in the form of stock dividends to one of aforesaid holding companies, the majority of the stock of which was owned by wholesale grocers concerned; and

Where one of said two holding companies, which owned and controlled the stock of said corporate agency, and the controlling stock of both of which was