

Complaint

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IN THE MATTER OF
SIMON AND SCHUSTER, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT¹

Docket 5902. Complaint, June 29, 1951—Decision, Feb. 11, 1956

Consent order requiring a publisher in New York City to cease fixing and maintaining resale prices and terms and conditions of sale of the publisher's editions of books which it sold to its retail book seller customers while permitting book clubs to sell their own editions of the same books in competition with such retailers at any prices and on any terms they might determine.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.

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

Wolfson, Caton & Moguel, of New York City, for Book-of-the-Month Club, Inc., *amicus curiae*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Antitrust Act, 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 respondent, has violated the provisions of Section 5 of the said Federal Trade Commission Act and Section 2 (a) of the said Clayton Antitrust Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in these respects as follows:

COUNT I

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 1230 Sixth Avenue, New York, New York.

¹ For consent settlement of Count III of complaint, see 48 F.T.C. 886.

PAR. 2. Respondent is now, and for many years last past has been, engaged directly or indirectly in the publication, distribution, and sale of popular fiction and non-fiction books, commonly known as trade books.

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.

Respondent, as part of its business, enters into agreements, understandings, or contracts with the authors of trade books, whereby the respondent is granted by the authors the exclusive rights to make, publish and sell in book form the literary works of said authors, including the right or privilege of making the hereinafter described understandings or agreements with book clubs.

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 Federal Trade Commission Act and 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 and printing plates from the States in which the several places of production and business of the respondent are located, to purchasers or to lessees 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.

Also, by virtue of, and pursuant to, the contractual relationship of respondent with book clubs, as hereinafter set forth, the latter, in the course and conduct of their businesses, are enabled to, and do, ship or cause to be shipped from the States in which they are published to purchasers located in other States and in the District of Columbia, the book club edition of books printed from the plates of particular titles leased to them by the respondent and which book club editions are sold in said commerce in competition with the afore-said publisher's editions of such books.

PAR. 4. Except in so far as it has been affected, as hereinafter alleged, respondent, in the course and conduct of its said business in commerce, has been and is now in competition with persons, firms,

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and other corporations, some of which were, and are engaged in similar businesses in commerce.

Also, except in so far as it has been affected, as hereinafter alleged, 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 and with said book clubs in the retail sale of said trade books.

PAR. 5. Respondent also, as part of its business, is now entering into and has, for many years last past, entered into agreements or understandings with so-called book clubs by which said clubs are granted exclusive delegated rights to publish, sell and distribute certain titles of said publisher's editions in what are known as book club editions. Book clubs are organizations engaged in the business of publishing trade books and in the sale and distribution thereof by the mail order method at retail. Among the book clubs with which respondent made said agreements or understandings are the Book-of-the-Month Club and The Literary Guild of America, Inc. Under said agreements or understandings, the terms of which are hereinafter more particularly alleged, printing plates are leased by the respondent to the book clubs for use in printing book club editions. There is a publisher's edition of each title of which there is a book club edition, and both editions are contemporaneously available, are alike, the same, or practically the same, in design, format, quality, size and appearance, and are sold in competition with each other.

PAR. 6. The said agreements or understandings between respondent and the book clubs provide that, in consideration of leasing the aforesaid printing plates, together with additional rights granted the book clubs as herein set forth, the clubs pay to respondent certain specified royalties, the total amounts of which are dependent, directly or indirectly, upon the number of copies of book club editions sold by said book clubs. Said agreements or understandings generally also provide that respondent shall fix and maintain specific minimum prices for the resale of the publisher's editions of the books bearing the titles covered by said agreements or understandings for a period of not less than one year from the dates of publication thereof.

These fixed resale prices in some instances are in excess of the prices which the book club charges its purchasers for the book club edition of the same title.

Under the provisions of the agreements or understandings which respondent has with each of the book clubs, the club receives from the respondent the exclusive delegated rights to use the printing

plates of books of the particular titles selected by said club for a specified period which usually is for two or more years. During such period, the book club is enabled to exercise such exclusive rights in producing, selling and offering for sale the books printed from the plates thus selected, at any price and on any terms or conditions that the said club may determine.

PAR. 7. Furthermore, in accordance with, and pursuant to, its understandings or agreements with said book clubs, the respondent has refused to offer or to grant, such leasing of plates and such other rights to its retail book seller customers who, in selling or offering to sell the publisher's editions, compete with said book clubs in their retail sale of the book club editions of the same title.

PAR. 8. The execution of the provisions in the aforesaid agreements between the respondent and the book clubs, whereby the respondent agrees to fix and maintain, for the period of agreement, the prices at which the retail book seller customers are to resell the publisher's editions of books which are sold in competition with the book club edition of said books, gives the book club an unfair competitive advantage.

PAR. 9. As a result of the respondent leasing the printing plates for a particular title to a book club in the manner hereinbefore described, it is selling and distributing, and knowingly and intentionally granting the means of selling and distributing, in commerce, for resale within the United States and in the District of Columbia, a publisher's edition and a book club edition of the same book, which editions are, in effect, of the same grade and quality, and which are sold in competition one with the other. The respondent is indirectly discriminating between its retail book seller customers, to whom it sells, for the purpose of resale, such publisher's editions, and its book club customers, to whom it leases the plates from which it knows that such book club editions will be printed, by imposing the afore-described restrictions and conditions only on the resale of such publisher's editions by its retail book seller customers and by granting the leasing and other rights, hereinbefore set forth, only to its book club customers.

PAR. 10. The result and effect of such understandings, agreements, contracts, arrangements, discriminations and of the system itself, have been, and are, that the competition between the respondent's retail book seller and book club customers has been and is now, substantially lessened, that the said book club customers have received an unfair competitive advantage over said retail book seller customers and have tended, and are now tending, to create in said book club customers a monopoly in the sale and distribu-

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tion, in commerce, in the books, the titles to which said book clubs have leased the printing plates.

PAR. 11. The acts, practices, methods, understandings and agreements of respondent, as hereinabove alleged, are all to the prejudice of the public, have a dangerous tendency to, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition in the sale and distribution in commerce of trade books within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club customers over respondent's retail book seller customers; have a dangerous tendency to destroy, hinder and prevent the resale by respondent's retail book seller customers not only of publisher's editions of the books sold in competition with the book club editions of such books, but also of other trade books; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. The allegations of Paragraph 5 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 6. Respondent, by contracts, agreements, understandings or suggestions, has fixed and maintained, and now fixes and main-

tains, at least for specified periods, the minimum prices at which the publisher's editions of certain of its trade books are to be resold by its retail book seller customers.

PAR. 7. Also respondent, in some instances, illegally has attempted to fix and maintain, and has fixed and maintained, such minimum prices at which the publisher's editions of certain of its trade books were to be resold by some of its retail book seller customers, even though such customers did not enter into any contract or agreement with respondent regarding such prices but such contracts or agreements had been entered into within the same State by and between respondent and others of its retail book seller customers.

PAR. 8. The contracts, agreements, understandings or suggestions whereby respondent has fixed and maintained and now fixes and maintains, at least for specified periods, the aforementioned minimum resale prices for its publisher's editions of certain of its trade books are also illegal, at least with reference to some of such books, including those the titles to which are selected and the printing plates for which are leased by the book clubs, in the manner hereinbefore described, in that they are not sold or resold in free and open competition with commodities of the same general class, that is, with trade books produced or distributed by others. Respondent is the only publisher of the publisher's editions of the trade books which it sells and distributes in the United States.

PAR. 9. Respondent has maintained the direct observance of said fixed resale prices on the publisher's edition of such books and has enforced indirect observance by prohibiting, in connection with the resale thereof at said fixed prices, the granting of any premium, gift, dividend, or other thing of value.

PAR. 10. Under the provisions of the understandings or agreements which the respondent has with the book clubs, these clubs received not only the exclusive delegated rights for a specified period to use the printing plates for the publication of the book club edition for the particular titles which the club has selected, but the said clubs were permitted to, and do, sell such editions in competition with the said publisher's editions of the same titles at any price and on any terms or conditions they may determine. Respondent's retail book seller customers have thereby been placed at a competitive disadvantage in the sale and distribution of such publisher's editions.

PAR. 11. The acts, practices, methods and agreements of respondent, as hereinbefore alleged, are all to the prejudice of the public, have a dangerous tendency to and have actually frustrated,

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hindered, suppressed, lessened, restrained and eliminated competition in the sale and distribution of trade books in commerce within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club customers over respondent's retail book seller customers; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT III

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. Respondent in the course and conduct of its said business, in commerce, has been for many years last past, and more particularly 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 products to some purchasers at higher prices than it sells such products of like grade and quality to other purchasers, and many 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 alleged.

Respondent has priced and sold its publisher's editions at list prices, which are the minimum resale prices fixed by contract or otherwise by respondent, less specific discounts allowed to each class of purchasers among which are jobbers or wholesalers.

Respondent has priced and sold said books to some jobbers or wholesalers at said list prices less a discount of 43%, irrespective

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of the number of copies of a title purchased. Respondent has priced and sold said books to other jobbers or wholesalers, who are in competition with those jobbers or wholesalers receiving the aforementioned discount above described, 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 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).

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C.A. 45), the Federal Trade Commission on June 29, 1951, issued its complaint in this proceeding and duly served same upon respondent, 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, New York. Said complaint was issued simultaneously with similar complaints, charging substantially the same violations of law, against five other publishing firms one of which was that against Doubleday & Company, Inc., Docket 5897. Counts I and II of the complaint herein were substantially similar to Counts I and II in the Doubleday complaint. Counsel in all of these proceedings agreed that since the issues were substantially the same in Counts I and II that the proceeding against Doubleday & Company, Docket 5897, would be fully tried first and after the taking of evidence in that case was closed, counsel in the other cases further agreed that the record in the matter of Doubleday & Company, Inc., Docket 5897, would be taken by them as the record in each of the individual cases. Under date of August 31, 1955, the Commission issued its final order in the Doubleday case which order has not been appealed from.

Thereafter, on December 29, 1955, there was submitted to the undersigned examiner an agreement between the respondent and counsel supporting the complaint providing for the entry of a

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consent order which is identical with the order of the Commission in the Doubleday case in so far as it applies to Counts I and II of that case. By the terms of said agreement respondent admits all the jurisdictional facts alleged in the complaint served upon it; the parties thereto agree that the record may be taken as if findings of such jurisdictional facts had been duly made in accordance with such allegations; agree that such agreement disposes of this proceeding; agree that the answer of respondent herein to the complaint shall be considered as having been withdrawn; agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; agree that the agreement shall not become a part of the official record until and unless it becomes a part of the decision of the Commission; agree that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint. By such agreement respondent waives any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered into in accordance with this agreement. Such agreement further provides that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to the respondent, and that when so entered it shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The Hearing Examiner having considered the agreement and proposed order and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted. The hearing examiner further finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and that the proceeding is in the public interest and in accordance with such agreement hereby enters the following order.

ORDER

It is ordered, That 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 publication, sale or distribution of trade books in commerce, as "commerce" is defined, construed and understood in the Federal

Trade Commission Act (15 U.S.C.A., Section 45) do forthwith cease and desist from:

Entering into, maintaining or continuing any contract, agreement or understanding of any nature with any book club or similar organization whereby respondent, while exempting said book club or organization from any responsibility for resale price maintenance, undertakes to fix, establish or maintain the resale price, terms or conditions of sale of any literary work which it publishes and sells and which it also sublicenses such book club or organization to publish and sell, in any area wherein said book club or organization and retail booksellers purchasing from respondent compete with one another in the sale of such work.

It is further ordered, That any and all other charges contained in the complaint are herewith dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 11th day of February, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this 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.

IN THE MATTER OF
GENERAL FOODS CORPORATION

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SECS. 2 (a), 2 (d), AND 2 (e) OF THE CLAYTON ACT

Docket 6018. Complaint, July 29, 1952—Decision, Feb. 15, 1956

Order requiring a corporation, engaged in the sale and distribution of its packaged food products, many of them nationally advertised and the subject of considerable consumer demand, and with annual sales in excess of \$500,000,000, to cease discriminating in price in violation of Sec. 2 of the Clayton Act, as amended, through—

- (1) Selling to its Institution Contract Wagon Distributor customers (ICWDs) its institution-pack grocery items for 10% less than the price it charged competing conventional wholesalers, and its institution coffee at two cents (2¢) per pound less, in violation of Sec. 2 (a); and
- (2) Furnishing its ICWDs with institution-size packaging of its products and institution blends of coffee, without making such packaging and blends available to competing conventional wholesalers on proportionally equal terms in violation of Sec. 2 (e); and

Dismissing for want of proof Count II of the complaint, charging violation of Sec. 2 (d) of the Clayton Act.

Mr. Eldon P. Schrup and Mr. Francis C. Mayer for the Commission.

Mr. Lester E. Waterbury, Mr. Frederick F. Mack and Mr. Frederick H. Heck, of White Plains, N. Y., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondent, General Foods Corporation, is charged in this proceeding, in three separate counts of the complaint, with having violated Sections 2 (a), 2 (d) and 2 (e) of the Clayton Act (U.S.C. Title 15, Sec. 13) as amended by the Robinson-Patman Act. The pertinent parts of these sections are as follows:

SEC. 2. (a): * * * it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent dif-