

Decision

IN THE MATTER OF
HARPER & BROTHERS

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND OF SEC. 2 (a) OF THE CLAYTON ACT

Docket 5898. Complaint, June 29, 1951—Decision, Mar. 22, 1956

Consent order—identical with the order in the *Doubleday*¹ case—requiring a New York City corporate book publisher to cease discriminating in price in the sale of trade books, through granting book clubs which leased them the printing plates, exclusive rights to publish, sell, and distribute “book club editions” of certain titles of their trade books; and fixing and maintaining minimum resale prices for its publisher’s editions of certain of its trade books sold to retail book sellers, while permitting book clubs to sell their “book club editions” of the same titles at any prices and on any terms and conditions; and order requiring it to cease selling its trade books at higher prices to some purchasers than to certain of their competitors.

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

Mr. Alexander S. Andrews, of New York City, for respondent.

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

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C.A. 45) and of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C.A. 13), the Federal Trade Commission on June 29, 1951, issued its complaint in this proceeding and duly served same upon respondent, a corporation under the laws of the State of New York, with its principal office and place of business located at 49 East 33rd Street, New York, New York. Said complaint was issued simultaneously with five other similar complaints against other publishing firms, one of which was against Doubleday & Company, Inc., Docket 5897. Counts I and II of the complaint herein are substantially the same as Counts I and II of the Doubleday complaint. Counsel in all of these proceedings agreed that since the issues were substantially the same in Counts I and II of the six complaints, that the proceeding against Doubleday & Company, Inc., Docket 5897, would be fully tried first, and after the taking of evidence in that case was closed, counsel in the other cases,

¹ *Doubleday & Co., Inc.*, D. 5897, Aug. 31, 1955. See p. 169 of this volume.

including counsel for respondent herein, further agreed that the record in the Doubleday case Docket 5897 would be taken by them as the record in each of their individual cases for Counts I and II thereof. Under date of August 31, 1955, the Commission issued the final order in the Doubleday case, which order has not been appealed from.

Accordingly, on January 12, 1956, there was submitted to the undersigned examiner an agreement between the respondent and counsel supporting the complaint providing for the entry of a 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.

Count III of this proceeding alleges a price discrimination charge against this respondent in its distribution of its publications in interstate commerce. After a substantial amount of evidence in support of this charge had been received, counsel for respondent entered into a stipulation with counsel in support of the complaint on February 14, 1952, which reads as follows:

IT IS HEREBY STIPULATED AND AGREED by and between Fletcher G. Cohn and Lewis F. Depro, Attorneys in support of the complaint, and Alexander S. Andrews, Attorney for the respondent herein, that, the following statement of matters alleged and set out in said Count III of said complaint, which are hereinafter set forth in PARAGRAPHS 1 to 6, inclusive, may be made a part of the record of evidence herein and may be taken, together with the evidence as hereinbefore presented at hearings before the said Hearing Examiner, either in the form of oral testimony or exhibits, as evidence in this proceeding, and in lieu of any further evidence in support of the charges stated in said Count III of said complaint, or in opposition thereto; and that the said hearing examiner may proceed upon said evidence and the record herein to make his initial decision as to said Count III of said complaint, stating his Findings as to the Facts, including inferences which he may draw from the matters herein stipulated and the record herein, and his Conclusion based thereon, and including an Order to Cease and Desist disposing of this proceeding, without the presentation of arguments, or the filing of briefs or other intervening proceedings relating to said Count III, and that the Commission likewise may proceed upon the matters herein stipulated and the record herein to make its Findings as to the Facts and Conclusion thereto and enter its Order disposing of this proceeding, without the presentation of arguments, or the filing of briefs or other intervening proceedings relating to said Count III:

PARAGRAPH 1. Respondent, Harper & Brothers, 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 49 East 33rd Street, New York, 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 popular fiction and non-fiction books, commonly known as trade books.

Respondent was incorporated in 1900 and since then has become, and is now, one of the largest publishers of 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

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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 said trade books are produced 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 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 is specified to the contrary in Paragraph 6 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 is specified to the contrary in Paragraph 6 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 for many years, and more particularly since June 19, 1936, either directly or indirectly, discriminated in price between different purchasers of its said trade books by selling such products to some purchasers at higher prices than it sold 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 books within the United States, except as it has been affected.

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.

Said discriminations by respondent were, and are, that it has priced and sold said books to some jobbers or wholesalers at said list prices with the following schedule of discounts being applicable thereto:

Number of copies ordered of same title:	Discount (percent)
1- 49 -----	41
50- 99 -----	42
100-249 -----	43

Whereas, 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 discounts, at list prices with the following schedule of discounts being applicable thereto:

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Number of copies ordered of same title:	Discount (percent)
1- 99 -----	43
100-249 -----	44

PAR. 6. The effect of the aforesaid discriminations or of any appreciable part thereof 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 the customers of either of them.

* * * * *

IT IS FURTHER SPECIFICALLY STIPULATED AND AGREED that any and all admissions made by the respondent herein are solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review thereof in the Supreme Court of the United States, or for any other proceeding in connection therewith, which may be brought or instituted by or on behalf of the United States Government or any agency thereof by virtue of the authority contained in the Federal Trade Commission Act and the aforesaid Clayton Act, as amended by said Robinson-Patman Act.

IT IS FURTHER STIPULATED AND AGREED between Counsel that they hereby jointly recommend to the hearing examiner that in his initial decision, insofar as same pertains to Count III of the aforesaid complaint, and to the Commission in its final disposition of the case, insofar as same pertains to said Count III of said complaint, adopt as the Order to Cease and Desist the following:

It is ordered, That the respondent, Harper & Brothers, 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.

In view of the foregoing, and after consideration of the agreement and proposed order applicable to Counts I and II and the stipulation of facts and order applicable to Count III, the hearing examiner is of the opinion that they provide an appropriate disposition of this proceeding, and the agreement and stipulation is

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accepted. The hearing examiner further finds the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, that the proceeding is in the public interest, finds the facts as stipulated to in Count III and in accordance with the agreement and the stipulation hereby enters the following order.

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It is ordered, That respondent Harper & Brothers, 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 sub-licenses 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 the respondent, Harper & Brothers, 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.

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

ORDER GRANTING APPEAL

It appearing that the hearing examiner filed his initial decision herein January 20, 1956, based upon a stipulation and an agreement between respondent and counsel in support of the complaint; and

It appearing further that respondent has noted an appeal from said initial decision seeking to have the first paragraph of Para-

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graph 5 thereof amended in certain respects, to which amendment counsel in support of the complaint have interposed no objection in their reply to said appeal; and

The Commission being of the opinion that the amendment sought by the appeal does not alter the initial decision in any material respect and since counsel in support of the complaint do not oppose the said proposed changes:

It is ordered, That the first paragraph of Paragraph 5 of the hearing examiner's initial decision be changed to read as follows:

"PAR. 5. Respondent in the course and conduct of its said business, in commerce, has for many years, and more particularly since June 19, 1936, either directly or indirectly, discriminated in price between different purchasers of its said trade books by selling such products to some purchasers at higher prices than it sold 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 books within the United States, except as it has been affected."

It is further ordered, That respondent's alternative request on appeal, namely that there be added at the end of said Paragraph 5 the sentence "All findings in this Paragraph 5 refer exclusively to times prior to July 1, 1953," be, and it hereby is, denied for the reason that there is no proof in the record to support such finding.

It is further ordered, That, as so modified, the initial decision did, on the 22nd day of March, 1956, become the decision of the Commission.

It is further ordered, That Harper & Brothers, 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
THE NORITO COMPANY ET AL.

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

Docket 6494. Complaint, Jan. 12, 1956—Decision, Mar. 27, 1956

Order requiring drug distributors in Chicago to cease advertising falsely the therapeutic properties, nature, method of operation, etc. of its "Norito-Plus Tablets" represented to be a specific treatment for all kinds of arthritis and rheumatism.

Mr. Morton Nesmith for the Commission.
Nash & Donnelly, of Chicago, Ill., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On January 12, 1956, the Federal Trade Commission issued its complaint in this proceeding, charging the Respondents with unfair and deceptive acts and practices in commerce by the use of false, misleading and deceptive representations in the sale and distribution in commerce of their drug product, designated "Norito-Plus Tablets", in violation of the Federal Trade Commission Act.

On February 6, 1956, counsel for Respondents submitted their answer to the complaint herein, admitting all material allegations of said complaint to be true. Under the provisions of Section 3.7 (2) of the Commission's Rules of Practice, such an answer constitutes a waiver of hearing as to the facts alleged in the complaint, and the Hearing Examiner is directed to issue an initial decision containing appropriate findings and conclusions and an appropriate order. Accordingly, on the basis of the complaint and admission answer, the Hearing Examiner finds the facts to be as follows:

1. Respondent, The Norito Company, is an Illinois corporation, having its office and principal place of business located at 225 North Michigan Avenue, Chicago, Illinois. Respondent I. R. F. Spiegel is an individual having the same office and principal place of business as the corporate respondent, and serving as president and a director thereof. In such capacity, Respondent Spiegel, during the time mentioned herein, formulated, directed and controlled the practices of the corporate respondent, including those here involved.

2. Respondents are now, and have been for more than one year last past, engaged in the business of offering for sale, selling and