

Complaint

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VIII

Jurisdiction is retained so that respondent may at any time hereinafter petition the Commission for construction or modification of this Order which the Commission will consider and, upon proper showing by respondent, allow to the extent it finds such construction or modification to be warranted and consistent with Section 7 of the amended Clayton Act.

IN THE MATTER OF

HMH PUBLISHING CO., INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (d) OF THE
CLAYTON ACT

Docket 8516. Complaint, June 29, 1962—Decision, Mar. 28, 1963

Order requiring the Chicago publisher of "Playboy" magazine, among others, with sales for 1960 in excess of \$3,500,000, to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by making payments to certain operators of chain retail outlets in railroad, airport, and bus terminals, and in hotels and office buildings without making comparable payments available to their competitors, and making the payments to the favored customers on the basis of individual negotiations and not on proportionally equal terms.

COMPLAINT

The Federal Trade Commission having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent HMH Publishing Co., Inc., is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 232 East Ohio Street, Chicago, Illinois. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Playboy". Respondent's sales of publications during the calendar year 1960 exceeded three and one-half million dollars.

PAR. 2. Publications published by respondent are distributed by respondent to customers through its national distributor, Independent News Co., Inc., hereinafter referred to as Independent News.

Independent News has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publisher. Independent News, as national distributor of publications published by respondent and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by Independent News for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. Independent News also had participated in the negotiation of various promotional arrangements with the retail customers of said publishers, including said respondent.

In its capacity as national distributor for respondent in dealing with the customers of respondent, Independent News served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondent. "Playboy" is among the most popular and widely circulated magazines in the United States and is distributed throughout various States by Independent News through local distributors to retail customers.

PAR. 3. Respondent, through its conduit or intermediary, Independent News, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of such publications.

PAR. 5. As an example of the practices alleged herein, respondent has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1960, and during the first six months of 1961, which were not offered to other

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competing customers in connection with the purchase and sale of respondent's publications were:

Customer	Approximate Amount Received	
	1960	1961 (Jan.-June)
ABC Vending Corp., Long Island City, N.Y.-----	\$1,715.84	\$950.72
Faber-Coe & Gregg, New York City-----	1,616.43	3,517.64
Greyhound Post Houses, Forest Park, Ill.-----	5,371.10	7,118.20
Interstate Co., Los Angeles, Calif.-----	657.30	1,280.63
Union News Co., New York City-----	30,742.63	20,168.41

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

PAR. 6. The acts and practices of respondent as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

Mr. Stanley M. Lipnick for the Commission.

Mr. G. Duane Vieth and *Mr. Stuart J. Land*, of *Arnold, Fortas & Porter*, of Washington, D.C.,

Mr. Maurice Rosenfield, of Chicago, Ill. for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

FEBRUARY 5, 1963

The complaint herein was issued by the Commission on June 29, 1962, wherein the respondent is charged with having made discriminatory payments to some of its customers in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The respondent filed its answer on September 4, 1962, admitting in part and denying in part the allegations of the complaint and asserted an affirmative defense that any payments made by it were granted to meet equal and comparable payments of one or more of its competitors. On September 11, 1962, counsel for the parties met with the hearing examiner for a prehearing conference and an order was issued reciting the results of the conference. The order contained a directive to each party to prepare a trial brief setting forth a statement of anticipated issues and disclosing, among other things, the names of the witnesses and the documentary exhibits which the party plans to introduce. The order further provided that a party may not introduce any testimony or exhibits which have not been referred to in his trial brief. Complaint counsel was to submit his trial brief on or before October 1, 1962, and the respondent on or before October 22, 1962. Complaint counsel complied with such directive and submitted a trial brief which was prepared in a commendable manner.

A motion of respondent that the time to file its trial brief be extended to November 9, 1962, was granted. On November 9, 1962, respondent filed a motion for leave to withdraw the answer to the complaint filed on September 4, 1962, and to file a substitute answer submitted with the motion. The substitute answer read: "Pursuant to Section 4.5 (b) (2) of the Commission's Rules of Practice, respondent admits all material allegations of the complaint. Respondent reserves the right to submit proposed findings and conclusions and the right to petition for review under Section 4.20 of the Rules of Practice."¹ Complaint counsel filed answer to the motion wherein he did not oppose respondent's motion to file the substitute answer with the reservation that such answer should not foreclose him from putting into the record evidence relating to the scope of the order which should be issued.

On November 20, 1962, counsel for the parties again met with the hearing examiner, at which time the hearing examiner announced that he would issue an order granting leave to the respondent to file the substitute answer. Thereupon complaint counsel stated that he wished to present certain evidence which would bear upon the scope of an order to be entered herein. Respondent's counsel opposed the request. After some discussion, it was agreed that complaint counsel would file a motion requesting that the matter be set for hearing for the stated purpose and respondent would be given the opportunity to file answer to such a motion. At the conference, complaint counsel stated specifically the type of evidence that he intended to present and the meeting was adjourned with the understanding that counsel for the parties would confer with the view of attempting to enter into a stipulation which would make it unnecessary to have any hearings in this proceeding. An order was entered granting leave to respondent to file the aforementioned substitute answer. There was submitted to the hearing examiner a stipulation, dated November 23, 1962, executed by counsel for the parties and on November 29, 1962, an order was issued receiving the said stipulation into the record herein, closing the record for the receipt of evidence and fixing January 4, 1963, and January 21, 1963, for the filing of proposed findings and replies thereto, respectively. Proposed findings of fact, conclusions of law and order were filed by counsel for the parties.

The hearing examiner has given consideration to the proposed

¹ Section 4.5(b)(2) of the Commission's Rules reads:

"(2) *Admitting allegations of complaint.* If the respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearings as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer, the respondent may, however, reserve the right to submit proposed findings and conclusions and the right to petition for review under § 4.20."

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findings filed by the parties hereto and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

The material allegations of the complaint in this proceeding, which are admitted by the respondent in its substitute answer, read:

PARAGRAPH ONE: Respondent HMH Publishing Co. Inc., is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 232 East Ohio Street, Chicago, Illinois. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Playboy". Respondent's sales of publications during the calendar year 1960 exceeded three and one-half million dollars.

PARAGRAPH TWO: Publications published by respondent are distributed by respondent to customers through its national distributor, Independent News Co., Inc., hereinafter referred to as Independent News.

Independent News has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publisher. Independent News, as national distributor of publications published by respondent and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by Independent News for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. Independent News also had participated in the negotiation of various promotional arrangements with the retail customers of said publishers, including said respondent.

In its capacity as national distributor for respondent in dealing with the customers of respondent, Independent News served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondent. "Playboy" is among the most popular and widely circulated magazines in the United States and is distributed throughout various States by Independent News through local distributors to retail customers.

PARAGRAPH THREE: Respondent, through its conduit or intermediary, Independent News, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PARAGRAPH FOUR: In the course and conduct of its business in commerce, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of such publications.

PARAGRAPH FIVE: As an example of the practices alleged herein, respondent has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances

were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1960, and during the first six months of 1961, which were not offered to other competing customers in connection with the purchase and sale of respondent's publications were:

<i>Customer</i>	<u><i>Approximate Amount Received</i></u>	
	<i>1960</i>	<i>1961 (Jan.-June)</i>
ABC Vending Corp., Long Island City, N.Y.-----	\$1,715.84	\$950.72
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Interstate Co., Los Angeles, Calif.-----	657.30	1,280.63
Union News Co., New York City-----	30,742.63	20,168.41

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

PARAGRAPH SIX: The acts and practices of respondent as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

By stipulation of November 23, 1962, entered into by counsel supporting the complaint and counsel for respondent, it was agreed that the evidentiary record herein, in addition to the complaint and the substitute answer, shall include the following:

1. Respondent made the following payments to the following persons in addition to the payments listed in Paragraph 5 of the Complaint. The payments were made on substantially the same terms applicable to the payments listed in the said Paragraph 5:

	<u><i>Approximate Amount Received July 1961 to July 1962</i></u>
ABC Vending Corp., Long Island City, New York-----	\$2,097.04
Union News Co., New York, New York-----	56,300.16

2. The Federal Trade Commission has never issued a cease-and-desist order against Respondent under Section 2(d) of the Clayton Act or under any other statute administered by the Commission. Prior to the Complaint herein, no complaint charging a violation of any of such statutes had been issued against Respondent.

The sole question involved is the appropriate order to be entered herein. In the complaint, there is set forth the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. Counsel in support of the complaint proposes such order. It reads:

IT IS ORDERED that respondent HMH Publishing Co., Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value

