

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA)	Criminal No.: 2003 CR-00114-001
)	
v.)	Filed: March 11, 2003
)	
NEW YORK PERIODICAL DISTRIBUTORS, INC.,)	Violation: 15 U.S.C. § 1
)	
Defendant.)	

PLEA AGREEMENT

The United States of America and New York Periodical Distributors, Inc. ("NYP"), a corporation organized and existing under the laws of the State of New York, hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

RIGHTS OF NYP

1. NYP understands its rights:
 - (a) to be represented by an attorney;
 - (b) to be charged by Indictment;
 - (c) to plead not guilty to any criminal charge brought against it;
 - (d) to have a trial by jury, at which it would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for it to be found guilty;
 - (e) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;

- (f) to appeal its conviction if it is found guilty at trial; and
- (g) to appeal the imposition of sentence against it.

**AGREEMENT TO PLEAD GUILTY
AND WAIVE CERTAIN RIGHTS**

2. NYP waives the rights set out in Paragraph 1(b)-(f) above. NYP also waives the right to appeal the imposition of sentence against it, so long as the sentence imposed is consistent with the recommendation in Paragraph 8 of this Plea Agreement. Nothing in this paragraph, however, shall act as a bar to NYP perfecting any legal remedies NYP may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct. The defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct. Pursuant to Fed. R. Crim. P. 7(b), NYP will waive indictment and plead guilty at arraignment to a one-count Information in the form attached to be filed in the United States District Court for the Northern District of New York. The Information will charge NYP with participating in a conspiracy to suppress and eliminate competition by allocating markets for the wholesale distribution of magazines, other periodicals, and books in Central New York State, from at least fall 1998 to summer 2000, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

3. NYP, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below.

FACTUAL BASIS FOR OFFENSE CHARGED

4. Had this case gone to trial, the United States would have presented evidence to prove the following facts:

- (a) For purposes of this Plea Agreement, the “relevant period” is that period from at least fall 1998 to summer 2000. During the relevant period, NYP was a corporation organized and existing under the laws of the State of New York. NYP has its

principal place of business in Massena, New York. During the relevant period, NYP was a wholesale distributor of magazines, other periodicals, and books in Central New York State. Wholesale distributors receive magazines, other periodicals, and books directly from publishers and national distributors, and then distribute them to retailers for sale to the general public.

(b) During the relevant period, NYP, through its directors, officers, and employees, participated in a conspiracy between NYP and another wholesale distributor and its affiliates, the primary purpose of which was to divide up markets for the wholesale distribution of magazines, other periodicals, and books in Central New York State. In furtherance of the conspiracy, NYP, through its directors, officers, and employees, engaged in discussions with these competitors. During these communications, an agreement was reached to divide up the areas that their companies would serve in Central New York State.

(c) During the relevant period, magazines, other periodicals, and books distributed by one or more of the conspirator firms, and equipment and supplies necessary for such distribution, as well as payments for the items and for their distribution, traveled in interstate commerce. The business activities of NYP and its co-conspirators in connection with the wholesale distribution of magazines, other periodicals, and books affected by this conspiracy were within the flow of, and substantially affected, interstate trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the Northern District of New York. Conspirators met and discussed their market allocation agreement, on at least one occasion, at a place located within the Northern District of New York.

POSSIBLE MAXIMUM SENTENCE

5. NYP understands that the maximum penalty which may be imposed against it upon conviction for a violation of Section One of the Sherman Antitrust Act is a fine in an amount equal to the greatest of:

- (a) \$10 million (18 U.S.C. § 1);
- (b) twice the gross pecuniary gain the conspirators derived from the crime (18 U.S.C. § 3571(c) and (d)); or
- (c) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (18 U.S.C. § 3571(c) and (d)).

6. In addition, NYP understands that:

- (a) pursuant to § 8B1.1 of the United States Sentencing Guidelines ("U.S.S.G."), the Court may order it to pay restitution to the victims of the offense;
- (b) pursuant to 18 U.S.C. § 3013(a)(2)(B) and U.S.S.G. § 8E1.1, the Court is required to order NYP to pay a \$400 special assessment upon conviction for the charged crime; and
- (c) pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but not more than five years.

SENTENCING GUIDELINES

7. Sentencing for the offense to be charged will be conducted pursuant to the U.S.S.G. Manual in effect on the day of sentencing. Pursuant to U.S.S.G. § 1B1.8, the United States agrees that self-incriminating information that NYP provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to NYP or in determining NYP's applicable sentencing guidelines range, except to the extent provided in U.S.S.G. § 1B1.8(b).

SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and NYP agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose, a sentence requiring NYP to pay to the United States a criminal fine of \$500,000, payable in installments as set forth below with interest accruing under 18 U.S.C. § 3612(f)(1)-(2), with no term of probation (“the recommended sentence”).

(a) The United States and NYP agree to recommend, in the interest of justice pursuant to 18 U.S.C. § 3572(d)(1) and U.S.S.G. § 8C3.2(b), that the fine be paid in the following installments: within thirty (30) days of imposition of sentence -- \$80,000 (plus any accrued interest); at the one-year anniversary of imposition of sentence (“anniversary”) -- \$80,000 (plus any accrued interest); at the two-year anniversary -- \$80,000 (plus any accrued interest); at the three-year anniversary -- \$80,000 (plus any accrued interest); at the four-year anniversary -- \$80,000 (plus any accrued interest); and at the five-year anniversary -- \$100,000 (plus any accrued interest); provided, however, that NYP shall have the option at any time before the five-year anniversary of prepaying the remaining balance (plus any accrued interest) then owing on the fine.

(b) NYP understands that the Court will order it to pay a \$400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B) and U.S.S.G. § 8E1.1, in addition to any fine imposed.

(c) The United States and NYP jointly submit that this Plea Agreement, together with the record that will be created by the United States and NYP at the plea and sentencing hearings, and the further disclosure described in Paragraph 10, will provide sufficient information concerning NYP, the crime charged in this case, and NYP’s role in the crime to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553. The United States agrees not to oppose NYP’s request that the Court accept NYP’s guilty plea and impose sentence on an expedited schedule as early as the

date of arraignment, based upon the record provided by NYP and the United States, under the provisions of Fed. R. Crim. P. 32(c)(1)(A)(ii) and U.S.S.G. § 6A1.1. The Court's denial of the request to impose sentence on an expedited schedule will not void this Plea Agreement.

9. The United States and NYP agree that the applicable sentencing guidelines fine range exceeds the fine contained in the recommended sentence set out in Paragraph 8 above. The United States and NYP further agree that the recommended fine is appropriate, due to the inability of NYP to pay a fine greater than that recommended without substantially jeopardizing its continued viability, pursuant to U.S.S.G. § 8C3.3(b), and in consideration of NYP's past and continuing cooperation and timely assistance in the investigation of other corporations and individuals in the magazine distribution industry pursuant to the Antitrust Division's program for self-reporting of violations. The United States agrees to advise the Court of the significance and usefulness of the cooperation and assistance of NYP referenced in the NYP Cooperation Agreements.

10. Subject to the ongoing, full, and truthful cooperation of NYP described in Paragraph 13 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court of the fact, manner, and extent of NYP's cooperation and its commitment to prospective cooperation with the United States' investigations and prosecutions, all material facts relating to NYP's involvement in the charged offense, and all other relevant conduct.

11. The United States and NYP understand that the Court retains complete discretion to accept or reject the recommended sentence provided for in Paragraph 8 of this Plea Agreement.

(a) If the Court does not accept the recommended sentence, the United States and NYP agree that this Plea Agreement, except for Paragraph 11(b) below, shall be rendered void.

(b) If the Court does not accept the recommended sentence, NYP will be free to withdraw its guilty plea (Fed. R. Crim. P. 11(c)(5)). If NYP withdraws its plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government shall not be admissible against NYP in any criminal or civil proceeding, except as otherwise provided in Fed. R. Crim. P. 11(f). In addition, NYP agrees that, if it withdraws its guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any offense referred to in Paragraph 15 of this Plea Agreement will be tolled for the period between the date of the signing of the Plea Agreement and the date NYP withdrew its guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater.

12. Civil causes of action are available, which potentially provide for a recovery of a multiple of actual damages. Moreover, determining complex issues of fact related to the cause and amount of any losses incurred by victims would complicate and prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process. Therefore, the United States agrees that it will not seek a restitution order for the offense charged in the Information.

NYP'S COOPERATION

13. NYP will cooperate fully and truthfully with the United States in the prosecution of this case and any litigation or other proceedings arising or resulting therefrom to which the United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of NYP shall include, but not be limited to:

(a) producing to the United States all documents, information, and other materials, wherever located (except documents qualified as privileged under the laws of the United States or protected under the work product doctrine), in the possession,

custody, or control of NYP, requested by the United States in connection with any Federal Proceeding;

(b) securing the ongoing, full, and truthful cooperation, as defined in Paragraph 14 of this Plea Agreement, of Paul Benjamin and Edward Murphy, including making such persons available in the United States, at NYP's expense, for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding; and

(c) using its best efforts to secure the ongoing, full, and truthful cooperation, as defined in Paragraph 14 of this Plea Agreement, of the current and former directors, officers, and employees of NYP, in addition to those specified in subparagraph (b) above, as may be requested by the United States, including making these persons available in the United States, at NYP's expense, for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding.

14. The ongoing, full, and truthful cooperation of each person described in either Paragraph 13(b) or 13(c) above will be subject to the procedures and protections of this paragraph, and shall include, but not be limited to:

(a) producing in the United States all documents, including claimed personal documents, and other materials, not privileged under United States law, wherever located, requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews in the United States, not at the expense of the United States, upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503);

(d) otherwise voluntarily providing the United States with any non-privileged material or information not requested in (a) - (c) of this paragraph that he or she may have that is related to any Federal Proceeding;

(e) when called upon to do so by the United States in connection with any Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings in the United States fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402), and obstruction of justice (18 U.S.C. § 1503); and

(f) agreeing that, if the agreement not to prosecute him or her in this Plea Agreement is rendered void under Paragraph 16(c), the statute of limitations period for any Relevant Offense as defined in Paragraph 16(a) will be tolled as to him or her for the period between the date of the signing of this Plea Agreement and six (6) months after the date that the United States gave notice of its intent to void its obligations to that person under the Plea Agreement.

GOVERNMENT'S AGREEMENT

15. Upon acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, and subject to the cooperation requirements of Paragraph 13 of this Plea Agreement, the United States agrees that it will not bring further criminal charges against NYP for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of the antitrust conspiracy involving the wholesale distribution of magazines, other periodicals, and books in Central New York State described in the Information. The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

16. The United States agrees to the following:

(a) Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence and subject to the exceptions noted in Paragraph 16(c), the United States will not bring criminal charges against any current or former director, officer, or employee of NYP for any act or offense committed before the date of this Plea Agreement and while that person was acting as a director, officer, or employee of NYP that was undertaken in furtherance of the antitrust conspiracy involving the wholesale distribution of magazines, other periodicals, and books in Central New York State described in the Information ("Relevant Offense");

(b) Should the United States determine that any current or former director, officer, or employee of NYP may have information relevant to any Federal Proceeding, the United States may request that person's cooperation under the terms of this Plea Agreement by written request delivered to counsel for the individual (with a copy to the undersigned counsel for NYP) or, if the individual is not known by the United States to be represented, to the undersigned counsel for NYP;

(c) If any person requested to provide cooperation under Paragraph 16(b) fails to comply with his or her obligations under Paragraph 14, then the terms of this Plea Agreement as they pertain to that person, and the agreement not to prosecute that person granted in this Plea Agreement, shall be rendered void;

(d) Except as provided in Paragraph 16(e), information provided by a person described in Paragraph 16(b) to the United States under the terms of this Plea Agreement pertaining to any Relevant Offense, or any information directly or indirectly derived from that information, may not be used against that person in a criminal case, except in a prosecution for perjury (18 U.S.C. § 1621), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), or obstruction of justice (18 U.S.C. § 1503);

(e) If any person who provides information to the United States under this Plea Agreement fails to comply fully with his or her obligations under Paragraph 14 of

this Plea Agreement, the agreement in Paragraph 16(d) not to use that information or any information directly or indirectly derived from it against that person in a criminal case shall be rendered void;

(f) The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence; and

(g) Documents provided under Paragraphs 13(a) and 14(a) shall be deemed responsive to outstanding grand jury subpoenas issued to NYP.

17. The United States agrees that when any person travels to the United States for interviews, grand jury appearances, or court appearances pursuant to this Plea Agreement, or for meetings with counsel in preparation therefor, the United States will take no action, based upon any Relevant Offense, to subject such person to arrest, detention, or service of process, or to prevent such person from departing the United States. This paragraph does not apply to an individual's commission of perjury (18 U.S.C. § 1621), making false statements (18 U.S.C. § 1001), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. § 1503), or contempt (18 U.S.C. §§ 401-402) in connection with any testimony or information provided or requested in any Federal Proceeding.

18. NYP understands that it may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of NYP as a matter for that agency to consider before determining what administrative action, if any, to take.

REPRESENTATION BY COUNSEL

19. NYP has been represented by counsel and is fully satisfied that its attorneys have provided competent legal representation. NYP has thoroughly reviewed this Plea Agreement and acknowledges that counsel has advised it of the nature of the charge, any possible defenses to the charge, and the nature and range of possible sentences.

VOLUNTARY PLEA

20. NYP's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement. The United States has made no promises or representations to NYP as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

21. NYP agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that NYP has failed to provide full and truthful cooperation, as described in Paragraph 13 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify counsel for NYP in writing by personal or overnight delivery or facsimile transmission of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph), and NYP shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. NYP agrees that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against NYP for any offense referred to in Paragraph 15 of this Plea Agreement, the statute of limitations period for such offense will be tolled for the period between the date of the signing of this Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

22. NYP understands and agrees that in any further prosecution of it resulting from the release of the United States from its obligations under this Plea Agreement, because of NYP's violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by it or current or former directors, officers, or employees of it to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against it in any such further prosecution. In addition, NYP unconditionally waives its right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410.

ENTIRETY OF AGREEMENT

23. This Plea Agreement and the NYP Cooperation Agreements (letters from James M. Griffin, Deputy Assistant Attorney General of the Antitrust Division to New York Periodical Distributors, Inc., filed under seal) constitute the entire agreement between the United States and NYP concerning the disposition of the criminal charge in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and NYP.

24. The undersigned is authorized to enter this Plea Agreement on behalf of NYP as evidenced by the Resolution of the Board of Directors of NYP attached to, and incorporated by reference in, this Plea Agreement.

25. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

DATED: _____ Jan 30, 03 _____

Respectfully submitted,

BY: _____
/s'/
PAUL H. BENJAMIN
President
New York Periodical Distributors, Inc.

BY: _____
/s'/
WILLIAM J. OBERDICK
(2235703--NY)
MICHAEL J. KEANE
(203489--DC)
JON R. SMIBERT
(653645--GA)
THERESA M. MAJKRZAK
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BY: _____
/s'/
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