

Syllabus

IN THE MATTER OF
BAYUK CIGARS, INC.

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 1391. Complaint, June 6, 1926—Decision, Feb. 8, 1928

Where the Island of Cuba had come to be recognized and considered by the cigar trade and consuming public of the United States as a country famous for its production of tobacco and cigars of superior quality and excellence, and the tobacco there grown had come to be known, designated and described to and by said cigar trade and purchasing public as Havana tobacco or Cuban tobacco, and to be in great demand in the United States, and cigars manufactured therefrom in whole or in part had come to be considered as more desirable and superior in quality to cigars composed wholly of tobacco grown elsewhere and to cigars containing a smaller proportion of such Cuban or Havana tobacco; and thereafter a domestic corporation engaged in the manufacture of cigars, with factories in the States of New York, New Jersey, and Pennsylvania, and in the sale and distribution thereof to wholesale and retail dealers, and the consuming public.

- (a) Designated, described, banded, labeled, and sold, a 5-cent cigar, containing no Havana or Cuban tobacco, as above set forth, "Havana Ribbon", featuring the aforesaid words upon the bands and containers thereof, and extensively so advertised the same under such name and designation in magazines and daily newspapers of general circulation among the cigar trade and consuming public throughout the United States and various sections thereof, and in widely distributed signs, placards, posters, and similar advertising media; and
- (b) Designated, described, banded, labeled and sold a 10 and 15 cent cigar, containing the aforesaid Havana or Cuban tobacco only in a minor proportion, "Mapacuba", featuring the aforesaid word upon the brand thereof, together with the shield or coat of arms of the Republic of Cuba, and also upon the labels of the containers thereof, together with a map of Cuba, a picture of the city and harbor of Havana, the aforesaid shield or coat of arms, and the words "Havana Cigars", together with pictures of the fortress of Morro Castle at Havana, the Cuban flag, tobacco fields such as are common in Cuba, and the legend, in Spanish, "Guarantee—This package is eminently distinguished because it comes from a superior crop of Vuelta Abajo", a Cuban district noted for its fine tobacco, and extensively so advertised said cigars, as above set forth, under the designation, description and representation "Mapacuba", together with depictions of the map of Cuba, of the cigars in question with the aforesaid band, and of a box thereof, with labels as above described;

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With the capacity and tendency to mislead and deceive and with the effect of misleading and deceiving many of the purchasing public into believing the aforesaid cigars to be composed in whole or in part of Havana tobacco as above described, in the case of that first named, and to be wholly or principally so composed in the case of that last named, and to induce the purchase of such cigars in such erroneous belief, and with the capacity and tendency to and with the effect of unfairly diverting trade from and otherwise injuring and prejudicing the business of competitors who rightfully and truthfully sell and distribute cigars composed in whole, and cigars composed in part only, of Havana or Cuban tobacco, and competitors who sell and distribute cigars composed of tobacco grown elsewhere than on the Island of Cuba without in anywise representing their cigars as containing Cuban or Havana tobacco:

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition.

Mr. Henry Miller for the Commission.

Mr. C. Andrade, jr., of New York City, for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, a Maryland corporation, engaged in the manufacture of cigars and sale thereof to retail dealers in various States, and with principal office and place of business in Philadelphia, with naming products misleadingly, misbranding or mislabeling and advertising falsely or misleadingly in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, for about five years preceding the complaint, designated as "Havana Ribbon," a cigar made by it and composed entirely of tobacco grown elsewhere than on the Island of Cuba, featured said name upon the containers of said cigars in which it shipped and delivered the same to its retail dealer vendees for display and sale by them to the consuming public, and upon the individual cigar bands or labels, and conspicuously so advertised the same in magazines, periodicals and other publications of general circulation throughout the United States and in certain sections thereof.

Such use of said name and designation in the packing, banding, labeling and advertising of said cigars, as alleged, had the capacity and tendency to and did mislead and deceive many among the cigar tobacco trade and the cigar trade, and the consuming public into believing said cigars to be composed of "Havana," tobacco i. e., tobacco grown on the Island of Cuba, and into purchasing the same

in such belief¹ and tended to divert business from and otherwise injure and prejudice competitors, many of whom sell cigars composed of "Havana" tobacco, as above set forth, and rightfully and lawfully so represent the same and others of whom sell cigars neither so composed nor in anywise so represented; all to the prejudice of the public and of the respondent's competitors.

Respondent further, as charged, for about five years preceding the complaint designated as "Mapacuba" a cigar made by it and composed of a mixture of tobaccos containing a small amount and proportion of "Cuban" tobacco, i. e., tobacco grown on the Island of Cuba, featured said name upon the containers of said cigars, together with conspicuous depictions of the Cuban flag, coat of arms, map, and a Spanish legend and statement, and upon the individual cigar bands or labels, and conspicuously so advertised said cigars in magazines, periodicals and other publications of general circulation throughout the United States and in certain sections thereof.

The use of the aforesaid name and designation in the packing, banding, labeling and advertising of said last named cigars, as alleged, had the capacity and tendency to and did mislead and deceive many among the cigar tobacco trade and cigar trade and the consuming public into believing said cigars to be composed of Cuban tobacco, as above set forth, or of such tobacco as the principal and predominant element, and into purchasing the same in such belief,² and tended to divert business from and otherwise injure and prejudice competitors, many of whom sell cigars composed of Cuban tobacco as hereinabove set forth and rightfully and lawfully so represent the same, and others of whom sell cigars of which said Cuban tobacco is not the principal and predominating element and ingredient, without in anywise misrepresenting such Cuban tobacco as such principal and predominating element and ingredient; all to the prejudice of the public and respondent's competitors.

¹ The complaint contains the following allegations relative to the use of the term "Havana" tobacco and the preference for such tobacco:

"For many years prior to the date hereof, tobacco has been a commercial export product of the Island of Cuba, and the term "Havana" tobacco, has for many years meant and still means tobacco of Cuban growth to the cigar tobacco trade, the cigar trade and the consuming public, many of whom have for many years considered and still consider said "Havana" tobacco superior in quality, for the manufacture of cigars, to tobacco grown elsewhere than on the Island of Cuba. Many among said trades and many of the consuming public have for many years considered and still consider that cigars made of said "Havana" tobacco are superior in quality to cigars made of tobacco grown elsewhere than on the Island of Cuba."

² The complaint contains allegations as to the term "Cuban" tobacco and as to the preference for such tobacco similar to those set forth in the preceding footnote relating to "Havana" tobacco.

Upon the foregoing complaint the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondent, Bayuk Cigars, Inc., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

Respondent having entered its appearance herein and filed its answer to said complaint, hearings were had at which testimony was taken and evidence introduced by counsel for the Commission in support of the allegations of the complaint and by respondent in opposition thereto before an examiner of the Commission theretofore duly appointed. Said evidence, including a transcript of the testimony taken, was filed of record in the office of the Commission, and thereafter briefs and oral argument were submitted by counsel for the Commission and for the respondent. Thereupon this proceeding came on regularly for decision; and the Federal Trade Commission, having duly considered the record, and being now fully advised in the premises, makes this its report, stating its findings as to the facts and its conclusions drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Bayuk Cigars, Inc., is a corporation organized in the year 1920, and existing under and by virtue of the laws of the State of Maryland, with its principal office and place of business in the City of Philadelphia, State of Pennsylvania. It is, and since the date of its organization has been, engaged in the business of manufacturing cigars and the sale and distribution thereof to wholesale and retail cigar dealers and to the consuming public throughout the several States of the United States and the District of Columbia. It maintains and operates eleven cigar factories situated in the States of New York, New Jersey, and Pennsylvania, and six branch jobbing houses located in the cities of New York, N. Y.; Philadelphia, Pa.; Detroit, Mich.; Flint, Mich.; Grand Rapids, Mich.; and Indianapolis, Ind. During the past five years its average annual production and sales have been in excess of 200,000,000 cigars. In distributing said cigars sold by it, respondent causes same to be transported and delivered from its aforesaid places of business or factories through and into the various other States of the United States and the District of Columbia to the respective purchasers thereof in such other States and in said District; and in

so carrying on said business respondent is, and since the date of its organization has been, continuously engaged in interstate commerce and in direct active competition with many individuals, partnerships, and other corporations engaged in the sale and transportation of cigars in commerce between and among the several States of the United States and the District of Columbia.

PAR. 2. Among the cigars manufactured and sold by respondent in interstate commerce, as set forth in paragraph 1 hereof, are two different types of cigars, the one designated, described, branded, labeled and sold by respondent as "Havana Ribbon"; and the other designated, described, branded, labeled and sold by it as "Mapacuba", which brands of cigars are and have been produced and continuously marketed by respondent among the trade and consuming public throughout the United States since the aforesaid date of its organization. The generally advertised retail prices of the so-called "Havana Ribbon" cigars are 5 cents each and, in a larger size, 8 cents each or two for 15 cents; and respondent's annual sales of same are in excess of 77,000,000. The generally advertised retail prices of the so-called "Mapacuba" cigars are 10 cents each, two for 25 cents, and 15 cents each, depending upon sizes or shapes; and respondent's annual sales of this brand exceed 15,000,000 cigars.

PAR. 3. In preparing its so-called "Havana Ribbon" cigars for sale and distribution respondent caused, and still causes, to be placed upon each of said cigars a paper band bearing conspicuously the words "Havana Ribbon"; and said cigars containing said band were and still are packed by respondent in the customary cigar containers of the respective capacities of 25 and 50 cigars, to which containers respondent also caused, and still causes, to be affixed in sundry places labels and brands bearing in large and conspicuous letters the words "Havana Ribbon". Said cigars so banded, packed, labeled, and branded were and still are displayed, offered for sale, sold and distributed by respondent to wholesale and retail dealers and to the consuming public; and in the regular course of business and in accordance with respondent's purpose and plan of distribution, said cigars still so banded, packed, branded and labeled were and are displayed, offered for sale, sold and distributed by dealers among themselves and to the consuming public. To further and promote the sale of said cigars respondent also caused, and still causes, extensive advertisements thereof to be published and displayed (a) in magazines and daily newspapers of general circulation among the cigar trade and consuming public throughout the United States and in various sections thereof; and (b) in widely distributed signs, placards, posters and similar advertising media, in all of which

advertisements respondent designated, described and represented said cigars as "Havana Ribbon" cigars; and through which advertisements it caused and still causes to be sold to the trade and consuming public large quantities of said so-called "Havana Ribbon" cigars.

PAR. 4. Each of said so-called "Mapacuba" cigars as and when marketed by respondent contained and still contains a paper band, placed thereon by respondent, displaying conspicuously the word "Mapacuba" together with a device consisting of a star and stripes simulating in general appearance the shield, emblem, insignia or coat of arms of the Republic of Cuba. When marketed by respondent said so-called "Mapacuba" cigars, containing aforesaid paper band, were and still are packed, displayed, sold and distributed by it in the customary cigar containers of the respective capacities of 25 and 50 cigars, to which containers respondent caused to be attached labels and brands prominently and conspicuously displaying the word "Mapacuba" in sundry places; and a map of Cuba; picture of the city and harbor of Havana, Cuba; also said device of a star and stripes simulating the shield, insignia, emblem or coat of arms of the Republic of Cuba. In addition to the foregoing, respondent caused to be displayed upon said containers in which it packed and marketed the so-called "Mapacuba" cigars up to and including the spring of 1924 certain labels displaying the words "Havana Cigars" in sundry places, pictures of the fortress of Morro Castle at Havana, Cuba, with the Cuban flag; also pictures of tobacco fields such as are common in Cuba, and an inscription in the Spanish language, a free translation of which is as follows:

GUARANTEE.—This package is eminently distinguished because it comes from a superior crop of Vuelta Abajo.

(Vuelta Abajo is the name of a district in Cuba noted for its production of fine tobacco). Throughout the course of respondent's business and in accordance with its purpose and plan of distribution said so-called "Mapacuba" cigars have been displayed and marketed in and by the cigar trade and to the consuming public under the name, designation and description of "Mapacuba" and as banded, packed, branded and labeled by respondent as hereinabove set forth. To promote and further the sale and distribution of said so-called "Mapacuba" cigars, respondent has caused for more than two years last past extensive advertisements thereof to be published (a) in magazines and newspapers of general circulation among the trade and consuming public throughout the United States and in various sections thereof; and also (b) in widely distributed display signs, placards, posters, and similar advertising media, in all of which

advertising matter such cigars were and are designated, described and represented as "Mapacuba" cigars; and in many of said advertisements respondent caused to be pictured a map of Cuba, one or more of said cigars containing aforesaid paper band, and also a box of said cigars showing the above mentioned labels which depict said device simulating the shield, insignia, emblem or coat of arms of the Republic of Cuba and the city and harbor of Havana, Cuba.

PAR. 5. At all times since the date of respondent's organization and for many years prior thereto, tobacco has been extensively grown on the Island of Cuba and exported therefrom to the United States and other countries both in the form of leaf tobacco and in cigars; and said Island is recognized and considered by the cigar trade and consuming public of the United States as a country famous for its production of tobacco and cigars of superior quality and excellence. The tobacco grown in Cuba is, and since time immemorial has been, known, designated and described to and by the cigar trade and purchasing public throughout the United States as "Havana tobacco" or "Cuban tobacco," which terms are synonymous in meaning and are used interchangeably. Said Havana tobacco or Cuban tobacco is in great demand in the United States and during all the times herein mentioned the same has been and still is extensively marketed and consumed in the form of cigars. Many of the cigar trade and consuming public of the United States have for years considered and still consider that cigars made in whole or in part of said Havana or Cuban tobacco are more desirable and are superior in quality to cigars composed wholly of tobacco grown elsewhere than on the Island of Cuba and to cigars containing a smaller proportion of said Cuban or Havana tobacco. None of said so-called "Havana Ribbon" cigars which have been manufactured and sold by respondent, as set forth above, contained any Havana or Cuban tobacco, but were composed or manufactured wholly of tobacco grown elsewhere than on the Island of Cuba. Said so-called "Mapacuba" cigars manufactured, advertised and sold by respondent as above set forth contained Havana or Cuban tobacco only in minor proportion, which proportion of Havana or Cuban tobacco varied from about 20 per cent to not exceed approximately 50 per cent; all other parts, constituting the greater or principal portion of said cigar, were manufactured of tobacco grown elsewhere than on the Island of Cuba.

PAR. 6. The use by respondent of the word "Havana" in the branding, labeling, advertising, and describing of its said so-called "Havana Ribbon" cigars containing no Havana or Cuban tobacco, all as hereinbefore set forth, is false and misleading and has and had the capacity and tendency to, and did, (a) mislead and deceive many

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of the purchasing and consuming public into the erroneous belief that said so-called "Havana Ribbon" cigars were manufactured and are composed in whole or in part of Havana tobacco or tobacco grown on the Island of Cuba; and (b) thereby cause purchasers to buy said cigars in such erroneous belief.

PAR. 7. Respondent's use, in connection with its cigars containing Havana tobacco in part only, of the word "Mapacuba" and of the simulation or depiction of the flag, shield, emblem, insignia or coat of arms of the Republic of Cuba, the map of Cuba, Cuban scenes and of said Spanish inscription, all as hereinbefore set forth, is false and misleading, has and had the capacity and tendency to, and did, (a) mislead and deceive many of the purchasing and consuming public into the erroneous belief that said so-called "Mapacuba" cigars were manufactured wholly or principally and mostly of Cuban tobacco, and (b) cause purchasers to buy said cigars in such erroneous belief.

PAR. 8. There are among the competitors of respondent mentioned in paragraph 1 hereof many who rightfully and truthfully sell and distribute in competition with respondent cigars composed in whole, and also cigars composed in part only, of Havana or Cuban tobacco. There are also many of said competitors who sell and distribute in competition with respondent cigars composed wholly of tobacco grown elsewhere than on the Island of Cuba and who in no wise represent that their cigars contain any Cuban or Havana tobacco. Respondent's acts and practices in branding, labeling and advertising its cigars with the words "Havana" and "Mapacuba" and with said likenesses and simulations of the flag, shield, emblem and insignia of the Republic of Cuba; map of Cuba; said scenes of the city and harbor of Havana, Cuba; said Spanish inscription and scenes of Cuban tobacco fields, all as hereinbefore set forth, had the capacity and tendency to and do unfairly divert trade from and otherwise injure and prejudice the business of said competitors.

CONCLUSION

The acts and things done by the respondent in the advertising, branding and labeling of its cigars as and under the conditions and circumstances set forth in the foregoing findings as to the facts are to the injury and prejudice of the public and respondent's competitors, are unfair methods of competition in interstate commerce and constitute a violation of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent thereto, the testimony, evidence, briefs and argument of counsel; and the Commission having made its findings as to the facts with its conclusion that respondent has violated the provisions of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

It is now ordered, That respondent Bayuk Cigars, Inc., its officers, directors, agents, representatives, servants, and employees cease and desist, in connection with the sale and distribution of cigars in interstate commerce—

(1) From using the word "Havana", or other word or words of similar import, alone or in conjunction with the word "Ribbon," or other word or words, as or in a brand name for or as descriptive of any such cigars which are not composed entirely of tobacco grown on the Island of Cuba;

(2) From using the word "Mapacuba," or other word or words of similar import, as or in a brand name for or as descriptive of any such cigars which are not composed in whole or in part of tobacco grown on the Island of Cuba;

(3) From using the word "Mapacuba," or other word or words of similar import, as or in a brand name for or as descriptive of any such cigars which are composed in part only of tobacco grown on the Island of Cuba, unless said word be immediately followed and accompanied by a word or words in letters equal or greater in size, visibility and conspicuousness, clearly and unequivocally indicating or stating that such cigars are not composed wholly, but in part only, of tobacco grown on the Island of Cuba;

(4) From using a depiction simulating the flag, emblem, insignia or coat-of-arms of the Republic of Cuba, map of Cuba, Cuban tobacco fields, city or harbor of Havana, Cuba, or depiction of similar import, in the advertising, branding, or labeling of any such cigars which are not composed in whole or in part of tobacco grown on the Island of Cuba;

(5) From using a depiction simulating the flag, emblem, insignia or coat of arms of the Republic of Cuba, map of Cuba, Cuban tobacco fields, city or harbor of Havana, Cuba, or depiction of similar import, in the advertising, branding or labeling of any such cigars which are composed in part only of tobacco grown on the Island of Cuba, unless such depiction be accompanied by a word or

words of equal or greater visibility and conspicuousness, clearly and unequivocally indicating or stating that such cigars are not composed wholly, but in part only, of tobacco grown on the Island of Cuba;

(6) From representing in any other manner whatsoever that any of said cigars contain or are composed in whole or in part of tobacco grown on the Island of Cuba, when such is not true in fact.

It is further ordered, That respondent, Bayuk Cigars, Inc., shall within sixty days after the service upon it a copy 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 hereinbefore set forth.

Syllabus

IN THE MATTER OF
AMERICAN PHOTO-ENGRAVERS' ASSOCIATION, ET AL.
AND THE INTERNATIONAL PHOTO-ENGRAVERS'
UNION OF NORTH AMERICA ET AL.

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Dockets 82 and 928. Complaint,¹ Oct. 20, 1925—Decision, Feb. 10, 1928

Where a trade association which included in its membership concerns producing from 75 per cent to 90 per cent of the output of photo-engravings in the United States, with annual sales for the industry amounting to over forty million dollars, and which (a) included among its objects (1) the thorough organization of the photo-engravers of America, (2) the elimination of the evils of ignorant and ruinous competition, (3) the spread of the knowledge of the elements of costs and what constitutes a "proper" remuneration for services rendered, and (4) the universal use of its so-called "standard scale" as the basis for pricing plates, and which (b) included in its code of ethics (violated by price cutting) such a friendly attitude among competitors as would enable them to meet and discuss frankly the means whereby "wily and unscrupulous" buyers might be effectively discouraged, and which (c) admitted to membership only those who were also members of their respective local associations, when the latter required its members to belong to the general organization; and said trade association's officers and members; in pursuance of a combination or conspiracy for the purpose of lessening, hindering, regulating or suppressing competition in price in the sale of photo-engraving products or of enhancing the prices therefor, and, in order to consummate said purpose, to coerce, intimidate or prevent manufacturers of said products from individually and freely making such prices for their products as the free exercise of their individual judgment directed, and from competing in price among themselves or with others,

- (a) Promulgated its so-called "standard scale," consisting of a schedule of uniform minimum base prices (based on high cost, rather than representative, jobs, and providing and intended to provide a profit), as the official basis of charges, for the purpose, among others, of facilitating measures for the regulation and lessening of price competition in photo-engraving products, and of enhancing the prices thereof, mailed every manufacturing photo-engraver in the United States a copy thereof, and directed a special committee to cooperate with its executive committee in introducing such scale into general use by all photo-engravers;

¹ Second amended.