

BAYUK CIGARS INCORPORATED

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

*Docket 7395. Complaint, Feb. 5, 1959—Decision, Feb. 12, 1960*¹

Consent order requiring a cigar manufacturer with main office in Philadelphia, Pa., and branch offices in several States—a substantial factor in the cigar

¹ Replacing order to cease and desist of Aug. 27, 1959, vacated and remanded Oct. 22, 1959.

Complaint

56 F.T.C.

industry with net sales in 1957 exceeding \$37,000,000—to cease violating Sec. 2(d) of the Clayton Act by such practices as paying to certain favored retail customers, including Walgreen Co. of Chicago, United Cigar Whelan Stores Corp. of New York City, Sun Ray Drug of Philadelphia, and Rexall Drug Co. of New York City, their full advertising costs in promoting its cigars; making special display promotional payments to certain customers, including United Cigar Whelan Stores Corp., New York City, The Union News Co., New York City, Peoples Drug Stores, Inc., Washington, D.C., Fred Harvey, Chicago, and Barkalow Bros. Co., Omaha, Nebr.; and paying The Union News Co. of New York City approximately \$700 per month as consideration for advertising its cigars on book matches distributed to Union's retail outlets—all without offering proportional payments or allowances to competitors of the favored customers.

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 this complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Bayuk Cigars Incorporated is a corporation organized and doing business under the laws of the State of Maryland, with its principal office and place of business located at 9th and Columbia Avenue, Philadelphia 22, Pennsylvania.

PAR. 2. Respondent has been and is presently engaged in the business of manufacturing, selling and distributing cigars. "Phillies" and "Webster" cigars are a few of the well-known cigars manufactured and distributed by respondent. Said respondent is a substantial factor in the cigar industry. It has branch offices, factories, and warehouses located in a number of States. Its net sales in 1957 exceeded \$37,000,000.

PAR. 3. Respondent has sold and distributed and now sells and distributes its cigars 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 paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or 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 cigars 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 cigars.

PAR. 5. As an example of the practices alleged herein, respondent has made payments or allowances to certain retail customers which were not offered to all other retail customers competing with the favored customers in the distribution and sale of respondent's cigars. In 1956 and 1957 respondent participated in a cooperative advertising program with certain favored retail customers wherein it agreed to pay the full advertising costs of these customers in promoting respondent's cigars. Among the favored customers receiving such payments which were not offered to all other customers competing with the favored customers in the distribution of respondent's cigars were:

<i>Customers</i>	<i>Approximate payments received</i>
Walgreen Company, Chicago, Illinois	\$26,900 (1956)
United Cigar Whelan Stores Corp., New York, N.Y.	14,700 (1957)
Sun Ray Drug, Philadelphia, Pa.	3,500 (1956-1957)
Rexall Drug Co., New York, N.Y.	3,000 (1957)

Respondent also made special display promotional payments to certain favored retail customers which were not offered on proportionally equal terms to all other retail customers competing with said favored customers in the sale and distribution of respondent's cigars. Among the favored customers receiving special display promotional payments in 1956 were the following:

<i>Customers</i>	<i>Approximate payments received</i>
United Cigar Whelan Stores Corp., New York, N.Y.	\$9,581
The Union News Company, New York, N.Y.	6,000
Peoples Drug Stores, Inc., Washington, D.C.	3,298
Fred Harvey, Chicago, Illinois	1,122
Barkalow Bros. Company, Omaha, Neb.	771

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

Under a book match distribution plan begun in 1957, respondent paid and is presently paying The Union News Company approximately \$700 per month as consideration for advertising respondent's cigars on book matches which are distributed to retail outlets operated by The Union News Company. This plan, or anything in lieu thereof, was not offered on proportionally equal terms to all other customers competing with The Union News Company in the sale and distribution of respondent's cigars.

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. J. Wallace Adair and *Mr. Jerome Garfinkel* for the Commission.

Fox, Rothschild, O'Brien & Frankel, by *Mr. A. Arthur Miller*, of Philadelphia, Pa., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated February 5, 1959, the respondent is charged with 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.

On December 18, 1959, the respondent and its attorney entered into an agreement with counsel in support of the complaint for a consent order.

Under the foregoing agreement, the respondent admits the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondent of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondent that it has violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of section 3.25(b) of the Rules of the Commission.

The hearing examiner being of the opinion that the agreement and the proposed order provide an appropriate basis for disposition of this proceeding as to all of the parties, the agreement is hereby accepted and it is ordered that the agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent Bayuk Cigars Incorporated is a corporation existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 9th and Columbia Avenue, in the City of Philadelphia, State of Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent Bayuk Cigars Incorporated, 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 cigars in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

(1) Paying, or contracting to pay or allow, anything of value to, or for the benefit of, a customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, processing, sale, or offering for sale of any products manufactured, sold, or offered for sale by respondent, unless such payment or consideration is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in fact in the distribution of such products.

(2) Paying or contracting to pay to any customer, directly or indirectly through a subsidiary or otherwise, anything of value for advertising on book matches, unless such payment or consideration, or something in lieu thereof, is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in fact in the distribution of respondent's products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission, by order entered October 22, 1959, having vacated its order of August 27, 1959, adopting as its own decision the hearing examiner's initial decision filed July 2, 1959, and having remanded this case to the hearing examiner; and

The hearing examiner, on December 29, 1959, having filed another initial decision wherein he accepted an agreement containing a consent order to cease and desist executed by the respondent and counsel in support of the complaint, and entered his order in conformity with the agreement; and

The Commission having determined that the initial decision last referred to is appropriate in all respects to dispose of this proceeding:

It is ordered. That said initial decision shall, on the 12th day of February, 1960, become the decision of the Commission.

It is further ordered. That the respondent, Bayuk Cigars Incorporated, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting

