

sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MASON, AU & MAGENHEIMER CONF. MFG. CO., INC.

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

Docket 7733. Complaint, Jan. 7, 1960—Decision, Dec. 3, 1964

Order dismissing complaint which charged a Long Island, N.Y., candy manufacturer with granting discriminatory prices and advertising and promotional allowances to certain of its customers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent has violated and is now violating Section 2(a) and Section 2(d) of the amended Clayton Act (U.S.C., Title 15, Sec. 13), hereby issues its complaint as follows:

COUNT I

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Old Country Road, Carle Place, Long Island, New York.

PAR. 2. Respondent is engaged in the business of manufacturing, distributing and selling candy and confectionery products.

Respondent's total sales for the year 1958 were in excess of \$5,000,000.

PAR. 3. These products were sold by respondent for use, consump-

tion, or resale within the United States and respondent causes them to be shipped and transported from the State of location of its principal place of business to purchasers located in States other than the State in which the shipment or transportation originated.

PAR. 4. Respondent maintains a course of trade in commerce, as "commerce" is defined in the amended Clayton Act, in such products described among and between the States of the United States.

Respondent maintains and operates a manufacturing plant in Mineola, Long Island, New York. From this plant it ships and sells throughout the United States to various purchasers located in the several States of the United States, including Pennsylvania.

PAR. 5. In the course and conduct of its business in commerce, respondent is discriminating in price between different purchasers of its products of like grade and quality by selling to some purchasers at higher and less favorable prices than it sells to other purchasers competitively engaged in the resale of its products with the non-favored purchasers or their purchasers.

For example, respondent sells the substantial bulk of its total output to three categories of buyers:

- (1) Vending machine operators,
- (2) Chain stores which include grocery, drug, variety, and theater, and
- (3) Wholesalers which sell to independent retailers.

For many years respondent has been granting a 10-12% discount in price on its products to favored vending machine operators, including Automatic Canteen Company, ABC Vending Corporation, and Union News Company. The vending machines owned and operated by these companies are located in various trade areas in competition with non-favored purchasers including: (1) vending machine companies which must purchase at higher and less favorable prices from respondent; (2) chain stores including grocery, drug, variety, and theater which purchase at higher prices from respondent; and (3) retail customers of non-favored wholesale purchasers from respondent, purchasing at the non-favored price plus a wholesale markup.

PAR. 6. In the course and conduct of its business in commerce, respondent is competitively engaged with other corporations, individuals, partnerships and firms in the manufacture, distribution and sale of its products.

PAR. 7. The effect of respondent's discrimination in price as alleged, may be substantially to lessen, injure, destroy or prevent such competition as alleged or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are engaged.

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Order

PAR. 8. The foregoing acts and practices of the respondent as alleged, violate Section 2(a) of the amended Clayton Act, (U.S.C. Title 15, Sec. 13).

COUNT II

PAR. 9. Each of the allegations of Paragraphs One through Four above, are hereby realleged and made a part of Count II as though set out in full.

PAR. 10. In the course and conduct of its business in commerce, respondent has been paying advertising and promotional allowances to certain favored customers without making the allowances available on proportionally equal terms to all other customers competing in the distribution and sale of its products.

For example, respondent has at various times paid sums of money to Penn Fruit Company, Food Fair Company, and American Stores Company for promotional or advertising activities.

Such allowances were not offered or made available on proportionally equal terms by respondent to other customers competing in the resale of respondent's products of like grade and quality with those customers receiving the allowances.

PAR. 11. The acts and practices of respondent as alleged violate Section 2(d) of the amended Clayton Act (U.S.C. Title 15, Sec. 13).

ORDER DISMISSING COMPLAINT

This proceeding, which charged violations of Sections 2(a) and 2(d) of the Clayton Act, as amended, 15 U.S.C. 13(a), 13(d), was placed on the suspense calendar by Commission order dated February 26, 1963,* and is now before us for final determination of respondent's motion to dismiss for lack of public interest. That motion was premised upon two grounds—discontinuance of the challenged practices prior to issuance of the complaint and a change in respondent's management and control subsequent to issuance of the complaint as the result of the acquisition of all of its capital stock by Bayuk Cigars, Inc., a company having no connection with the challenged practices. The hearing examiner granted the motion. Upon consideration of complaint counsel's appeal from the examiner's dismissal, the Commission concluded that it could not realistically determine whether the challenged practices had been discontinued without additional information concerning Bayuk's pricing policies and the effectiveness of Bayuk's controls over respondent's merchandising activities. Pending completion of an investigation to secure such information, the Commission placed the matter on the suspense calendar.

*Reported in 62 F.T.C. 1515.

The evidence presented by respondent in support of the motion to dismiss established that a new board of directors had been appointed after respondent's acquisition by Bayuk, and that a majority of the new board was composed of individuals connected with Bayuk who have no previous affiliation with respondent. The new board created a special executive committee charged with the responsibility of insuring compliance with applicable state and federal laws. The investigation further indicates that Bayuk's president has instructed respondent's president that no discriminatory practices will be permitted. Respondent is required to forward duplicate invoices to Bayuk's headquarters, thus enabling Bayuk to scrutinize respondent's pricing policies. Bayuk's treasurer has submitted an affidavit in which he stated that he has general supervision over respondent's accounting and bookkeeping methods, and that specific steps, including the requirement of periodic reports aided by newly acquired data processing equipment, have been taken to prevent price discrimination and the payment of promotional allowances except where actually earned. Thus, it appears that Bayuk has in good faith instituted a continuing program designed to eliminate the practices which formed the nucleus of the complaint against respondent.

On the basis of the above facts, the Commission is satisfied that the public interest in the present case would best be served by granting respondent's motion to dismiss the proceeding. Accordingly,

It is ordered, That respondent's motion to dismiss the complaint be, and it hereby is, granted and that the complaint be, and it hereby is, dismissed.

Commissioner Jones not participating for the reason that oral argument was heard prior to her taking the oath of office.

IN THE MATTER OF

BAKERS OF WASHINGTON, INC., ET AL.

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