

Syllabus

IN THE MATTER OF

SILVER SERVICE CORPORATION AND EDWIN I. GORDON

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3654. Complaint, Nov. 30, 1938—Decision, July 16, 1940

Where a corporation and an individual, who was its president and treasurer and dominated and controlled its business activities and practices, engaged in sale and distribution to retail merchants of a sales promotion plan, under which they supplied to merchants entering into contracts with them, advertising material with which to conduct a "Count-the-dot" sale, and which contemplated use by local merchants of newspaper material supplied, reproducing pictures or photographs of various articles of plated silverware, with numerous dots imposed thereon, and offer by local merchant in local newspaper to award certain prizes of silverware free to person most nearly estimating correct number of dots, and also to give to stated number of persons whose answers were nearest to prize-winning answer certain credit checks" or coupons redeemable in silverware, and, as thus engaged, in substantial competition with others also engaged in sale and distribution of various sales promotion plans in commerce among the various States and in the District of Columbia, and including among such competitors many who do not engage in methods and practices as herein set forth—

- (a) Represented said sales promotion plan to particular merchants contacted and solicited as being a special campaign to introduce and advertise silverware in question, facts being it was in no sense such a special or introductory offer or advertising campaign, but merely method adopted by them for marketing said silverware, on sale of which, under an agreement between them and manufacturer of product, they received stated commission on each set sold;
- (b) Represented or caused or assisted purchasers of such a plan to represent as aforesaid that plan in question was a contest, facts being it was not such within real meaning of term, in many instances no prizes of any kind were awarded but credit checks or coupons were forwarded by them or by merchant under their direction to all persons sending in answers to purported contest, without regard to correctness of answers submitted, and purported contest actually was merely means of obtaining names of members of public who might be interested in purchasing silverware, and of inducing, through issuance of such credit checks or coupons, purchase thereof;
- (c) Represented or caused or assisted purchasers, as aforesaid indicated, to represent that through credit voucher, checks, or other form of prize or gift award, in connection with such plan, recipients were to be enabled to receive a credit, reduction, or other financial advantage in purchase of merchandise, facts being credit checks or coupons issued by them or by merchants under their direction did not have any value or represent any prize or discount to prospective purchaser, but represented merely difference between fictitious value advertised and regular retail price of silverware, and recipients of said vouchers or checks did not in fact receive any such credit, reduction, or other financial advantage based upon usual customary retail price of merchandise involved; and

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- (d) Represented or caused or assisted purchasers, as above indicated, to represent as customary or regular price or value of merchandise offered for sale in connection with plan in question prices or values which were in fact fictitious, and in excess of those at which such merchandise was regularly and customarily offered for sale at retail in usual and normal course of business, and which, in some instances, were twice as much as regular retail prices of silverware involved;

With effect of misleading and deceiving substantial number of retail merchants into purchase of their said sales promotional plan, and substantial number of purchasing public into purchase of merchandise offered for sale in connection therewith, and with results that trade was diverted unfairly to them from their competitors; to the substantial injury of competition in commerce:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Robert S. Hall* and *Mr. Edward E. Reardon*, trial examiners.

Mr. James L. Fort for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Silver Service Corporation, a corporation, and Edwin I. Gordon, an individual, hereinafter referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Silver Service Corporation, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 58 East Washington Street, Chicago, Ill. Respondent Edwin I. Gordon is the president and treasurer of respondent Silver Service Corporation and as such operates, dominates, and controls the business activities and affairs of respondent, Silver Service Corporation.

Respondent Silver Service Corporation, and respondent Edwin I. Gordon are engaged in the business of selling and offering for sale to retail merchants throughout the various States of the United States a certain sales promotion plan.

In the course and conduct of their said business respondents maintain and at all times mentioned herein have maintained a course of trade in said sales promotion plan in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. Respondents enter into contracts with various retail merchants throughout the various States of the United States, under and by the terms of which, for a stated consideration, respondents agree, among other things, to furnish to such merchants advertising mats and other supplies to be used by retail merchants in the conduct of a "Count-the-dot" sale. The mats, when used, reproduce what are known to the trade as "Count-the-Dot" puzzles, which consist of a reproduction or photograph of various articles of plated silverware featured by such retail merchants. Superimposed upon such reproduction or photograph are numerous dots. Retail merchants are instructed by the respondents to cause the insertion of such reproduction or photograph in a paper or periodical of general circulation within the trade area of such merchants for a contracted and stated period of time. Accompanying such picture is a representation made by the retail merchant, acting under instructions by the respondents, that upon a given day the retail merchant will give free of charge to the person most closely approximating the number of dots in the picture certain described merchandise which is represented to be of considerable value.

Further representations are made that a stated number of persons submitting answers or solutions to such puzzles nearest the correct answer or solution of the same will receive vouchers or checks redeemable in merchandise only and sold only at the store of such retail merchant.

PAR. 3. In truth and in fact such credit vouchers or checks are indiscriminately distributed without regard to the solution submitted by contestants and are intended to be used and are used solely for the purpose of stimulating trade by enticing customers into the store of the merchant.

PAR. 4. The contract between the respondents and retail merchants also provides, among other things, that the merchants shall be entitled to the services of a representative to advise them during the course of the sale or contest. Acting under the direction and advice of the respondents, retail merchants procure from Oneida, Ltd., a corporation manufacturing plated silverware and located at Oneida, N. Y., certain silver-plated articles which, upon instruction of respondents, are falsely represented to be in value more than the real worth thereof; such increase in represented value amounting to approximately the purported value of said credit vouchers.

The conditions and terms of the purchase of the plated silverware by the retail merchant from Oneida, Ltd., are fixed in a certain contract existing between said Oneida, Ltd., and respondents.

These false and fictitious values are widely advertised by circulars, handbills, periodicals, magazines, newspapers, and by other means

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throughout the trade area where the retail merchants operate, and the publishing of such fictitious prices has a tendency to and does mislead and deceive a substantial number of purchasers into the false belief that by purchasing the merchandise so advertised and represented during the period of the sale hereinbefore described, they effect economies and make pecuniary gains and savings. Relying upon such belief, a substantial number of the members of the purchasing public have purchased said merchandise.

PAR. 5. In engaging in the business of stimulating trade and holding itself out as business consultants, the respondents are in competition with a substantial number of other persons, firms, copartnerships, and corporations who likewise represent themselves to be business consultants and are engaged in the business of stimulating trade, but who do not engage in the practice of fostering false or fictitious prices, and who do not cause those with whom they contract falsely to represent to the purchasing public that the commodity offered for sale is of a superior quality to such articles ordinarily sold at a price for which it is offered for sale and who do not mislead and deceive or cause a deception of the members of the purchasing public by issuing, or causing to be issued, trade or credit vouchers for various stated amounts which are actually of no monetary value in purchasing from the merchants so issuing.

PAR. 6. The aforesaid acts and practices of the respondents have a tendency and capacity to and do in fact cause a substantial diversion of trade from their competitors. As a consequence thereof, substantial injury has been done and is now being done by respondents to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 7. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice of the public and of respondents' competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on the 30th day of November 1938, issued, and thereafter served, its complaint in this proceeding upon respondents, Silver Service Corporation, a corporation, and Edwin I. Gordon, an individual, charging them with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act.

After the issuance of said complaint and the filing of respondents' answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by James L. Fort, attorney for the Commission, before Robert S. Hall and Edward E. Reardon, examiners of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. No testimony or other evidence was offered by the respondents. Thereafter, the proceeding regularly came on for final hearing before the Commission on said complaint, the answer thereto, testimony and other evidence, and brief in support of the complaint (no brief having been filed on behalf of the respondents, and oral argument not having been requested), and the Commission having duly considered the matter, and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Silver Service Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 58 East Washington Street, Chicago, Ill. Respondent Edwin I. Gordon, is the president and treasurer of respondent Silver Service Corporation and as such dominates and controls the business activities and practices of respondent Silver Service Corporation.

The respondents are now and since the year 1936 have been engaged in the sale and distribution of a sales-promotion plan to retail merchants, which plan includes certain purported contests and certain newspaper mats and other advertising material. Respondents cause and have caused their said plan and the contests and advertising material used in connection therewith, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain and since 1936 have maintained a course of trade in their said products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. The respondents are in substantial competition with other corporations and individuals and with firms and partnerships engaged in the sale and distribution of various sales promotion plans in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of their business the respondents, acting through agents or solicitors, contact retail merchants and undertake to sell such merchants the respondents' sales promotion plan. If the merchant is induced to purchase the plan a written contract is entered into whereby the respondents agree, for a stated consideration, to supply to the merchant certain advertising material with which to conduct what is known as a "Count-the-dot" sale. The advertising material includes, among other things, certain newspaper mats which, when used, reproduce pictures or photographs of various articles of plated silverware. Superimposed upon such photographs are numerous dots. The retail merchant, acting under directions supplied to him by the respondents, causes these photographs to appear in local newspapers, along with representations that on a certain designated day the merchant will award certain pieces of silverware free to the person most nearly estimating the correct number of dots on the photographs appearing in such advertisements.

Further representations are made in the advertisements that in addition to the prize awarded for the most nearly correct answer in the contest, the merchant will give to a stated number of persons whose answers are nearest to the prize-winning answer certain "credit checks" or coupons redeemable in silverware.

While all of the operations in connection with the sale, including the advertising, are carried on in the name of the merchant, such operations are in fact planned and directed in their entirety by the respondents, acting through their agents. All mats and other advertising material are supplied by the respondents, and the merchant is guided and instructed by the respondents, through their agents, as to all of the details involved in putting the sale into operation.

PAR. 4. Under an agreement existing between respondents and the manufacture of the silverware used in the operation of the plan, the respondents receive a stated commission on each set of silverware sold during the sale.

The entire sales promotion plan is represented to the merchant by respondents as being a special campaign for the purpose of introducing and advertising the silverware. The Commission finds, however, that in fact the plan is in no sense a special or introductory or advertising campaign but is merely a method adopted by the respondents for marketing the silverware.

PAR. 5. The Commission further finds that the so-called "Count-the-dot" contest is not in fact a contest within the real meaning of the term. In many instances no prizes of any kind are awarded, but credit checks or coupons are forwarded by the respondents or by the merchant, under the respondents' direction, to all persons sending

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in answers to the purported contest, without regard to the correctness of the answers submitted by such persons. Actually, the purported contest is merely a means of obtaining the names of members of the public who might be interested in purchasing silverware, and of inducing, through the issuance of such credit checks or coupons, the purchase of such silverware.

PAR. 6. The Commission further finds that the values ascribed to such silverware in said advertising are highly fictitious, being greatly in excess of the prices at which such silverware is regularly and customarily sold at retail in the usual and normal course of business. In some instances the values advertised have been twice as much as the regular retail prices of the silverware. The credit checks or coupons issued by the respondents, or by the merchants under the respondents' direction, do not in fact have any value, and do not represent any prize or discount to the prospective purchaser, but merely represent the difference between the fictitious values advertised and the regular retail prices of the silverware.

PAR. 7. There are among the competitors of the respondents as referred to in paragraph 2 hereof many who do not engage in the methods and practices herein set forth.

PAR. 8. The use by the respondents of the acts, practices, and methods herein set forth has the tendency and capacity to, and does, mislead and deceive a substantial number of retail merchants into the purchase of respondents' sales promotional plan, and a substantial number of the purchasing public into the purchase of the merchandise offered for sale in connection with such plan. As a result trade has been diverted unfairly to the respondents from their competitors and in consequence substantial injury has been done and is being done by the respondents to competition in commerce between and among the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of the respondents as herein found are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondents, testimony, and other evidence taken before Robert S.

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Hall and Edward E. Reardon, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint, and brief filed by James L. Fort, counsel for the Commission, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, Silver Service Corporation, a corporation, and its officers, and Edwin I. Gordon, an individual, their respective agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any sales promotion plan or of any merchandise which is to be resold through use of a sales promotion plan furnished by respondents, do forthwith cease and desist from:

1. Representing that the respondents are conducting any special campaign or advertising campaign to introduce or advertise silverware or other merchandise.

2. Representing, or causing or assisting the purchasers of said plan to represent, that any sales promotion plan in which credit vouchers, checks, gifts, or any form of so-called prizes, are given to the entrants or contestants therein without regard to the relative correctness of the answers or solutions submitted by said entrants or contestants, is a contest.

3. Representing, or causing or assisting the purchasers of said plan to represent, that credit vouchers or checks, or any other form of prizes or gifts awarded in connection with such sales promotion plan, enable the recipients thereof to receive a "credit," "reduction," or other financial advantage in the purchase of merchandise when the recipients thereof do not in fact receive a credit, reduction, or other financial advantage based upon the usual and customary retail price of such merchandise.

4. Representing, or causing or assisting the purchasers of said plan to represent, as the customary or regular prices or values of merchandise offered for sale in connection with the said sales promotion plan, prices or values which are in fact fictitious and in excess of the prices at which such merchandise is regularly and customarily offered for sale.

It is further ordered, That the respondents shall, within 60 days after the 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.

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IN THE MATTER OF
HY-TEST CEMENT COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3779. Complaint, May 2, 1939—Decision, July 16, 1940*

Where a corporation engaged for more than 15 years past in sale and distribution of certain masonry cement under trade name of Hy-Test and which, through its president and principal executive officer who owned controlling interest therein, had taken part, along with other members and organizations of general trade and industry concerned, in tests conducted by Bureau of Standards of the various products involved of the different participating members in the interest of the public, the trade, State governments, and the United States Government, and which, through active participation therein by its said president and through conferences with officials of said Bureau and notices therefrom and otherwise, was fully advised as to the policy adopted and respected generally in said connection of divulging to participant's results of said tests only as concerned particular participant's product and of not divulging at all to general public results thereof as respects particular products or manufacturers' data—

- (a) Divulged and made public results of such research by overprinting on Bureau's circular describing same, symbol identifying its own particular product, and distributed and made known to its salesmen and through them to general public, results of the tests or research by said Bureau as they affected not only its own product but those of competitors;
- (b) Published under same title as made use of by chief of section concerned of said Bureau in article entitled, "Brick Laying to Avoid Leaks," and included in its own article thus published, and at its own expense, statement identifying and praising its own particular product, and on a comparative basis, as a result of particular tests in question and investigations and research by said Bureau; and
- (c) Published, through its agents and through advertising in sales promotional literature from time to time during the years, the results of said tests of the Bureau and information with reference thereto, in which it identified all masonry cements as used therein and not disclosed in the Bureau's research paper, in violation, as aforesaid, of the established policy and practice in the Bureau, and contrary to its rules and instructions, and understandings between it and participants and in bad faith;

With results, through its said acts and practices in advising purchasing public as to identity of cements used in said tests, made under supervision of said Bureau as aforesaid, and through use of reports of tests and articles prepared by said section chief, for advertising publicity and sales promotion purposes, of placing it at a competitive advantage over its competitors who participated in said tests under the Research Associates plan of bureau in question, above described, and were unwilling to adopt and use such or any other method or methods contrary to policy of said Bureau with reference to plan in question, and complied with rules, regulations, and instructions issued by said Bureau, and did not use reports of tests