

IN THE MATTER OF
JOHN MARICAK, DOING BUSINESS AS CONTINENTAL
SILVER COMPANY OF AMERICA

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

Docket 4369. Complaint, Oct. 31, 1940—Decision, Oct. 28, 1941

Where an individual engaged in interstate sale and distribution to retailers of a so-called sales stimulator plan which involved premium cards, advertising material, and silverware and was similar to other such plans made use of by him at other times during the last several years;

In offering his said plan, which (1) involved the purchase of so-called premium cards at \$4.50 a thousand by the dealer for issuance to his customers upon their purchases in specified amounts and his undertaking to redeem such cards in Wm. A. Rogers silverware, he supplying to dealer-purchasers various advertising posters for use in putting plan into effect and, in some instances, sets of silverware for display purposes, and which (2) was presented to dealers by his representatives or agents who, traveling extensively through the United States, were supplied by him with contract forms and with samples of the advertising posters and display sets—

- (a) Represented, through his representatives and agents, that he was connected with, or was a representative of, Wm. A. Rogers, Ltd., Oneida, Ltd., Successor, manufacturers of the silverware used in the operation of his said plan, and that such plan was an advertising campaign conducted by or on behalf of said manufacturers;

Facts being he was not in any manner connected with said concern, but purchased Wm. A. Rogers silverware in the open market, usually from independent jobbers, and his said plan was a commercial enterprise conducted for his own profit;

- (b) Represented that he would provide retailers purchasing his plan with display sets of silverware which would become their property, making specific and prominent reference in the contract to such display set along with such representation;

Facts being that in some cases he failed to supply such dealers with any sets for aforesaid purposes;

- (c) Represented, as aforesaid, and through advertising matter used by his agents in presenting the plan, that the dealer's customers, upon forwarding to him a certain designated number of premium cards, would receive silverware without cost; and

- (d) Represented that after a designated percentage of such premium cards had been forwarded to him by dealer's customers for redemption, he would refund to the dealer entire amount paid by him, and that the operation of the plan would therefore be without cost to the dealer;

The facts being that premium cards forwarded to him for redemption in silverware were not thus redeemed without cost, but holders of such cards were required to remit certain amounts of money therewith in order to obtain silverware; his plan did not contemplate a refund to the dealer of the entire amount paid for the premium cards, his contracts being couched in ambiguous language, particularly so as to clauses respecting redemption of such cards and cash refunds to dealers, and it being impossible, as a practical

1602

Complaint

matter, under his construction and interpretation of the contract, for the dealer to recover more than a small part of the amount paid for the cards; With tendency and capacity to mislead and deceive a substantial number of retail dealers into the mistaken belief that such representations were true, and to cause them to purchase his sales stimulator plan as a result thereof: Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. William C. Reeves*, trial examiner.

Mr. Eldon P. Schrup 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 John Maricak, an individual, trading and doing business under the name Continental Silver Co. of America, hereinafter referred to as respondent, has 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. The respondent, John Maricak, is an individual trading and doing business under the name and style of Continental Silver Co. of America, with his office and principal place of business located at 921 Charlevoix Building, Detroit, Mich. Respondent is now, and for more than 1 year last past has been, engaged in the business of offering for sale and selling a so-called sales stimulator plan, including premium cards, tableware, silverware, and other materials which are used in carrying said plan into effect, to retail merchants located in various States of the United States and in the District of Columbia.

PAR. 2. The respondent, being engaged in business as aforesaid causes said premium cards, tableware, silverware, and other materials used in connection with said so-called sales stimulator plan, when sold, to be transported from his office and principal place of business in Detroit, Mich., to purchasers thereof located at their respective points of location in various States of the United States other than the State of Michigan and in the District of Columbia.

Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said premium cards, tableware, silverware, and other materials used in connection with said plan, in commerce among and between the various States of the United States and in the District of Columbia.

Complaint

33 F. T. C.

PAR. 3. In the course of the operation of his business, and in order to sell his said plan and premium cards, and the tableware, silverware, and other materials used in connection therewith, respondent enters into a form of agreement with retail merchants who are contacted by respondent's selling agents.

Respondent's form of agreement provides for the purchase by the retail merchant of premium cards, upon which the merchant's name appears, at \$4.50 per thousand which are to be given by the merchant to the merchant's customers upon the purchase by the customers of certain specified amounts of the merchant's goods.

By the terms of said form of agreement, respondent is to redeem in designated items of merchandise such premium cards when forwarded to respondent in specified numbers by such merchant's customers.

The form of agreement provides that respondent, as a part of such plan, is to furnish participating retail merchants with various display posters, circulars, redemption catalogs and advertisements to be used by said retail merchants in putting the aforesaid sales stimulator plan into effect and operation.

PAR. 4. In the course of the operation of his business and for the purpose of inducing retail merchants to purchase and use said plan and the premium cards, and the tableware, silverware, and other materials used in connection therewith, respondent makes the following representations:

1. That respondent is a representative of, or is connected with, or is putting into effect an advertising campaign for, Wm. A. Rogers, Ltd., Oneida, Ltd., Successor, of Sherrill, N. Y., manufacturers of tableware and silverware.

2. That respondent, for the purpose of putting such plan into operation, will provide retail merchants purchasing and using respondent's said plan and premium cards, with exhibit or display sets of tableware or silverware.

3. That respondent will redeem, without cost, in designated items of merchandise, such premium cards as are forwarded to him in specified numbers by the merchant's customers, and that respondent will refund to the retail merchant the entire purchase price of such premium cards after a designated number of such cards has been sent in by customers of such merchant for redemption.

4. That retail merchants may participate in said so-called sales stimulator plan and secure the cards, display or exhibit sets of tableware or silverware and the premiums for their customers without cost to the merchant.

1602

Findings

PAR. 5. Respondent's representations as above set forth are grossly exaggerated, false, misleading, and deceptive. In truth and in fact, respondent is not in any manner connected with, representing, or conducting an advertising campaign for Wm. A. Rogers, Ltd., Oneida, Ltd., Successor. Respondent does not provide all merchants purchasing and using respondent's said plan and premium cards, with exhibit or display sets of tableware or silverware for use by such merchants in putting respondent's said plan into effect; nor does respondent refund to participating retail merchants the entire purchase price of said premium cards after a designated number of said premium cards has been sent to respondent by customers of said merchants for redemption. Retail merchants cannot participate in said plan and secure the premium cards, display or exhibit sets, and the premiums for their customers without cost to them.

PAR. 6. The use by respondent of the aforesaid false, misleading, and deceptive statements and representations has a capacity and tendency to, and does, mislead and deceive retail merchants, situated in various States of the United States, into the erroneous and mistaken belief that such statements and representations are true, and into the purchase and use of respondent's said so-called sales stimulator plan and the premium cards used in connection therewith.

PAR. 7. The aforesaid acts and practices of said respondent, as herein alleged, are all to the prejudice and injury of the public and constitute 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 October 31, 1940, issued and thereafter served its complaint in this proceeding upon the respondent, John Maricak, an individual, trading and doing business under the name Continental Silver Co. of America, charging him with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint (no answer thereto being filed by respondent), testimony and other evidence in support of the allegations of the complaint were introduced by Eldon P. Schrup, attorney for the Commission, before William C. Reeves, a trial examiner of the Commission therefore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the complaint, testimony, and other evidence, report

Findings

33 F. T. C.

of the trial examiner upon the evidence, and brief in support of the complaint (respondent not having filed brief 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. For more than 2 years immediately prior to June 1940 the respondent, John Maricak, was trading and doing business under the name of Continental Silver Co. of America, with his office and principal place of business located at 921 Charlevoix Building, 2033 Park Avenue, Detroit, Mich. Respondent's business was that of selling to retail dealers a so-called sales stimulator plan, which plan involved premium cards, advertising material, and silverware. Respondent has at other times during the last several years been engaged in the sale of various other sales stimulator plans and has operated under various trade names. These plans were similar in all material respects to the more recent plan referred to above.

PAR. 2. In the course and conduct of his business respondent caused his sales stimulator plan, including premium cards, advertising material, and silverware, when sold, to be transported from his place of business in the State of Michigan to purchasers thereof located in various other States of the United States and in the District of Columbia. At all times mentioned herein respondent maintained a course of trade in his sales stimulator plan in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. Respondent's sales stimulator plan involved the purchase by retail dealers of so-called premium cards from respondent at \$4.50 per thousand cards. These cards, bearing the name of the dealer, were issued by the dealer to his customers upon the purchase by such customers of certain specified amounts of merchandise from the dealer, usually one card being given with each 25-cent purchase. Respondent agreed to redeem these premium cards in Wm. A. Rogers silverware. To dealers purchasing the sales stimulator plan, respondent supplied various advertising posters for use in putting the plan into effect, and in some instances sets of silverware to be used by the dealer for display purposes.

PAR. 4. For the purpose of contacting dealers and selling them his sales stimulator plan, respondent employed representatives or agents who traveled extensively throughout various sections of the

1602

Findings

United States. These representatives were supplied by respondent with forms of contracts to be executed by dealers purchasing the plan, and also with sample advertising posters and samples of the display sets of silverware to be used in the operation of the plan.

PAR. 5. In the course and conduct of his business and for the purpose of inducing dealers to purchase his sales stimulator plan, the respondent, acting through his representatives and agents, made certain statements and representations to prospective purchasers. Among these statements and representations were the following:

1. That respondent was a representative of, or was connected with, Wm. A. Rogers, Ltd., Oneida, Ltd., Successor, manufacturers of the silverware used in the operation of respondent's sales stimulator plan, and that such sales stimulator plan was in the nature of an advertising campaign conducted by or on behalf of such silverware manufacturers.

2. That respondent would provide retail dealers purchasing respondent's sales stimulator plan with display sets of silverware which would become the property of the dealer.

3. That the dealer's customers, upon forwarding to the respondent a certain designated number of premium cards, would receive silverware without cost.

4. That after a designated percentage of such premium cards had been forwarded to respondent by the dealer's customers for redemption, respondent would refund to the dealer the entire amount paid by the dealer for such premium cards, and that the operation of the sales stimulator plan would therefore be without cost to the dealer.

The advertising matter supplied by respondent to his agents, and used by the agents in presenting the plan to dealers, featured the word "Free" and otherwise represented that the redemption of the premium cards in silverware would be without cost to the holders of the cards. Certain portions of the form of contract presented to the dealer were couched in ambiguous language, this being true particularly as to the clauses in the contract with respect to the redemption of the premium cards and the cash refund to the dealer. Specific and prominent reference was made in the contract to the display set of silverware, the representation being that the display set would be supplied to the dealer "Free" and would become the dealer's property.

PAR. 6. The Commission finds that these statements and representations were false and misleading. Respondent has not at any time been a representative of, or in any manner connected with, Wm. A. Rogers, Ltd., Oneida, Ltd., Successor. While the silverware used by respondent in connection with his sales stimulator plan was manu-

Order

33 F. T. C.

factured by such silverware concern, respondent purchased the silverware in the open market, usually from independent jobbers. Respondent's sales stimulator plan was in no sense an advertising campaign for or on behalf of such silverware manufacturers, but was merely a commercial enterprise conducted by respondent for his own profit. In some cases respondent failed to supply dealers purchasing his plan with any sets of silverware for display purposes. The premium cards forwarded to respondent for redemption in silverware were not redeemed without cost to the holders of such cards, but such holders were required to remit certain amounts of money along with such cards in order to obtain the silverware. Respondent's plan did not contemplate the refund to the dealer of the entire amount paid by the dealer for the premium cards. In fact, under the construction and interpretation placed upon the contract by respondent, it was impossible as a practical matter for the dealer to recover more than a small part of the amount paid for the cards.

PAR. 7. The Commission further finds that the use by the respondent of the aforesaid false and misleading representations had the tendency and capacity to mislead and deceive a substantial number of retail dealers into the erroneous and mistaken belief that such statements and representations were true, and to cause such dealers to purchase respondent's sales stimulator plan as a result of such erroneous and mistaken belief.

CONCLUSION

The acts and practices of the respondent as herein found are all to the prejudice of the public, and constitute 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 (no answer thereto having been filed by respondent), testimony, and other evidence taken before William C. Reeves, a trial examiner of the Commission theretofore duly designated by it, in support of the allegations of the complaint, report of the trial examiner upon the evidence, and brief in support of the complaint (respondent not having filed brief and oral argument not having been requested); and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act.

1602

Order

It is ordered, That the respondent, John Maricak, an individual, trading and doing business under the name Continental Silver Co. of America, or trading under any other name, his representatives, agents, 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 his sales stimulator plan, including premium cards, advertising matter, silverware, or any other merchandise, do forthwith cease and desist from:

1. Representing either directly or by implication that respondent is a representative of, or has any connection with, the manufacturer of Wm. A. Rogers silverware: *Provided, however*, That this order shall not be construed to prohibit the respondent from dealing in such silverware.

2. Representing either directly or by implication that respondent's sales stimulator plan is in the nature of an advertising campaign conducted by or on behalf of the manufacturer of Wm. A. Rogers silverware.

3. Representing that respondent will supply dealers purchasing his sales stimulator plan with display sets of silverware for use in putting such plan into operation, when respondent does not in fact supply such display sets as represented.

4. Representing that respondent will give silverware or other merchandise free, when such silverware or other merchandise is not in fact given free.

5. Representing that premium cards or other similar devices will be redeemed in silverware or other merchandise, unless and until all of the terms and conditions of such offer are clearly stated in immediate connection or conjunction with such offer, and there is no deception as to the price to be paid in connection with the obtaining of such silverware or other merchandise.

6. Representing that upon the redemption of a specified number of premium cards respondent will refund any sum of money to dealers purchasing such cards, when such refund is not in fact made, and if there are any conditions connected with such refund, such conditions must be clearly stated in immediate connection or conjunction with such offer of refund.

7. Representing that the operation of respondent's sales stimulator plan is without cost to dealers purchasing such plan.

It is further ordered, That the respondent shall, within 60 days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

J. FRED MALONE AND JOE P. MALONE, TRADING AS
HARPER MANUFACTURING COMPANY, MALONE
CLOTHING MANUFACTURING COMPANY, AND VARIOUS
OTHER NAMESCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4516. Complaint, June 5, 1941—Decision, Oct. 29, 1941*

Where two individuals engaged in manufacture and in interstate offer and sale of men's clothing through traveling salesmen or agents, whom it equipped with kits including order blanks and sample swatches from which the purchaser made selections of material, and who, upon securing an order took and recorded the customers' measurements on order blanks and forwarded them, together with a number identifying the material selected, to said individuals at their place of business, collecting as their commission a substantial down payment on the purchase price, following which and transmission of order to said individuals, clothing was shipped to customer in question via parcel post, C. O. D. balance of contract, or purchase price—

- (a) Represented that the garments would be made to order of the material selected, and that the material to be used contained no cotton, said salesmen making use of order blanks containing blank spaces for the height, weight, and general build of the customer and implying that the clothing sold by them was tailor made or made to measure—

The facts being garments thus ordered were of the ready-made variety or stock type of clothing, altered by individuals in question when deemed necessary partially to conform to the measurements shown on the order blank; many of the garments sent to their customers were not made in accordance with measurements submitted and of a cloth of a grade, texture, and weave corresponding with those selected by customer, but were made from material substantially inferior; said individuals in some instances failed to return purchase price received from customer, or to deliver garment selected by him; and materials from which products were made contained predominant quantities of cotton;

- (b) Represented that the du Pont Company was back of, or associated with, said individuals in connection with the sale of their garments, that material used by them was made by said company, and that it was furnishing the goods free, the customer paying only for the labor involved;

The facts being that the E. I. du Pont de Nemours & Co., or, as also known, the du Pont Co., long engaged, among other things, in the manufacture of textile fabrics and possessed of a valuable good-will in the word "du Pont" as applied to its products, was not connected in any way with said individuals, and was not the maker of the material used by them; and

- (c) Represented that the customer would have an opportunity to inspect and try on the garments before finally accepting them and paying the balance due, and that they manufactured all of the garments sold by their agents and shipped them to the customer direct from their own factory;