

Syllabus

IN THE MATTER OF

J. D. DRUSHELL TRADING AS J. D. DRUSHELL COMPANY,
AND LAURENCE A. SMITHCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3642. Complaint, Oct. 31, 1938—Decision, Feb. 25, 1939*

Where an individual engaged in sale and distribution of (1) coin-vending machines especially designed to market 1- and 5-cent candy bars made by Hershey Chocolate Corporation, and referred to in conduct of said business as "Hershey Automatic Merchandisers," "Hershey Vending Machines," "Hershey Machines," and "Advance Hershey Vending Machines," and of (2) "Automatic Stores" vending machines which usually contained four separate slots and compartments for distribution of candy, etc., and of (3) candy, confectionery, peanuts, and other commodities for use in said machines, and of (4) assortments of toys and charms designed to be mixed with commodities placed in said "Automatic Stores," so that members of public, on placing coin therein, would occasionally receive one of said toys or charms, presence of which was concealed, in addition to other commodities purchased, and thus secure same wholly by lot or chance, and in selling and distributing his said products through numerous representatives whom he employed and who traveled throughout the various States calling upon retail trade and soliciting orders for said machines, and whose practice it was, on arrival in city in which they expected to canvass, to insert "Man Wanted" advertising in local newspaper or periodical setting forth glowing opportunities to make large profits with own business in sale of Hershey bars through new patented machines, etc.; and, as thus engaged, in active and substantial competition with others engaged in sale and distribution of coin-operated vending machines of various types, and candy, confectionery, peanuts, and other commodities for use therein, in commerce among the various States and in the District of Columbia; and a traveling and sales representative of said individual; as a part of a fraudulent sales plan and scheme entered into by said individual and his representatives, and which included use of contact advertising as above set forth, and acting directly and through said sales representatives, with his knowledge, acquiescence, and active cooperation—

- (a) Represented to prospects contacted and secured as aforesaid that said individual was the representative or agent of the Hershey Chocolate Corporation or the Chocolate Sales Corporation of Hershey, Pa., and that he, or the said business, was directly connected with said concerns, and a division or subsidiary thereof, and that said individual, or the business, was the sole distributor of Hershey penny candy bars, and that such bars were vended exclusively in his vending machines, facts being said individual, trading under company trade name employed by him, was not a part of said Hershey concerns, had no direct connection therewith, was not a division or subsidiary thereof, nor sole distributor of their penny candy bars, which were not vended exclusively in said individual's machines, and he had no authority to arrange for distributors for such concerns;

Syllabus

28 F. T. C.

- (b) Represented, as aforesaid, or in such contact advertising, that said machines would pay the prospect an average net profit of \$1 per week each, and produced false and fraudulent testimonial letters purportedly signed by various individuals and containing exaggerated, untrue, and misleading statements as to profits obtained from machines in question in support of such claim, and represented, in contact advertising aforesaid, that the operator would receive an income from machines in question of \$125 a month and up, depending on expansion, and that said "Automatic Stores" vending machines would earn six times as much as other types of machines sold by said individual, and that when toys and charms were used, through their appeal to children and adults, said machines could be set to vend candy and other merchandise at about \$1 a pound, and that its said vending machines were strictly slug-proof and insured against fire, theft, or mysterious disappearance, facts being such machines, distributed as aforesaid, would not produce such exaggerated earnings as represented, nor would said "Automatic Stores" equal in earnings six times those of a single machine nor average net profit of \$5 per week, nor could they be set to vend at about \$1 per pound, and still distribute toys and charms;
- (c) Represented that said individual or business assigned exclusive territorial rights within a certain city or cities, county or counties, and that it or its representatives would obtain desirable locations for the purchasers of its said machines, and that, if locations failed to bring net profit of \$1 per week someone from such concern would relocate the purchaser's machines where such net profit would be obtainable, and that if, after location of machines, purchaser was dissatisfied therewith, said individual would permit machines to be returned and would refund investment in full, less 12½-percent sales cost, or resell same for purchaser, and, in support of such representations or in connection therewith, produced alleged contract for operators and distributors for signature of prospective purchaser and to be sent to said individual or concern for execution, but which in fact never was executed or returned, facts being such individual never expected, planned, or intended to assign any such exclusive territory or rights, location for purchasers' machines was not obtained nor were they relocated as above set forth, and said individual did not either resell or permit return of merchandise of purchasers and refund of investment in event of purchasers' dissatisfaction as above represented and set out; and
- (d) Supplied, as above set forth, and placed in the hands of operators of its said vending machines toys and charms for distribution under plan or arrangement involving game of chance or sale of chance to procure such toy or charm, contrary to public policy and to established public policy of the United States Government, and in competition with many who are under a moral and legal compulsion not to adopt such practices, and refrain from so doing; with effect of securing said individual an undue preference and operating unjustly against competitors aforesaid who refrain from use of such methods;

With effect of deceiving, through such false and misleading statements and representations made by said individual himself, or through his aforesaid and other sales representatives in describing said products and in promotion of his said fraudulent sales plan and scheme, ultimate purchasers into contracting for and buying his said vending machines, and with capacity and tendency so to do, and to divert unfairly to said individual and repre-

sentative trade of competitors engaged in sale in commerce among the States and in said District of same kind and nature as those dealt in by said individual and sales representative, and truthfully advertised and described by such competitors; to the injury of competition in commerce:

Held, That such acts and practices were all to the prejudice and injury of the public and competitors and constituted unfair methods of competition and unfair and deceptive acts and practices in commerce.

Before *Mr. Arthur F. Thomas*, trial examiner.

Mr. Merle P. Lyon for the Commission.

Mr. Franklin R. Overmyer and *Mr. Henry Junge*, of Chicago, Ill., for respondents.

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 J. D. Drushell, an individual trading as J. D. Drushell Co. and Laurence A. Smith, an individual, hereinafter referred to as respondents, have violated the provisions of the 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. J. D. Drushell is an individual trading as J. D. Drushell Co., with his office and principal place of business located at 4753 Broadway, Chicago, Ill.

Laurence A. Smith of 4753 Broadway, Chicago, Ill., is an individual and sales representative of J. D. Drushell, trading as J. D. Drushell Co. This respondent, acting individually and in cooperation with the respondent J. D. Drushell, trading as J. D. Drushell Co., has actively participated in the acts and practices hereinafter alleged.

PAR. 2. The respondent J. D. Drushell, trading as J. D. Drushell Co., is now, and for more than 2 years last past has been, engaged in the business of selling and distributing coin-operated vending machines of various type and character and candy, confectionery, peanuts, and other commodities for use in said vending machines. Respondent causes said products when sold to be transported from the city of Chicago in the State of Illinois to operators and purchasers thereof located in other States of the United States and in the District of Columbia.

These vending machines sold by respondent J. D. Drushell, trading as J. D. Drushell Co., are placed in public business places where members of the public may secure therefrom candy, confectionery, peanuts, and other commodities by inserting a coin in the machine. These vending machines, sold and distributed by respondent, comprise two

Complaint

28 F. T. C.

general types: A coin-vending machine specially designed to market 1- and 5-cent candy bars manufactured by the Hershey Chocolate Corporation of Hershey, Pa., which said vending machines are referred to by respondents in orders, correspondence, and advertising material as "Hershey Automatic Merchandisers," "Hershey Vending Machines," "Hershey Machines" and "Advance Hershey Vending Machines"; the second type sold and distributed by respondent is a vending machine known as "Automatic Stores" and usually contains four separate slots and compartments for the distribution of candy, confectionery, peanuts, and other commodities. In addition to the commodities mentioned above for use in said "Automatic Stores," respondent sells and distributes an assortment of toys and charms which are designed to be mixed with the commodities placed in said vending machines known as "Automatic Stores" so that members of the public, when placing a coin in said machine will occasionally receive one of said toys or charms in addition to or as a part of the commodities purchased, the said toys and charms being so concealed from the purchaser or prospective purchaser that their distribution to the purchasing public is wholly by lot or chance.

PAR. 3. In the course and conduct of his business the respondent, J. D. Drushell, trading as J. D. Drushell Co., is in active and substantial competition with other individuals and with corporations and partnerships engaged in the sale and distribution of coin-operated vending machines of various types and character, and candy, confectionery, peanuts, and other commodities for use in said vending machines in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of said business and for the purpose of inducing the purchase of said coin-vending machines designed to market candy bars manufactured by the Hershey Chocolate Corporation of Hershey, Pa., respondent J. D. Drushell, trading as J. D. Drushell Co., has made use of a sales plan consisting of false representations, fraudulent schemes, devices, and practices, among which are the following:

The respondent, J. D. Drushell, trading as J. D. Drushell Co., employs numerous traveling sales representatives, including said respondent, Laurence A. Smith, who travel throughout the various States of the United States, calling upon the retail trade and soliciting orders for respondent's machines. These sales representatives, with the knowledge, acquiescence, and active cooperation of the respondent, J. D. Drushell, trading as J. D. Drushell Co., as a part of a fraudulent sales plan and scheme, entered into by this respondent and this respondent's representatives, for the purpose and with

the result of selling this respondent's machines, make false and misleading representations as follows:

(a) Representatives of respondent J. D. Drushell, trading as J. D. Drushell Co., on arrival in a city which they expect to canvass cause to be inserted in a newspaper or periodical of said city one of the following, or some similar advertisement:

Wanted man to own and operate route of new patented machines that vend NEW HERSHEY BARS. World's largest selling chocolate. Full or part time. Nearly 100% profit. To qualify you must have good reference and \$395 cash for equipment. Give security. Income \$125 per month and up depending on expansion. We furnish all locations. Give phone. Box -----.

IMMEDIATE opening, here and adjacent territory, for trustworthy man to manage distribution of nationally advertised products enjoying 100 million profit. No selling required as accounts are established and will be turned over to party who finances self to extent \$675, fully secured. Starting income about \$40 weekly. Right man will receive additional financial aid, assuring expansion after indication of worthiness. Address Box ----- Give Phone. Personal interview will be arranged with company executive.

National company has opportunity here for reliable party. Supervise own business. A new merchandising system for special Hershey products to industry. Income starts at about \$200 per month, will assist to build income to \$400 monthly. Requires \$660 cash. No selling or experience. Give phone for interview. Address Box -----.

(b) When said representative of respondent J. D. Drushell, trading as J. D. Drushell Co., receives response to the advertisement inserted, an appointment is arranged with the prospective purchaser and the said representative outlines that he represents a large concern which is the sole distributor of Hershey penny candy bars, that respondent's company is directly connected with the Hershey Chocolate Corporation of Hershey, Pa., and the Chocolate Sales Corporation of Hershey, Pa., and that Hershey bars are vended exclusively in respondent's vending machines, and large sales from the coin vending machines which he is attempting to sell are described. An effort is made to corroborate the exaggerated average income referred to in the advertisement to which the prospective purchaser has replied, and prospective purchaser is informed by said representative that these vending machines will pay him an average net profit of \$1.00 per week each. To support this the representative produces false and fraudulent testimonial letters purported to be signed by various individuals which contain exaggerated, untrue and misleading statements as to profits obtained from operation of the vending machines distributed by respondent J. D. Drushell, trading as J. D. Drushell Co.

(c) Said representative of respondent J. D. Drushell, trading as J. D. Drushell Co., further represents as a part of this fraudulent

sales plan and scheme that the purchaser will be assigned exclusive territorial rights within a certain city or cities, county, or counties. The prospective purchaser is further informed that respondent's representative or someone from respondent's concern will obtain desirable locations for the purchaser's vending machines and that, if the locations fail to bring a net profit of \$1 per week for each machine, someone from respondent's concern will relocate purchaser's machines in locations where such net profit will be obtainable. Said representative also states that if, after location of the machines, the purchaser is dissatisfied with them, respondent will permit the machines to be returned and will refund this investment in full less 12½-cent sales cost or resell them for the purchaser. In addition to this, respondent's representative further represents that the machines are strictly slug proof and are insured against theft, fire, and mysterious disappearance. In connection with the above representations, the representative produces an alleged contract for operators and distributors for signature by the prospective purchaser and which is to be sent to said respondent J. D. Drushell, trading as J. D. Drushell Co., for execution, but which is never executed or returned to the purchaser. Also in connection with the allegations of the relationship with the Hershey Chocolate Corporation, the representative produces a printed form, alleging it to be a distributor's application, which features in very large letters the following legend:

Industrial Department
HERSHEY CHOCOLATE

Machine Division
J. D. Drushell Co.
4641-47 Ravenswood
Chicago, Illinois

Largest Organization in the World for Distribution
of Hershey Products through Advance Automatic
Equipment

PAR. 5. All the representations made by respondent as a part of said fraudulent sales plan and scheme are grossly exaggerated, misleading and untrue. In truth and in fact, the respondent J. D. Drushell, trading as J. D. Drushell Co., is not a part of the Hershey Chocolate Corporation or the Chocolate Sales Corporation of Hershey, Pa., and does not have any direct connection with said companies, is not a division or subsidiary of said companies, and is not the sole distributor of Hershey penny candy bars. Hershey candy bars are not vended exclusively in vending machines of said respondent J. D. Drushell trading as J. D. Drushell Co., and said respondent has no authority to arrange for distributors for said Com-

panies. The coin-vending machines distributed by the respondent, J. D. Drushell, trading as J. D. Drushell Co., will not produce such exaggerated earnings as represented. The respondent J. D. Drushell, trading as J. D. Drushell Co., never expected, planned, or intended to assign "exclusive territorial rights" within any city or county to the purchaser. The location for purchaser's machines is not obtained by said respondent or anyone acting for him, and purchaser's machines are not relocated by either said respondent or anyone acting for him, should first location prove unsatisfactory. The respondent J. D. Drushell, trading as J. D. Drushell Co., does not resell or permit the return of machines of the purchaser for refund of investment in event purchaser is dissatisfied. The machines distributed by said respondent are not strictly slug proof, and are not insured against theft, fire, and mysterious disappearance.

PAR. 6. In the course and conduct of his business and for the purpose of inducing retailers to purchase said coin-operated vending machines known as "Automatic Stores," respondent J. D. Drushell, trading as J. D. Drushell Co., has made use of and now uses various types of advertising matter purporting to be descriptive of said vending machines known as "Automatic Stores." Such advertising used by this respondent contains among others, the following statements and representations:

Six times the earnings of a single machine.

The use of charms and toys creates amazing sales. Grown-ups, as well as kiddies, are intrigued at the sight of these clever toys and charms mixed with candy and nuts. We have seen youngsters drop in 10 to 15 pennies seeking to receive the toy they see through the glass. Read these figures: Peanuts cost 8¢ and 10¢ per lb. depending on locality. Hard candies can be purchased at approximately 12¢ lb. This merchandise sells from 60¢ to 70¢ per lb.

When charms and toys are used operators are setting them to vend at about \$1 per lb.

By using "Automatic Stores" and this merchandise, operators have found that they can easily and quickly develop their business.

In addition to said advertising, representatives of respondent J. D. Drushell, trading as J. D. Drushell Co., including Laurence A. Smith, with the knowledge, acquiescence, and active cooperation of respondent J. D. Drushell, trading as J. D. Drushell Co., for the purpose and with the result of selling respondent's vending machines, make representations that said "Automatic Stores" will return earnings of "Six times the earnings of a single machine;" that the earnings can be greatly stimulated and increased by the use of toys and charms; that when toys and charms are used, the vending machines can be set to vend at about \$1 per pound; that said machines will average a net profit of \$5 weekly per machine.

Complaint

28 F. T. C.

PAR. 7. Said statements and representations contained in said advertising and in representations of salesmen of this respondent J. D. Drushell, trading as J. D. Drushell Co., are grossly exaggerated, misleading, and untrue. In truth and in fact, one "Automatic Stores" will not equal the earnings of six times the earnings of a single machine and will not average a net profit of \$5 per week for each machine; and also, said machine cannot be set to vend at about \$1 per pound and still distribute toys and charms. Furthermore, the use of toys and charms as above alleged involves a game of chance or the sale of a chance to procure a toy or charm, which is a practice deemed contrary to public policy; and is contrary to an established public policy of the Government of the United States.

Many persons, firms, and corporations located in the several States of the United States and engaged in competition with respondent J. D. Drushell, trading as J. D. Drushell Co., are under a moral and legal compulsion not to adopt such practices and do refrain from adopting them. The use of said method by this respondent gives him an undue preference and operates unjustly against those competitors of said respondent who are required to refrain from the use of such methods.

PAR. 8. Each and all of the false and misleading statements and representations made by the respondent J. D. Drushell, trading as J. D. Drushell Co., himself, or through the respondent Laurence A. Smith and other sales representatives in describing his products or in the promotion of said fraudulent sales plan and scheme hereinabove set forth, were and are calculated to, have had, and now have a capacity and tendency to deceive and do deceive the ultimate purchasers into contracting for and buying that which they did not intend to buy. The aforesaid practices have the capacity and tendency to unfairly divert to the respondents the trade of competitors engaged in selling in commerce between and among the States of the United States and the District of Columbia products of the same kind and nature as those of the respondents, which said products are truthfully advertised and described by said competitors.

As a consequence thereof, 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. 9. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice of the public and of the 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.

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, 1938, issued, and subsequently served, its complaint in this proceeding upon the respondents, J. D. Drushell, an individual, trading as J. D. Drushell Co., and Laurence A. Smith, 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 separate answers by the respondents, the Commission by order herein designated and appointed Arthur F. Thomas, an examiner of the Commission, to take testimony and receive evidence in this proceeding, and ordered the taking of testimony to begin on January 3, 1939, in Chicago, Ill. At the time and place designated by the Commission the respondent J. D. Drushell appeared by Franklin R. Overmyer and Henry Junge, his attorneys, and the respondent Laurence A. Smith appeared pro se, and moved that they be granted leave to file amended answers admitting all of the material allegations of fact set forth in the complaint and waiving all intervening procedure and further hearing as to the facts. The hearing was thereupon closed by the trial examiner. Subsequently, on, to wit, January 21, 1939, the Commission, by order entered herein, granted the separate motions of the respondents for leave to withdraw their original answers and to substitute therefor amended answers admitting all the material allegations of the complaint, and waiving all intervening procedure and further hearing as to the facts, which amended answers were duly filed in the office of the Commission. Thereafter this proceeding regularly came on for final hearing before the Commission, on the said complaint and the amended answers of the respondents, and the Commission having duly considered the same, 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. The respondent J. D. Drushell is an individual trading as J. D. Drushell Co., with his office and principal place of business at 4753 Broadway, Chicago, Ill. The respondent Laurence A. Smith is an individual and sales representative of J. D. Drushell, trading as J. D. Drushell Co. This respondent, acting individually and in co-

Findings

28 F. T. C.

operation with the respondent J. D. Drushell, trading as J. D. Drushell Co., has actively participated in the acts and practices alleged in the complaint.

PAR. 2. The respondent J. D. Drushell, trading as J. D. Drushell Co., is now, and for more than 2 years last past has been, engaged in the business of selling and distributing coin-operated vending machines of various types and character and candy, confectionery, peanuts, and other commodities for use in said vending machines. Respondent causes said products when sold to be transported from the city of Chicago in the State of Illinois to operators and purchasers thereof located in other States of the United States and in the District of Columbia.

These vending machines sold by respondent J. D. Drushell, trading as J. D. Drushell Co., are placed in public business places where members of the public may secure therefrom candy, confectionery, peanuts, and other commodities by inserting a coin in the machine. These vending machines, sold and distributed by respondent, comprise two general types: A coin-vending machine specially designed to market 1- and 5-cent candy bars manufactured by the Hershey Chocolate Corporation of Hershey, Pa., which said vending machines are referred to by respondents in orders, correspondence, and advertising material as "Hershey Automatic Merchandisers," "Hershey Vending Machines," "Hershey Machines," and "Advance Hershey Vending Machines"; the second type sold and distributed by respondent is a vending machine known as "Automatic Stores" and usually contains four separate slots and compartments for the distribution of candy, confectionery, peanuts, and other commodities. In addition to the commodities mentioned above for use in said "Automatic Stores," respondent sells and distributes an assortment of toys and charms which are designed to be mixed with the commodities placed in said vending machines known as "Automatic Stores" so that members of the public, when placing a coin in said machine, will occasionally receive one of said toys or charms in addition to or as a part of the commodities purchased, the said toys and charms being so concealed from the purchaser or prospective purchaser that their distribution to the purchasing public is wholly by lot or chance.

PAR. 3. In the course and conduct of his business, the respondent, J. D. Drushell, trading as J. D. Drushell Co., is in active and substantial competition with other individuals and with corporations and partnerships engaged in the sale and distribution of coin-operated vending machines of various types and character, and candy, confectionery, peanuts, and other commodities for use in said vending ma-

chines in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of said business and for the purpose of inducing the purchase of said coin-vending machines designed to market candy bars manufactured by the Hershey Chocolate Corporation of Hershey, Pa., respondent, J. D. Drushell, trading as J. D. Drushell Co., has made use of a sales plan consisting of false representations, fraudulent schemes, devices, and practices, among which are the following:

The respondent, J. D. Drushell, trading as J. D. Drushell Co., employs numerous traveling sales representatives, including said respondent, Laurence A. Smith, who travel throughout the various States of the United States, calling upon the retail trade and soliciting orders for respondent's machines. These sales representatives, with the knowledge, acquiescence, and active cooperation of the respondent, J. D. Drushell, trading as J. D. Drushell Co., as a part of a fraudulent sales plan and scheme, entered into by this respondent and this respondent's representatives, for the purpose and with the result of selling this respondent's machines, make false and misleading representations as follows:

(a) Representatives of respondent, J. D. Drushell, trading as J. D. Drushell Co., on their arrival in a city which they expect to canvass, cause to be inserted in a newspaper or periodical of said city one of the following, or some similar advertisement:

Wanted—man to own and operate route of new patented machines that vend NEW HERSEY BARS. World's largest selling chocolate. Full or part time. Nearly 100% profit. To qualify you must have good reference and \$395 cash for equipment. Give security. Income \$125 per month and up depending on expansion. We furnish all locations. Give phone. Box -----.

IMMEDIATE opening, here and adjacent territory, for trustworthy man to manage distribution of nationally advertised products enjoying 100 million profit. No selling required as accounts are established and will be turned over to party who finances self to extent \$675, fully secured. Starting income about \$40 weekly. Right man will receive additional financial aid, assuring expansion after indication of worthiness. Address Box ----- Give Phone. Personal interview will be arranged with company executive.

National company has opportunity here for reliable party. Supervise own business. A new merchandising system for special Hershey products to industry. Income starts at about \$200 per month, will assist to build income to \$400 monthly. Requires \$660 cash. No selling or experience. Give phone for interview. Address Box -----.

(b) When said representative of respondent, J. D. Drushell, trading as J. D. Drushell Co., receives response to the advertisement inserted, an appointment is arranged with the prospective purchaser

Findings

28 F. T. C.

and the said representative outlines that he represents a large concern which is the sole distributor of Hershey penny candy bars, that respondent's company is directly connected with the Hershey Chocolate Corporation of Hershey, Pa., and the Chocolate Sales Corporation of Hershey, Pa., and that Hershey bars are vended exclusively in respondent's vending machines, and large sales from the coin vending machines which he is attempting to sell are described. An effort is made to corroborate the exaggerated average income referred to in the advertisement to which the prospective purchaser has replied, and prospective purchaser is informed by said representative that these vending machines will pay him an average net profit of \$1 per week each. To support this the representative produces false and fraudulent testimonial letters, purported to be signed by various individuals, which contain exaggerated, untrue, and misleading statements as to profits obtained from operation of the vending machines distributed by respondent, J. D. Drushell, trading as J. D. Drushell Co.

(c) Said representative of respondent, J. D. Drushell, trading as J. D. Drushell Co., further represents as a part of this fraudulent sales plan and scheme that the purchaser will be assigned exclusive territorial rights within a certain city or cities, county, or counties. The prospective purchaser is further informed that respondent's representative or someone from respondent's concern will obtain desirable locations for the purchaser's vending machines and that, if the locations fail to bring a net profit of \$1 per week for each machine, someone from respondent's concern will relocate purchaser's machines in locations where such net profit will be obtainable. Said representative also states that if, after location of the machines, the purchaser is dissatisfied with them, respondent will permit the machines to be returned and will refund this investment in full less 12½ percent sales cost or resell them for the purchaser. In addition to this, respondent's representative further represents that the machines are strictly slug proof and are insured against theft, fire, and mysterious disappearance. In connection with the above representations, the representative produces an alleged contract for operators and distributors for signature by the prospective purchaser and which is to be sent to said respondent, J. D. Drushell, trading as J. D. Drushell Co., for execution, but which is never executed or returned to the purchaser. Also in connection with the allegations of the relationship with the Hershey Chocolate Corporation, the representative produces a printed form, alleging it to be a distributor's application, which features in very large letters the following legend:

Findings

Industrial Department

HERSHEY CHOCOLATE

Machine Division

J. D. Drushell Co.

4641-47 Ravenswood

Chicago, Illinois

Largest Organization in the World for
Distribution of Hershey Products through
Advance Automatic Equipment

PAR. 5. All the representations made by respondent as a part of said fraudulent sales plan and scheme are grossly exaggerated, misleading, and untrue. In truth and in fact, the respondent, J. D. Drushell, trading as J. D. Drushell Co., is not a part of the Hershey Chocolate Corporation or the Chocolate Sales Corporation of Hershey, Pa., and does not have any direct connection with said companies, is not a division or subsidiary of said companies, and is not the sole distributor of Hershey penny candy bars. Hershey candy bars are not vended exclusively in vending machines of said respondent, J. D. Drushell, trading as J. D. Drushell Co., and said respondent has no authority to arrange for distributors for said companies. The coin-vending machines distributed by the respondent, J. D. Drushell, trading as J. D. Drushell Co., will not produce such exaggerated earnings as represented. The respondent, J. D. Drushell, trading as J. D. Drushell Co., never expected, planned, or intended to assign "exclusive territorial rights" within any city or county to the purchaser. The location for purchaser's machines is not obtained by said respondent or anyone acting for him, and purchaser's machines are not relocated by either said respondent or anyone acting for him, should first location prove unsatisfactory. The respondent, J. D. Drushell, trading as J. D. Drushell Co., does not resell or permit the return of machines of the purchaser for refund of investment in event purchaser is dissatisfied. The machines distributed by said respondent are not strictly slug proof, and are not insured against theft, fire, and mysterious disappearance.

PAR. 6. In the course and conduct of his business and for the purpose of inducing retailers to purchase said coin-operated vending machines known as "Automatic Stores," respondent, J. D. Drushell, trading as J. D. Drushell Co., has made use of and now uses various types of advertising matter purporting to be descriptive of said vending machines known as "Automatic Stores." Such advertising

used by this respondent contains among others the following statements and representations:

Six times the earnings of a single machine.

The use of charms and toys creates amazing sales. Grown-ups as well as kiddies are intrigued at the sight of these clever toys and charms mixed with the candy and nuts. We have seen youngsters drop in 10 to 15 pennies seeking to receive the toy they see through the glass. Read these figures: Peanuts cost 8¢ to 10¢ per lb. depending on locality. Hard candies can be purchased at approximately 12¢ lb. This merchandise sells from 60¢ to 70¢ per lb.

When charms and toys are used operators are setting them to vend at about \$1 per lb.

By using "Automatic Stores" and this merchandise, operators have found that they can easily and quickly develop their business.

In addition to said advertising, representatives of respondent, J. D. Drushell, trading as J. D. Drushell Co., including Laurence A. Smith, with the knowledge, acquiescence, and active cooperation of respondent, J. D. Drushell, trading as J. D. Drushell Co., for the purpose and with the result of selling respondent's vending machines, make representations that said "Automatic Stores" will return earnings of "Six times the earnings of a single machine;" that the earnings can be greatly stimulated and increased by the use of toys and charms; that when toys and charms are used, the vending machines can be set to vend at about \$1 per pound; that said machines will average a net profit of \$5 weekly per machine.

PAR. 7. Said statements and representations contained in said advertising and in representations of salesmen of this respondent, J. D. Drushell, trading as J. D. Drushell Co., are grossly exaggerated, misleading, and untrue. In truth and in fact, one "Automatic Stores" will not equal in earnings six times the earnings of a single machine and will not average a net profit of \$5 per week for each machine; and also, said machine cannot be set to vend at about \$1 per pound and still distribute toys and charms. Furthermore, the use of toys and charms as above alleged involves a game of chance or the sale of a chance to procure a toy or charm, which is a practice deemed contrary to public policy and is contrary to an established public policy of the Government of the United States.

Many persons, firms, and corporations located in the several States of the United States and engaged in competition with respondent, J. D. Drushell, trading as J. D. Drushell Co., are under a moral and legal compulsion not to adopt such practices and do refrain from adopting them. The use of said methods by this respondent gives him an undue preference and operates unjustly against those competitors of said respondent who are required to refrain from the use of such methods.

PAR. 8. Each and all of the false and misleading statements and representations made by the respondent, J. D. Drushell, trading as J. D. Drushell Co., himself, or through the respondent, Laurence A. Smith, and other sales representatives in describing his products or in the promotion of said fraudulent sales plan and scheme hereinabove set forth, were and are calculated to, have had, and now have a capacity and tendency to deceive and do deceive the ultimate purchasers into contracting for and buying the vending machines of the respondent, J. D. Drushell. The aforesaid practices have the capacity and tendency to unfairly divert to the respondents the trade of competitors engaged in selling in commerce between and among the States of the United States and the District of Columbia, products of the same kind and nature as those of the respondents, which said products are truthfully advertised and described by said competitors. As a consequence thereof, 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.

CONCLUSION

The aforesaid acts and practices of the respondents have been, and are, all to the prejudice and injury of the public and said 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 and the answers of the respondents, in which answers respondents admit all the material allegations of fact set forth in the complaint and waive all intervening procedure and further hearing as to the facts, and the Commission having made its findings as to the facts and conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, J. D. Drushell, individually and as sole trader under the name and style of J. D. Drushell Co., or trading under any other name, and Laurence A. Smith, individually, or in combination or conspiracy with each other, their agents, representatives, and employees, directly or through any device, corporate or otherwise, in connection with the offering for sale, sale, and distribution of the coin-operated vending machines specially designed to

market 1- and 5-cent candy bars manufactured by the Hershey Chocolate Corporation of Hershey, Pa., variously known as "Hershey Automatic Merchandisers," "Hershey Vending Machines," "Hershey Machines," "Advance Hershey Vending Machines," "Automatic Stores," or the same or similar machines under whatever name sold, in interstate commerce or in the District of Columbia, do forthwith cease and desist, directly or indirectly, from:

1. Representing that the respondent, J. D. Drushell, is the representative or agent of, or in any manner connected with, the Hershey Chocolate Corporation or the Chocolate Sales Corporation, of Hershey, Pa., or that the "company" operated by said respondent is a division or subsidiary of or affiliated with either of said firms, when such is not the fact.

2. Representing that the respondent, J. D. Drushell, is the sole distributor of Hershey penny candy bars or that such bars are distributed exclusively through the vending machines sold by said respondent, or that said respondent has authority to arrange for distribution of candy for the Hershey Chocolate Corporation or the Chocolate Sales Corporation.

3. Representing that respondents' vending machines will pay the operator thereof an average net profit of \$1 per week for each machine, or that the operator thereof will receive an income of \$125 per month or any other amount, unless such is the fact.

4. Representing that the respondent, J. D. Drushell, assigns exclusive territorial rights within any certain trade area to any purchaser or prospective purchaser of his vending machines, unless and until such exclusive territory is in fact assigned.

5. Representing that the respondent, J. D. Drushell, obtains locations for said vending machines, or that he relocates said vending machines should first location prove unsatisfactory, unless and until such locations are in fact obtained.

6. Representing that the respondent, J. D. Drushell, resells or permits the return of said vending machines for refund of investment in case the purchaser thereof is dissatisfied, unless and until such machines are so disposed of and the investment in fact returned to dissatisfied purchasers.

7. Representing that said vending machines are strictly slug proof or are insured against fire, theft, or mysterious disappearance, unless such is the fact.

8. Representing that said "automatic stores" vending machines will earn six times as much as other types of machines sold by the respondent, J. D. Drushell, or that they will average a net profit of \$5

795

Order

per week for each such machine, or any other amount, unless such is the fact.

9. Representing that said "automatic stores" vending machines can be set to vend candy and other merchandise at the rate of \$1 per pound, or any other amount, unless such is the fact.

10. Supplying to, or placing in the hands of, operators of any of said vending machines, toys, charms, or other articles of merchandise which may be distributed through said vending machines in such a manner as to constitute a lottery device or the distribution of such merchandise by lot or chance.

It is further ordered, That the respondents shall, within 60 days after service upon them of this order, file with the Commission separate and individual reports in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
**CHARLES W. CROMER DOING BUSINESS AS SHALWIN
HOSIERY MILLS**

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

Docket 2794. Complaint, Apr. 30, 1936—Decision, Feb. 27, 1939

Where an individual engaged in manufacture of hosiery which had appearance and feel of silk but which was composed largely of rayon and cotton, and in sale and distribution thereof to purchasers in various other States, in substantial competition with those engaged in sale and distribution of hosiery of same type, kind, and grade and of various other types, kinds, and grades, and including those who do not represent, brand, label, advertise, or describe their said product falsely or deceptively and do not represent that their said product contains more silk than is in fact present therein—

- (a) Caused to be stamped on two types of his said hosiery, words "PURE THREAD SILK," together with words, on one of said types, "Reinforced with Art Silk," and words, on the other, "Reinforced with Fine Rayon," and placed on both types label setting forth, in part, "New Style Split Foot Silk Hose are made of the finest materials," etc., and represented thereby, directly and by implication, to members of the purchasing public, that such hosiery contained silk, product of the cocoon of the silk worm, as the principal or major constituent therein, and contained said product in a proportion or quantity larger than that present in said hosiery, top, heel, toe, and sole of which were made of cotton, and body of which, designated by term "PURE THREAD SILK" as aforesaid, was composed of 87 percent rayon and 13 percent silk, with percentage of silk in whole hose amounting to only 3 percent thereof by weight;
- (b) Caused to be stamped on another type of hose sold and distributed by him words "Rayon reinforcing Two THREADS PURE SILK," with said last four words in large conspicuous type and first words in small and less conspicuous type, and thereby represented, directly and by implication, to members of the purchasing public in various States as aforesaid, that such hosiery contained silk as aforesaid as principal or major constituent therein, and also in proportion or quantity larger than that of rayon present in said product, top, heel, toe, and sole of which were made of cotton, with body thereof, stamped with words "Rayon Reinforcing Two THREADS PURE SILK," containing approximately 60 percent rayon and 40 percent silk;

With result of thereby placing in the hands of dealers means or instrumentality of deception and fraud whereby they were enabled, aided, and assisted in misleading and deceiving members of the purchasing public as to the contents of said hosiery and the quality, value, grade, and substance thereof; and

- (c) Caused to be stamped on substantial number of said hose words "50¢ per pair," and represented thereby that said price was customary and ordinary retail value thereof, facts being it was fictitious and much higher than that at which it was customarily offered for sale and sold at retail;