

IN THE MATTER OF
ILLINOIS CONTINENTAL
MACHINE CORPORATION ET AL.

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

Docket 6615. Complaint, Aug. 20, 1956—Decision, Nov. 15, 1957

Order dismissing for lack of proof complaint charging two corporate promoter-sellers located in Chicago and Laguna Beach, Calif., and their common officer, with making false representations in advertising in magazines and periodicals of national circulation designed to elicit the interest of private individuals as purchasers and operators of their vending machines, and the cooperation of civic organizations as sponsors therefor.

Mr. S. F. House for the Commission.

Defrees, Fiske, O'Brien, Thompson & Simmons, by *Mr. Thomas J. Johnson, Jr.*, of Chicago, Ill., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On August 20, 1956, the Federal Trade Commission issued the complaint in this proceeding, charging the Respondents with the dissemination of various false representations relative to the easy work and high profits to be gained from the purchase and operation of Respondents' candy and chewing-gum vending machines. The specific charges may be summarized as follows:

1. That, contrary to Respondents' representations, large profits rarely, if ever, accrue to persons who purchase and operate Respondents' vending machines;

2. That, contrary to Respondents' representations, purchasers are generally not able to earn \$100.00 per week in their spare time, and do not recoup their original investment in fifteen months;

3. That, contrary to Respondents' representations, purchasers are required to engage in extensive canvassing and selling;

4. That, contrary to Respondents' representations, purchasers of Respondents' machines are not required to have a car and good references in order to qualify therefor, but only to have the purchase price of the machine;

5. That, contrary to Respondents' representations, purchasers are not given exclusive sales territories;

6. That, contrary to Respondents' representations, Respondents do not give financial assistance to purchasers for expansion; that such

persons can expand only by purchasing additional machines from Respondents;

7. That, contrary to Respondents' representations, Respondents do not manufacture the vending machines sold by them; and, in effect, that such representation is misleading in that "There has long been a preference on the part of a substantial portion of the purchasing public for dealing directly with the manufacturer in the belief that lower prices, elimination of middleman's profits, superior products, and other advantages can thereby be obtained";

8. That, contrary to Respondents' representations, the vending machines are often not placed for the purchaser in a satisfactory location, and, when it becomes necessary to relocate them, the relocation must be done by the purchaser;

9. That the statement "Insured for property and liability by 'Lloyds of London'—plus fire and theft insurance and a 100% Money Back Guarantee" is false in that it fails to disclose that the purchaser of Respondents' vending machine must pay an additional sum for such insurance and for such profit guarantee.

THE ANSWER

On September 20, 1956, Respondents submitted their answer to the above charges. They admit their identity as alleged except that they assert that the address of Respondent Lawrence F. Ellison is 545, instead of 945, Diamond Street, Laguna Beach, California. Respondents, in their answer, also admit that they have been engaged for more than two years in the sale and distribution of vending machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, and that they have been in substantial competition with others so engaged.

Respondents deny that they sell their vending machines through sales representatives or agents as alleged, but aver that all sales of their products are made through independent distributors who are not agents of Respondents, but are independent contractors for whose acts and practices the Respondents are not responsible. They admit the dissemination of national advertisements, but deny any responsibility for the local advertisements disseminated by the individuals whom they call their "independent distributors." Finally, Respondents deny the dissemination of any false advertisements and the doing of any act or practice in violation of the Federal Trade Commission Act.

IDENTITY OF RESPONDENTS

Respondent Illinois Continental Machine Corporation is an Illinois corporation, with its principal office and place of business located at

105 North Clark Street, Chicago, Illinois. Respondent Copperite, Inc. is a California corporation with its principal office and place of business located in the home of Respondent Lawrence F. Ellison, 545 Diamond Street, Laguna Beach, California, and its Chicago office in the same space occupied by the other corporate respondent, but using the address, 74 West Washington Street, Chicago, Illinois, because the building is located at the corner of Washington and Clark Streets in Chicago. Individual Respondent Lawrence F. Ellison, the manager and former president of Respondent Illinois Continental Machine Corporation and the sole stockholder of Respondent Copperite, Inc., actively directs and controls the policies and practices of both the corporate respondents.

Respondents are, and for more than three years last past have been, engaged in commerce in the business of promoting, selling and distributing vending machines and supplies therefor. Their course of trade therein is substantial, and they have been and now are in competition with other persons, corporations, firms and partnerships similarly engaged.

RESPONDENTS' METHOD OF OPERATION

Respondents have represented themselves to be manufacturers of vending machines, and have prepared a sales kit for use in promoting the sale of such vending machines, which contains, among other things, a photograph depicting a factory interior, entitled "One Corner of Assembly Line." In fact, however, Respondents have not operated a factory, but their machines have been manufactured for them, according to their specifications, by W. G. Parrish & Company of Chicago, Illinois. The completed machines are delivered either to the Respondents or, upon their order, to places designated by them. In promoting the sale of their vending machines, Respondents place advertisements in various magazines and periodicals, such as the Boilermakers' and Blacksmiths' Journal, the American Legion Magazine, Pilot Log, the Optimist Magazine, the V.F.W. Magazine, the U.S. Junior Chamber of Commerce Magazine, the Rotarian, and the Saturday Evening Post. These advertisements are designed to elicit the interest of private individuals as operators of Respondents' vending machines, and the cooperation of civic organizations as sponsors therefor. All of these magazines have national circulation, although most of them are directed particularly to the members of certain fraternal, civic or industrial associations. Typical of such advertisements are the following:

\$\$ OPPORTUNITY \$\$
FOR CLUB MEMBERS—OR MEMBERS'
RELATIVES AND FRIENDS

Own your own business! Earn up to \$100 per week spare time; much more full time. No selling or canvassing. Operate from own home. No experience needed. Work under sponsorship of local service, civic organization. Minimum cash required: \$1500 to \$4950 (depending on size of operation). We extend help as you grow up to \$20,000. Must furnish satisfactory references for honesty and reliability to meet civic club requirements. This plan will stand your bank's inspection. Write for complete details free!

Operate these proved MONEY-MAKERS with sponsor emblem on each unit—and watch your income soar. . . . Remember: each \$1,000 sales—your profits after cost of merchandise approx. \$530.00.

\$1,500 to \$5,000 cash starts you in this exceptional income business depending on size of operation. Immediate weekly earnings. No specialized experience necessary.

Sales of Respondents' vending machines are effected throughout the country by salesmen whom the Respondents designate as "Independent Distributors," who are supplied by Respondents with the sales kit mentioned above, containing copies of national advertisements, bank references, recommended sales talks, suggested advertisements for insertion in local newspapers, and contract and order blanks. These "distributors" are also supplied by Respondents with a sample vending machine, which they are required to purchase.

Respondents' salesmen call upon civic, fraternal, service and union organizations and propose that they sponsor the installation of Respondents' vending machines by procuring suitable locations therefor in local business establishments, and by allowing their insignia to be placed on the machines. In consideration therefor, the association or organization is offered 10% of the proceeds to be derived from the operation of the vending machine, to be donated to the association's favorite charity, which is also designated on the machine. After securing a commitment for such sponsorship, the salesman generally inserts in the local newspaper an advertisement, the format of which has been supplied to him by Respondents' offering Respondents' vending machines for sale as a business opportunity sponsored by the local civic organization. Typical of such advertisements are the following:

You will operate this business from your home without employees or office expense and you do no selling. You will be associated AND SPONSORED BY A LOCAL CIVIC ORGANIZATION TO HANDLE WHOLESALE HERSHEY'S, SUCHARDS, ADAMS, DENTYNE, BEEMAN'S, BEECH-NUT, CHLOROPHYLL GUM and other world advertised brands. Business is set up for you: Only supervision needed. Requires \$4,950 now. This will enable you to have 100 locations which will be secured by the sponsor. Good references, car. An all-cash, profitable, and depression-proof business. Financial assistance enables rapid expansion. High income starts immediately. Want individual capable of earning \$10,000 to \$20,000 yearly.

A BUSINESS OF YOUR OWN
WITH 100%
MONEY BACK GUARANTEE

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Victoria and most cities in Texas. You will operate this business from your home without employees or office expenses, and you do no selling. You will be associated with and sponsored by a local civic organization. Insured for property and liability by "LLOYDS OF LONDON" * * * plus fire and theft insurance, and a 100% MONEY BACK GUARANTEE! To handle Wholesale HERSHEY'S, PETER PAUL, DENTYNE, BEECH-NUT, and other world advertised brands. Business is set up for you. Only supervision needed. Required \$4000 to \$8000 now. Good references, car. An all cash, profitable and depression-proof business. Income starts immediately. Thereafter will assist you in financing up to \$20,000 for expansion. Write giving full details of yourself and telephone number to P.O. Box 11601, Dallas, Texas.

When a prospective "operator" answers this advertisement, the sales plan is described to him, and, if he agrees to purchase Respondents' vending machines, a three-party sponsorship contract is entered into by the salesman as "independent dealer of the Illinois Continental Machine Corporation," the sponsoring organization, and the prospective "operator." In this contract the contractual obligations of each are set forth. The sponsor agrees to obtain suitable locations for the installation of the vending machines to be purchased by the "operator," and, if relocation is necessary, to procure such new locations, for which service the sponsor is to receive 10% of the proceeds derived from each machine. The "dealer" agrees to sell to the "operator" a certain number of machines, together with supplies therefor. The "operator" agrees to purchase the machines and to service them and pay the sponsor 10% of the proceeds.

Upon completion of such sponsorship contract, the "operator" is required to sign a purchaser order agreement whereby he purchases from the "independent dealer" a certain number of vending machines for which he is required either to make a payment in full with order, or to pay one-half with order and the remainder C.O.D. The order is signed by the purchaser, by the "independent dealer," and by one of the respondent corporations, and a copy is forwarded to the respondent corporation for its signature. Payment is required to be made to one of the respondent corporations, and must be in the form of cash or its equivalent.

At the time of purchase the "operator" is offered the option of obtaining insurance as offered in the advertisement, for an additional sum. If he applies for this insurance, the application therefor is sent to one of the respondent corporations, and thereafter transmitted by it to the insurance company.

The machines purchased are delivered from Respondents' establishment in Chicago to the city in which the "operator" resides. Thereafter the "operator" may either install the machines himself in locations of his own selection, or they may be installed for him

by the "independent dealer" in locations procured by the sponsor, for which service \$3.00 per machine is withheld by the Respondents out of the purchase price of the machines. This money is refunded to the "operator" by Respondents if he declines to avail himself of this service, and instead installs his own machines.

After the machines are installed, a form, styled "Completion Sheet," must be signed by the purchaser or "operator," listing the locations of his machines and stating that with the instruction and assistance he has received from the "independent distributor," he "feels capable of following through with" his "Coin Automatic Merchandising Machine operations." A copy of this completion sheet is forwarded to Respondents, and by Respondents to the insurance company in the event that the "operator" has purchased such insurance. The insurance does not become effective until the insurance company receives this form. Thereafter, Respondents have no further contact with the "operator" unless such "operator" desires to "expand" by purchasing additional vending machines, in which event the Respondents will, if desired, assist him in such expansion by extending him credit up to the amount of \$20,000.00.

THE ISSUES ANALYZED AND RESOLVED

Analysis of the complaint, the answer, and the evidence raise factual and legal issues as hereinafter set forth. In considering and resolving these issues, we must remember that counsel supporting the complaint bears the burden of proof and must sustain each allegation of the complaint by reliable, probative and substantial evidence. Substantial evidence has been judicially defined as meaning

* * * such reliable evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain or irrelevant matter, * * * It implies a quality and character of proof which induces conviction and makes a lasting impression upon reason" (*Carlay Company*, 153 F. 2d 493, 496).

Therefore all the evidence in the record must be evaluated in the light of this basic definition, and in consonance with the rule relating to the burden of proof. Should the evidence fail to meet the requirements enunciated therein, the burden of proof has not been sustained, and the allegations of the complaint remain unproven. Only by firm and faithful observance of this cardinal principle can justice be dispensed in administrative law.

Thus, we now proceed to the consideration and resolving, seriatim, of the issues herein.

1. Are Respondents accountable, under the Federal Trade Commission Act, for the representations contained in the advertisements and sales talks disseminated by the salesmen of their vending machines, who are designated by Respondents as "independent distributors" or "independent dealers"?

Respondents insist that their vending machines are sold through independent dealers who are not their agents or employees, and for whose acts and practices in the promotion of such sales they are not responsible. They emphasize the fact that all the contracts with which we are here concerned refer to the local salesman as Respondents' "independent dealer"; that such dealers are paid no salaries; that Respondents make no deductions from their earnings for social security or income tax purposes; and that such salesmen conduct their business in an independent manner.

To the contrary, the facts are that the so-called "independent dealers," except for the sample machines which they are required to buy, purchase no vending machines from Respondents. The title, when a vending machine is sold, is actually transferred directly from Respondents to the ultimate purchaser. The consideration therefor, in the form of the purchase price, also passes directly from the purchaser to Respondents. No vending machines are kept in stock by the salesmen; they have no fixed place of business; they are supplied by Respondents with advertising material for insertion in local newspapers; and the evidence indicates that they do not deviate from the advertising script furnished by Respondents. They also receive from Respondents a sales kit, and detailed directions as to their selling activities. Furthermore, Respondents' salesmen present themselves to prospective purchasers as representatives of Respondents, and, according to testimony in the record, are so regarded by such prospective purchasers. Accordingly, we must conclude that the persons styled by Respondents as "independent dealers" are not such in reality, but that in truth and in fact they are sales representatives or agents of the Respondents, for whose acts and practices in promoting the sale of Respondents' vending machines Respondents are accountable under the Federal Trade Commission Act.

2. Have Respondents falsely represented that large profits generally accrue to operators of their vending machines; that earnings of \$100 per week will generally accrue to such operators; or that they will recoup their investment within fifteen months?

Undisputed testimony indicates that if cost and maintenance of Respondents' vending machines be disregarded, profits from their operation run from 45% to 60% of the cost of the candy and gum

dispensed by the machines. The exact extent to which such profit must be reduced to recoup the original cost of the machine, and provide for depreciation and servicing thereof, has not been shown. The evidence shows, however, that seven purchasers of Respondents' vending machines who testified in support of the complaint expressed dissatisfaction with the operation of such machines; some because they did not like the locations of their machines; others because they blamed the Respondents for inducing false hopes of large profits; and all because they did not make what they considered a sufficient profit.

Their testimony establishes, however, that large profits, in the sense of large net returns, do not always accrue to purchasers or operators of Respondents' vending machines. On the other hand, Respondents have presented evidence showing that numerous purchasers of such machines have expressed satisfaction with their business venture by buying additional vending machines from Respondents. At least one of the witnesses called in support of the complaint was shown, on cross-examination, to have written glowing letters of commendation of Respondents' machines, and of the profits to be derived therefrom. On this point, even the complaint itself implies, by the assertion, "Large profits *rarely*, if ever, have accrued to purchasers," that such profits may sometimes so accrue. Likewise, the complaint alleges that "Purchasers *generally* are unable to earn \$100 a week in their spare time, or to recoup their original investment within 15 months," adding the admission that "The quoted figures are theoretically possible, but only under perfect conditions."

In the light of the emphasis thus placed by the complaint upon the words "rarely" and "generally" in the allegations concerning possible profits, and the proposed findings of facts submitted by counsel supporting the complaint, we are asked to find that large profits "*rarely*" accrue to purchasers, and that purchasers "*generally*" are unable to earn \$100 a week in their spare time or to recoup their original investment within fifteen months. We have not, however, been furnished with any sound basis for such a conclusion. The record contains no evidence of the relation, percentage-wise, of dissatisfied purchasers to the total number of purchasers of Respondents' vending machines, nor is there any evidence therein tending to show how many purchasers made what they considered satisfactory profits, as implied by the evidence in the record showing repeat purchases of vending machines. In the absence of such evidence, or some evidence competent to serve as a basis for comparison, we must conclude that there is no substantial, probative and reliable evidence

in the record to support the conclusion that Respondents' representations relative to large profits or an income of \$100 per week are false and misleading. Accordingly, the allegations of the complaint in that respect have not been proven.

3. Did Respondents falsely represent that the "operators" of their vending machines would not be required to engage in extensive canvassing and selling?

The evidence shows that Respondents' advertisements did contain representations to the effect that the "operators" of Respondents' vending machines would not be required to engage in any canvassing or selling. There is no evidence in the record to indicate that these words, as used in Respondents' advertisements, have any meaning except in the usual and ordinary sense in which they are customarily used and understood by the public generally. Thus, the word "selling" must be accepted as meaning simply the transfer of title to property for a consideration; and the word "canvassing" must be taken as meaning a seeking of the opportunity to sell. As so interpreted, Respondents' advertisements necessarily indicate that the "operators" of their vending machines would not have to engage in a door-to-door solicitation, or other type of personal contact between seller and prospective purchaser, in the vending of candy and gum by means of Respondents' machines. There is evidence in the record that some operators of Respondents' vending machines found it necessary to seek new locations therefor. The obtaining of such new locations, however, cannot reasonably be equated with canvassing or selling. There is no valid basis, therefore, for the conclusion that Respondents falsely represented that no canvassing or selling would be necessary in operating their vending machines. In truth and in fact, none is necessary. Accordingly, this charge of the complaint has been disproved and must fail.

4. Did Respondents falsely represent that prospective purchasers of their vending machines would be required to have a car, good references, and a specified sum of money in order to qualify for the purchase of such machines?

The evidence shows that Respondents in their advertisements did represent that prospective purchasers of their vending machines were required to have a car, good references, and a specified sum of money to qualify therefor. One salesman testified that he did not ask a prospective purchaser if he had a car. All of the operators, however, who testified in this proceeding stated that an automobile was necessary to their business. We believe that we are justified in assuming that one of the purposes of Respondents' advertisements was to acquaint those interested therein with the general require-

ments of Respondents' proposal. It follows, therefore, since the use of a car was a necessity for operators, that the representation of such necessity cannot be false, as alleged.

Under Respondents' sponsorship plan, each prospective purchaser was required to be accepted for sponsorship by the local civic or fraternal organization. Without good references on the part of the prospect, it may be assumed that the organization would not have pledged its sponsorship to him. The mere fact that the proposed operator was accepted by the sponsoring organization implies its approval of him. We must conclude, therefore, that in one form or another, prospective purchasers were required to have good references.

Since the complaint admits that a specified sum of money was required of the purchaser of Respondents' vending machines, we must conclude that the representation concerning the money requirement, as well as those concerning a car and good references, was true. It follows that the charge concerning all three requirements fails because it is contrary to the facts as shown by the evidence.

5. Did Respondents falsely represent that purchasers of their vending machines would be given an exclusive sales territory?

The record shows that Respondents' advertisements contain no representation concerning exclusive sales territories. In fact, the purchase order provides as follows:

4. OPERATING PROVISION * * * It is easy to place equipment on a consignment basis, and the purchaser has the privilege of operating equipment in all available locations * * * COPPERITE, INC. assumes no responsibility for securing locations and assignment of territories.

The sponsorship contract makes no mention of exclusive sales territory. There is evidence that when this contract is forwarded to the Respondents, it is checked to determine that there are no riders attached thereto giving exclusive territories, and if such a rider is found, the sale is rejected.

The evidence shows, however, that one witness, Anderson, testified that the salesman who sold him Respondents' vending machines promised him an exclusive sales territory, and that such salesman also promised the same exclusive territory to one Bennett. The salesman, Johnson, who supposedly made these promises testified that he did promise Anderson an exclusive sales territory, and that the sponsorship contract was amended to indicate Vigo County, Indiana, as such exclusive territory. The salesman further testified that he also promised Bennett, who lived in Sullivan County, an exclusive territory, consisting of that county. This testimony reveals that the same exclusive territory was not given to two dif-

ferent purchasers, but rather that separate territories were given to two purchasers. The only relevant evidence, therefore, shows that only one salesman made the representation that exclusive territories would be given: an oral representation by one of Respondents' agents. This representation is, by the same evidence, shown to be true, because the exclusive territory so promised was duly granted. The evidence also shows that this promise of exclusive territory was made without the actual knowledge and consent of Respondents. We must conclude, therefore, that the representation of exclusive territory was true in the one instance in which it was shown to have been made, and that therefore the allegation of false and deceptive representation against Respondents in connection therewith fails because the evidence shows that the representation, as made, was true.

6. Did Respondents falsely represent that purchasers of their vending machines would be given liberal financial assistance for expansion if desired?

Subparagraph 6 of Paragraph Six of the complaint alleges that the Respondents have represented that purchasers of their vending machines will:

6. Be given liberal financial assistance for expansion if desired.

Paragraph Seven of the complaint alleges that the foregoing representation is false and misleading, and, in subparagraph 6 thereof, that, in truth and in fact,

Respondents do not give financial assistance to purchasers. Such persons can expand only by purchasing additional machines from the Respondent.

The evidence establishes that Respondents have made and disseminated the representation alleged in subparagraph 6 quoted above. Uncontradicted evidence also shows that the Respondents accept repeat orders for vending machines on sale terms of one-half of the purchase price cash with order, and the balance at the rate of \$1.00 per month per machine, with payments extending over a period of twenty-five months, without interest or carrying charges. These terms for the purchase of additional vending machines appear very definitely to constitute "liberal financial assistance for the purpose of expansion," and to show that Respondents' representation concerning such assistance is in fact true.

Thus the evidence in the record disproves the general allegation of Paragraph Seven of the complaint, that Respondents' representation concerning financial assistance is false and misleading.

The specific allegation set forth in subparagraph 6 of Paragraph Seven of the complaint, which asserts that "Respondents do not give financial assistance to purchasers," is not an exact denial of the

specific allegation in subparagraph 6 of Paragraph Six of the complaint, that liberal financial assistance will be given for expansion if desired, in that subparagraph 6 of Paragraph Seven refers, not to financial assistance given for expansion, but to financial assistance given to purchasers. This appears to be an unwarranted extension of the original allegation to include all purchasers instead of only purchasers of additional vending machines.

The assertion in the complaint immediately following the allegation discussed above, that "Such persons can expand only by purchasing additional machines from the Respondent," is not in accordance with the facts. Uncontradicted evidence in the record shows that operators of Respondents' vending machines may expand their business, not only by purchasing additional new machines from Respondents, but also by purchasing used or reconditioned machines from any source, by buying up the business of another vending-machine operator, or by purchasing additional vending machines of another make.

The record contains no evidence indicating that Respondents' advertisement concerning the giving of financial assistance reasonably implies any other kind of financial assistance than the acceptance of repeat orders on credit. Possibly the author of the complaint intended to imply that by the use of the words "financial assistance," Respondents gave the impression that they were offering something more than the extension of credit to an operator for the purchase of additional vending machines. If so, the exact type of financial assistance contemplated has not been revealed.

From the foregoing analysis we must conclude that the allegation that Respondents do not give financial assistance to operators desiring to expand their vending-machine business has been disproved by evidence in the record.

7. Did Respondents falsely represent that they manufacture the vending machines sold by them?

The evidence shows that Respondents did falsely imply that they were manufacturers of the vending machines which they offered for sale, whereas, in truth and in fact, such machines were manufactured for the Respondents, in accordance with their specifications, by W. G. Parrish Company of Chicago, Illinois. In the complaint, the legal and practical significance of the foregoing misrepresentation is described by the following averment:

There has long been a preference on the part of a substantial portion of the purchasing public for dealing directly with the manufacturer in the belief that lower prices, elimination of middleman's profits, superior products, and other advantages can thereby be obtained.

Counsel supporting the complaint states in his proposed findings as to the facts that the charge in question is "Supported by common knowledge." Although that assertion may be true, it is not self-evident. During the course of the hearing counsel supporting the complaint presented no evidence to prove such assertion. Neither did he request that judicial knowledge be taken of the existence of the alleged preference, nor that official notice be taken of any precedent to that effect. If such request had been made, we could have had the benefit of advice by opposing counsel, and the issue could have been clarified and resolved in accordance with the requirements of due process. Failing in these respects, the record contains only the bare assertion, by counsel supporting the complaint, that this allegation is true. It follows, therefore, that since the misrepresentation relative to Respondents being manufacturers is unsupported by any proof as to the practical and legal significance of that statement, the charge as to misrepresentation in this respect has failed for lack of proof.

8. Did Respondents falsely represent that vending machines purchased from them would be placed in locations satisfactory to the purchasers thereof?

The complaint charges that the Respondents have represented that they would have the vending machines purchased from them placed at satisfactory locations, but that, contrary to such representation, the locations in which the machines were actually placed were "often unsatisfactory."

The evidence shows that Respondents have represented in their advertisements that their vending machines would be placed in locations to be secured by the sponsor. It may be reasonably assumed that such locations would be "satisfactory" from the standpoint of the servicing of the machines and the profit to be derived therefrom. This advertising representation was later supplemented by a sponsorship contract which placed the responsibility, both for locating the vending machines and for any relocations that might become necessary, upon the sponsor, for which such organization was to receive 10% commission on the proceeds from the vending machines so placed.

Each of the seven operators who testified in this proceeding, except one witness, Trumpetier, signed a Location Completion Form acknowledging, in effect, that their vending machines had been satisfactorily placed. They testified, in general, however, to dissatisfaction with a number of their locations. One witness testified that he executed the Location Completion Form only in order to validate insurance on his vending machines.

As hereinbefore stated, the record contains no evidence to show the total number of vending machines sold by Respondents, nor, with respect to the issue presently being considered, was any evidence presented showing how many of all the machines sold were placed in locations satisfactory to the operators thereof. There is evidence of only seven operators who considered their locations unsatisfactory, and no evidence as to the total number of operators who might have been likewise dissatisfied. Consequently we have no factual basis in the record upon which to base a determination as to the percentage of the total number of machines sold, whose operators were dissatisfied with their locations, the total number of relocations which proved to be necessary, or whether such relocations were satisfactory or unsatisfactory to the operators of the vending machines placed therein. In the absence of such evidence, or some evidence competent to serve as a basis for comparison, we must conclude that there is no substantial, probative and reliable evidence in the record to support the conclusion that Respondents' representations relative to the location of their vending machines is false and misleading. Accordingly, the allegation of the complaint that such locations were "often" unsatisfactory has not been proven.

9. Was Respondents' advertising statement, "Insured for property and liability by Lloyds of London. 1:—Plus fire, theft insurance and a 100% Money Back Guarantee," false and misleading because it failed to disclose that the purchaser must pay an added sum for such insurance?

The evidence shows that some of Respondents' salesmen offered to purchasers of Respondents' vending machines, at the time of purchase, an opportunity to purchase, for an additional consideration, certain policies of insurance issued by Miller National Insurance and Lloyds of London. For present purposes, we are not concerned with the detailed provisions of these policies or the way in which the premiums therefor were transmitted to the insurance agency in Denver, Colorado, which represented the two insurance companies named.

Since there is no evidence in the record that purchasers were ever actually misled or deceived by the Respondents' representation quoted above, and since there is also no evidence of consumer understanding of the advertisement in question, we must determine, on the basis of the advertisement itself, whether such representation has the tendency and capacity to deceive.

We think we are justified in taking judicial notice of the common business practice of requiring purchasers who desire insurance in connection with a purchase to pay the premium therefor. This

Order.

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practice is so prevalent in business today that to expect a seller to pay for insurance which protects a purchaser is to expect something for nothing in a business deal. Purchasers today, more reasonably, expect the seller either to quote outright the cost of such insurance, or to include it in the price of the commodity purchased. It appears to us, therefore, that a prospective purchaser of vending machines would have to be very foolish indeed to expect to get insurance on such machines without paying for it in one form or another.

Accordingly, we must conclude that the Respondents' representations relative to insurance cannot reasonably be interpreted as false, misleading and deceptive, simply because they fail to reveal that the purchaser must pay the premium on such insurance in addition to the price of the vending machines themselves. Therefore the allegation of the complaint in this respect fails for lack of proof.

CONCLUSION

In summary, we must conclude that the allegations of the complaint have not been proved by reliable and substantial evidence. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

FINAL ORDER

The hearing examiner on August 21, 1957, having filed an initial decision dismissing the complaint in this proceeding, and no appeal from said decision having been filed; and

The Commission on October 17, 1957, having placed the case on its own docket for review:

It is ordered, That the Commission's action of October 17, 1957, purporting to place the case on the Commission's docket for review be, and it hereby is, vacated and set aside.

It is further ordered, That the initial decision of the hearing examiner did, on October 16, 1957, become the decision of the Commission.

Decision

IN THE MATTER OF

BEN STECKER, ALSO KNOWN AS BEN STECHER,
TRADING AS DUMONT FURS

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket 6817. Complaint, June 11, 1957—Decision, Nov. 19, 1957

Consent order requiring a New York City furrier to cease violating the Fur Products Labeling Act by failing to comply with the labeling and invoicing requirements.

Mr. John T. Walker for the Commission.

Mr. Angelo M. Torrisi, of New York, N.Y., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein charging the above-named respondent, Ben Stecker, also known as Ben Stecher, an individual trading as Dumont Furs, with having violated the provisions of the Federal Trade Commission Act in certain particulars.

On October 3, 1957, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between said respondent and by his attorney and John T. Walker, counsel supporting the complaint, under date of September 24, 1957, and subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by that Bureau.

On due consideration of the said "Agreement Containing Consent Order To Cease And Desist," the hearing examiner finds that said agreement, both in form and in content, is in accord with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings and that by said agreement the parties have specifically agreed that:

1. Respondent Ben Stecker, also known as Ben Stecher, is an individual trading as Dumont Furs, with his office and principal place of business located at 115 West 30th Street, in the City of New York, State of New York.

2. Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission, on June 11, 1957, issued its complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.