

IN THE MATTER OF
THE ATLAS MFG. & SALES CORP. ET AL.

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

Docket 6902. Complaint, Oct. 2, 1957—Decision, Dec. 4, 1958

Order requiring three affiliated Cleveland concerns selling vending machines and supplies therefor, to cease representing falsely in "bait" advertising placed in the classified columns of newspapers to obtain leads to purchasers, that employment was offered to selected person with opportunities for exceptional profits, that buyers' investment was working capital secured by inventory with no risk of loss, that the business was permanent and depression proof, etc.; and that the respondents were agents of Hershey Chocolate Corporation.

Mr. Terral A. Jordan for the Commission.

Mr. Wallace A. Jenkins, Jr., of Parma, Ohio, for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding, in substance, involves numerous charges that respondents have violated the Federal Trade Commission Act by advertising, soliciting and selling commercially in interstate commerce bulk vending machines and the candy or other products to be used therein and sold therefrom to the public. It is alleged that respondents, by means of false and misleading advertising and promotional material, sold substantial quantities of said vending machines and supplies therefor in the course and conduct of their business. Respondents in their respective answers admit certain allegations but deny others, and in substance each denies that it or he has violated the Act in any way. This initial decision finds generally that the allegations of the complaint are amply substantiated upon the whole record by a preponderance of the reliable, probative and substantial evidence as required by Section 7(c) of the Administrative Procedure Act and the Commission's Rules of Practice for Adjudicative Proceedings adopted pursuant thereto and that respondents have violated the Federal Trade Commission Act in each of several particulars, except one which is not pressed by Commission's counsel, lacks evidence to support it, and is therefore dismissed. A cease and desist order is issued herein appropriate to the findings and conclusions which are hereinafter set forth.

This case was instituted by the filing of a complaint on October 2, 1957, legal service of which was duly had upon the several respondents, who in due course filed their separate answers during November 1957. Thereafter hearings wherein evidence was presented by Commission's counsel were held in Cleveland, Ohio, on January 14 and 15, 1958, and in Detroit, Mich., on January 17, 1958, at which latter time Commission's counsel conditionally rested his case in chief, resting it absolutely and waiving the presentation of rebuttal evidence at the end of respondents' evidence after they had finally rested. Respondents presented their evidence in Pittsburgh, Pa., April 14, 1958, and in Cleveland, Ohio, on April 15 and 16, 1958, and rested their respective defenses. In accordance with an order authorizing the filing of proposed findings of fact, conclusions of law and order, Commission's counsel filed his on June 6, 1958, and respondents filed theirs on June 9, 1958, all of which have been carefully considered in the light of the whole record presented herein. Since the evidence supports the proposed findings of fact, conclusions and order submitted by Commission's counsel, the examiner has adopted them either in *haec verbae* or in substance and effect. The proposals of respondents, except that relating to the dismissal of respondent Phillip Schwimmer, and one proposition of law, have been rejected as not in accord with the record and findings herein made.

The complaint charges respondents with having used statements and representations in their advertising and promotional material addressed to and read by the public, which statements and representations, it is charged, were false, misleading, and deceptive in twelve different particulars, reference to each of which will be hereinafter made in the order in which it appears in the complaint. The record consists of 611 pages of transcript and 138 documentary exhibits, of which Commission's counsel offered 124 and respondents offered 14. The testimony adduced consisted of that of the several individual respondents other than Phillip Schwimmer, a substantial number of so-called "consumer witnesses," some called by Commission's counsel and some by respondents in opposition thereto, and several other witnesses not falling into either of these two classes. On behalf of the Commission there was presented the testimony of six "consumer witnesses" residing in the vicinity of Detroit, Mich., and a stipulation as to similar testimony by another "consumer witness," resident of that area. These were people who had answered re-

spondents' newspaper advertising. Respondents called five "consumer witnesses" residing in Pittsburgh or eastern Ohio. With one exception these witnesses were large operators, one having some 1,100 bulk vending machines on location with 13 servicemen and another had about 11,500 on location and also engaged in the sale of such machines to the extent of about 6,000 per year. While some of these large operators had started in a small way and made a substantial success of the business, there is no evidence that they were induced to get into the business by reason of respondents' advertising although the smaller operators had done so. It would unduly extend this initial decision and serve no useful purpose to narrate the testimony or refer to most of the exhibits, and the references herein made are only to the highlighted parts of the entire record although the whole record has been fully considered and is inherently passed upon in the findings hereinafter made.

In his separate answer, respondent Phillip Schwimmer, an attorney at law in Cleveland, Ohio, vigorously challenged his connection with the matters involved herein and appeared personally to renew his challenge, making a motion to dismiss as to him, which, after the presentation of evidence absolving him from legal connection with the charges, was granted by the hearing examiner, and the complaint dismissed as to him subject to formal ratification in the initial decision (Tr. 6-10 and 84-87). In substance the record shows that this respondent had never been an official of respondents Atlas Manufacturing & Sales Corp. or American Products Corporation and had had no connection with either corporation other than the ownership of three percent of the stock in the former and holding a directorship therein but having no connection with the policies of any of the respondents. While he has been giving legal advice in the past, he has never received any income from his stock during the many years of ownership nor any legal fees. The motion to dismiss as to him was not resisted, and the order hereinafter entered dismisses the complaint and proceeding as to said Phillip Schwimmer. In the subsequent portions of this initial decision therefore, for brevity, reference to the respondents generally means all respondents except the said Phillip Schwimmer.

The hearing examiner, after hearing and observing all of the witnesses and their conduct and demeanor while testifying, has given full, careful and impartial consideration to their testimony and to all other evidence presented on the record and to the fair

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and reasonable inferences arising therefrom, as well as to any and all facts pleaded in the complaint which are admitted by the respective answers of the respondents, limiting the effect of such admissions however strictly to those respondents who admit such pleaded facts. Proper recognition is also given to certain relevant matters of official notice as to which request has been made by Commission's counsel as hereinafter specifically referred to and as to which "any party shall on timely request be afforded an opportunity to show the contrary" as provided by §7(d) of the Administrative Procedure Act and §3.14(c) of the Commission's Rules of Practice for Adjudicative Proceedings. All statements, arguments and proposals of counsel for the parties have likewise been fully considered. Upon the whole record thus evaluated and weighed, it is found that the material allegations of the complaint are each and all fully and fairly established as to each of the charges as to all respondents, other than Phillip Schwimmer, by the preponderance of the evidence, with one exception hereinafter noted. The hearing examiner therefore specifically finds as follows:

Respondent, The Atlas Manufacturing & Sales Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio. Respondents Wallace Jenkins and Frank Olsak are individuals and are president and vice president and secretary, respectively, of said corporate respondent. The individual respondents formulate, direct and control the acts, practices and policies of the corporate respondent. The principal office and place of business of said corporate and individual respondents is located at 12220 Trisket Road, Cleveland, Ohio. Respondents Wallace Jenkins, Frank Olsak and The Atlas Manufacturing & Sales Corp. each admit this by their answers, and the evidence shows that said Jenkins owns 52 percent of the stock and the said Olsak owns 42 percent of the stock of said corporation. While Olsak categorically denies that he has anything to do with the sales operations of the corporation and confines his duties strictly to those of the manufacturing end in the process of making the vending machines produced by the corporation, the record shows that major sales programs are voted on a stockholders' meetings and that all policies and major problems relating to sales and production are a matter of constant discussion between Olsak and Jenkins. In a closely held small corporation such as this, it would be manifestly naive to find

that either of these two stockholders and officers who own 94 percent of the stock could compartmentalize their work and duties so as to insulate either of them from legal responsibility for any corporate activities engaged in by the other.

American Products Corporation is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Ohio. Respondent Wallace Jenkins is the sole owner of the stock and the sole officer of the said American Products Corporation and in this capacity formulates, directs and controls the acts, practices and policies of the corporate respondent. The principal office and place of business of said American Products Corporation is located at 12220 Trisket Road, Cleveland, Ohio. These facts are admitted by respondents Wallace Jenkins and American Products Corporation in their answers, and it is also established by the testimony of the former.

Respondent Roland S. Jenkins is an individual trading and doing business as Atlas Enterprises. His office and principal place of business is located at 8693 Lynnhaven Road, Cleveland 30, Ohio. The answer admits and the testimony of this respondent establishes these facts.

Respondent, American Products Corporation, until August, 1956, and all other respondents are now, and for more than one year last past have been engaged in the business of manufacturing, advertising, selling and distributing vending machines and vending machine supplies. In the course and conduct of their business, respondents now cause and have caused said products, when sold, to be transported from their aforesaid places of business in the State of Ohio to purchasers thereof located in various other States of the United States and the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade, in commerce, between and among the various States of the United States and the District of Columbia in said products. The several respondents admit these facts in their answers and there is an abundance of other evidence to establish the substantial extent of respondents' dealings in vending machines throughout a substantial part of the United States.

In the course and conduct of their business as aforesaid, respondent, American Products Corporation, prior to August 1956, and all other respondents have been, and now are in direct and substantial competition in commerce with other individuals and with various firms and corporations engaged in the sale in commerce

of vending machines and supplies therefor. These facts are fully admitted by the answers of the several respondents and, of course, are well established upon the record, which discloses, among other things, that there are a vast number of concerns engaged in automatic merchandising and the manufacture of vending machines (RX-3, p. 2, stating, "It is estimated that at present [1956] there are 150 manufacturers of automatic merchandising machines").

Respondent, Wallace Jenkins, as an individual, and as an officer of The Atlas Manufacturing & Sales Corp., and The Atlas Manufacturing & Sales Corp. have in the past supplied and presently supply advertising and promotional material for use in the sale and distribution of vending machines and vending machine supplies to the respondent Roland S. Jenkins, trading under the name of Atlas Enterprises, and to numerous other persons, firms and corporations engaged in the sale and distribution of vending machines and vending machine supplies. The answers of respondents The Atlas Manufacturing & Sales Corp., Wallace Jenkins and Roland S. Jenkins admit this fact, and the testimony of Roland S. Jenkins identifies much of his sales material contained in his sales kits was supplied to him by Wallace Jenkins as an individual and officer of the corporation. Wallace Jenkins also testified several times that he had furnished such advertising material to various other persons, firms and corporations engaged in the sale and distribution of vending machines and supplies. Commission's counsel requests that official notice be taken of orders issued against certain customers of The Atlas Manufacturing & Sales Corp., who were furnished substantially the same advertising material that the evidence discloses herein was used by Roland S. Jenkins in his contacts and negotiations with the public. These orders are contained in the cases of *Robert L. Kniffen*, Docket No. 6315, and *Vendit, Inc., et al.*, Docket No. 6695. Of course, since consent orders were entered in the said proceedings, the facts therein agreed to in no respect bind any of the respondents herein since none of them were parties to said proceedings but consideration has been given to the type of orders issued by the Commission in such cases in resolving the propriety of the order hereinafter issued.

Wallace Jenkins, as an individual and as an officer of The Atlas Manufacturing & Sales Corp., and The Atlas Manufacturing & Sales Corp. have engaged in the sale and distribution of vending

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machines and supplies therefor to the ultimate purchaser and have used the same sales plans and techniques as those employed by Roland S. Jenkins trading as Atlas Enterprises. Wallace Jenkins owns all of the stock of the American Products Corporation which was engaged in the sale and distribution of vending machines and vending machine supplies in the same manner as respondent Roland S. Jenkins. The Master Manufacturing and Sales Company was affiliated with The Atlas Manufacturing & Sales Corp. and was similarly engaged in the sale and distribution of vending machines and supplies therefor in the same manner as respondent Roland S. Jenkins. The testimony of both Roland S. Jenkins and Wallace Jenkins establishes these facts and shows that Roland S. Jenkins received his training and experience in the handling and sale of the products herein involved as an employee of his father and his corporations. Likewise, Commission's Exhibits 80-A & B through 95-B, a report made by Wallace Jenkins to the Cleveland Better Business Bureau narrates a part of these facts.

The evidence indisputably discloses that Roland S. Jenkins is the son of Wallace Jenkins, that he was employed by his father's corporations between 1946 and 1950, and following military service he returned in 1953 and 1955 to said employment and was sales manager of The Atlas Manufacturing & Sales Corp., as well as president during 1953-54 of American Products Corporation, which was then and now is owned 100 percent by his father, Wallace Jenkins, and which corporation carried on the sales operations of the Atlas machines and also sold the supplies to be vended therein until Roland began to carry on such business as a sole trader. During these years said American Products Corporation was in the vending machine business and operated in the same manner as Roland S. Jenkins has since operated and now operates the business of selling vending machines and supplies. Atlas Manufacturing & Sales Corp. put forth a letter of introduction, Commission's Exhibit 34, stating that Roland S. Jenkins is that corporation's authorized representative. While Roland S. Jenkins maintains in some instances a separate business address, he has free access to and use of the office and stationery of Atlas and in some of his advertising, Commission's Exhibit 110, uses the corporation's address as his business address. Numerous other exhibits tie these several addresses and the business of the father's companies and those of Roland inextricably together. No other customer of the father's business appears from

the record to have had the special privileges or connection therewith that Roland has had and now has. While Roland S. Jenkins now operates as a sole tradership under the name and style of Atlas Enterprises, the similarity of the word "Atlas" in both titles and the general methods of advertising to the public interlock the advertising of both concerns in the minds of prospective purchasers interviewed by Roland and his agents as being one and the same organization. The hearing examiner observed the friendliest of personal relations existing between the father and son during the hearing. It could not be successfully urged by respondents that their personal and business relationships are not so closely linked together as to be completely inseparable insofar as the public is concerned.

Behind the facades of the several corporate veils and the sole tradership, the respondents, both individual and corporate, cannot escape liability for the sales practices of Roland S. Jenkins in his dealings with the public. Both the senior Jenkins and Olsak necessarily profit from the many successful sales which have been made by the junior Jenkins. See *G. Howard Hunt Pen Co. v. F.T.C.* (C.A. 3, 1952), 197 F.2d 273, 281, and *Irwin v. F.T.C.* (C.C.A. 8, 1944), 143 F.2d 316, 325, and numerous cases cited, which hold that the author of false, misleading and deceptive advertising may not furnish even his independent customers with a means of misleading the public and thereby insulate himself against responsibility for the deception caused by said advertising. Federal Trade Commission proceedings are not premised on strict legal fraud and the good faith or bad faith of respondents is not material. See *Ford Motor Co. v. F.T.C.* (C.C.A. 6, 1941), 120 F.2d 175, 181-182, *cert. den.* 314 U.S. 668 (1941). As the Supreme Court has stated in *F.T.C. v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934), "though the practice condemned does not amount to fraud, as understood in courts of law * * * [i]n deed, there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made * * * That is the respondents' plight today, no matter what their motives may have been when they began. They must extricate themselves from it by purging their business methods of a capacity to deceive."

Respondent, Roland S. Jenkins, to induce the purchase of vending machines and vending machine supplies offered for sale by him, has placed and now places advertisements in newspapers

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in Ohio and in various other States of the United States which advertisements are calculated to cause and do in fact cause persons to make inquiries of the said Roland S. Jenkins concerning the nature of the offer made therein. Persons making inquiries are then visited by the said Roland S. Jenkins, his employees, agents or representatives. Such salesmen show to the prospective purchaser a variety of advertising and promotional material contained in a sales kit carried by them and furnished by respondent Roland S. Jenkins. Substantially all of the material contained in said sales kit originated with and was supplied by the said Wallace Jenkins as aforesaid. Either Roland S. Jenkins or his employees, agents or representatives make numerous oral representations of the matters referred to in the sales kits or others such as agreeing to accept back the vending machines if the purchaser cannot place them on location, all of which are calculated to induce and do in fact induce the purchase of said vending machines and vending machine supplies. Roland S. Jenkins, in his answer and testimony, has admitted the use of classified advertisements as alleged in the complaint and evidenced by various exhibits of both the Commission and respondents. The wide dissemination of these advertisements in interstate commerce is thoroughly evidenced by the record. The classified advertisements hereinafter referred to were published by Roland S. Jenkins in various newspapers in different States including those in Detroit, Mich., wherein a number of the "consumer witnesses" testified they read them. Such classified ads are hereinafter set forth in some detail. They and other promotional material of respondents contain the several items of statement or inference contained therein which are alleged to have had the tendency and capacity to mislead and deceive, and as the record shows in many instances did actually mislead and deceive, the consuming public.

The newspaper ads first invite attention to the products of respondents and to the great financial possibilities to be realized if such ad is answered. This first contact is the important one. If "bait advertising" is used to solicit replies from members of the public inquiring about what a respondent has to sell, the subsequent transactions between them do not purge the original advertisement of its tendency to mislead or deceive the public. It has been held in *Carter Products, Inc., et al. v. F. T. C.* (C.A. 7, 1951), 186 F.2d 821, 824:

... The law is violated if the first contact or interview is secured by deception (*Federal Trade Comm. v. Standard Education Society, et al.*, 302 U.S. 112,

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115 [25 F.T.C. 1715, 2 S. & D. 429]), even though the true facts are made known to the buyer before he enters into the contract of purchase (*Progress Tailoring Co. et al. v. Federal Trade Comm.*, 7 Cir., 153 F. 2d 103, 104, 105 [42 F.T.C. 882, 4 S. & D. 455]). See also *Aronberg, et al., v. Federal Trade Comm.*, 7 Cir., 132 F. 2d 165, 169 [29 F.T.C. 1634, 3 S. & D. 528].

It is immaterial, therefore, if either Roland S. Jenkins or his agents or representatives made clear to their prospective purchasers before any sales were actually made that such purchasers were not in fact obtaining employment from the Hershey Chocolate Company but were going into business for themselves with the risks of the business made their own. It is also immaterial that those who made the representations other than Roland S. Jenkins were his employees or agents or were independent contractors. See *G. Howard Hunt Pen Co., v. F.T.C.*, *supra*, and *Irwin v. F.T.C.*, *supra*.

The classified advertisements which are quoted in paragraph 5 of the complaint and admitted by respondents are evidenced in the record also by Commission's Exhibits 96, 110, 111, and respondents' Exhibit 5. These advertisements are short and are quoted as follows:

START SPARE TIME
SERVICING
HERSHEY CANDY ROUTE

We will select a responsible person in your area to service our NEW HERSHEY CANDY DISPENSERS. No selling or experience necessary. Qualified person will have opportunity of earning \$5,000 per year devoting spare time to start. About 6 hours per week required to service route and to manage business. To be eligible you must drive car and be able to make small investment of \$594 CASH to handle inventory. For personal interview write giving particulars, phone and reference to: District Manager, Dept. 102, 8693 Lynnhaven road, Cleveland 30, Ohio. (CX-96)

SPARE OR FULL TIME SERVICING
HERSHEY CANDY ROUTE

We will select a responsible person in your area to service our NEW HERSHEY CANDY DISPENSERS. No selling or experience necessary. Qualified person will have opportunity of earning \$5,000 per year devoting spare time to start. About 6 hours per week required to service route and managing business. To be eligible you must drive car and be able to make small investment of \$594 CASH to handle inventory. For personal interview write giving particulars, phone and reference to District Manager, Dept. 194, 12220 Triskett Road, Cleveland 11, Ohio. (CX-110)

START SPARE TIME
SERVICING
HERSHEY CANDY
ROUTE

We will select a responsible person in your area to service our NEW

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HERSHEY CANDY DISPENSERS. No selling or experience necessary. Qualified person will have opportunity of earning \$5,000 per year devoting spare time to start. About 6 hours per week required to service route and managing business. To be eligible you must drive car and be able to make small investment of \$594 CASH to handle inventory.

For personal interview write giving particulars, phone and reference to:

District Manager,
Dept. 179, 8693 Lynnhaven,
Cleveland 30, Ohio (CX-111)

As respondents concede, in proposing as one of their conclusions of law: "The important criterion in determining whether a product is falsely advertised is the net impression which the advertisement is likely to make upon the general public." *Charles-of-the-Ritz Distributors Corp. v. F.T.C.* (C.C.A. 2, 1944), 143 F.2d 676, 679, 680, and numerous cases cited. The Commission must consider the class of persons to whom the appeal is made, and in the case at bar these include many who, while not wholly ignorant, are so financially pressed that they will grasp at straws for financial succor and infer much more than a technical close examination of the advertisement might lead a prudent person to gather therefrom.

These lead or "bait advertisements" were published either under the heading of "Business Opportunities" or "Help Wanted" columns of numerous newspapers. Whatever the classified heading was is immaterial. These columns are for the most part read by persons seeking to better their financial situations, and the testimony of the "consumer witnesses" called by Commission's counsel amply attest the viewpoints and situations confronting persons who are typical of the public answering such ads who have not previously been in the vending machine business. The advertisements quoted above, as published in the newspapers and the other promotional material presented to the consuming public by respondents or their agents and representatives, in each of their several different appealing inducements had the tendency and capacity to mislead and deceive the public to whom the ads were addressed. The several specific representations are hereafter enumerated:

1. Respondents falsely represented that employment was offered to certain especially selected persons, the truth being that any person who answered the ads who could pay for vending machines was sold such machines and supplies therefor. The language of the ads nowhere states that it is necessary to pur-

chase the vending machines but to the contrary says, "We are looking for a reliable person * * * to refill and collect from our automatic merchandise dispensers" and "a responsible person * * * to serve our new Hershey candy dispensers," thereby clearly implying that the respondents would retain title and ownership and the applicant would merely be employed by them.

2. By the aforesaid language, the respondents also falsely represented that persons selected for employment would operate and service respondents' vending machines.

3. Respondents falsely have represented, directly or indirectly, that they were employees, agents or representatives of the Hershey Chocolate Company of Hershey, Pennsylvania, because the advertising does not refer to the name of any of the respondents but at the bottom refers to "District Manager Department —," etc., below references to the Hershey Chocolate Company in one way or another in the preceding portion of the ad. Respondents admit by answer, testimony, or both, that none of respondents were employed by Hershey and did not represent it, but only bought its products for resale to the purchasers of their vending machines.

4. Respondents falsely represented, directly or indirectly, that persons selected by them for employment must own or be able to drive a car, have references, or have a specified sum of money. The quoted advertisements definitely state these requirements, but while the evidence indicates that no substantial route could be operated without a motor vehicle, respondents never made inquiry of those answering the ads as to any of such matters as references or car ownership and sold as few or many vending machines as the prospect could pay for.

5. Respondents falsely represented, directly or indirectly, that persons selected for employment must invest in amounts varying from \$575 up to \$1,250 in their several advertisements, which amount was to be used as working capital for the purchase of an inventory of merchandise for dispensing in the vending machines referred to in the advertisement. The evidence overwhelmingly establishes that the public believes that inventory refers to stock in trade, such as in this case, candy or other products to be dispensed in the vending machines. As a matter of fact, there was no such security, the money being substantially all required and used for the outright purchase of respondents' vending machines, a negligible amount of goods to be dispensed being usually also included in the sale.

6. Respondents falsely represented that any amount invested was secured by an inventory and there was no risk of losing the investment. Several of the advertising materials used by respondents said there was "no risk of losing your investment," whereas in fact there was no insurance against loss by inexperienced members of the public, and the amount of candy purchased would not secure anything like the amount invested in any event. Several of the "consumer witnesses" testified that they were "hooked," that most of the machines they purchased could not be located and had to be stored on their own premises. It is elementary that such an article which cannot be used to any advantage is a dead loss to its owner, and furthermore, there is abundant undisputed testimony in the record that secondhand vending machines sell for a very small fraction of what the witnesses paid respondents for theirs and also that old established customers of respondents could buy from them new machines at but a fraction of what new customers can. The machines in fact were not even security for their own real value due to a glutted secondhand market on such machines.

7. Respondents falsely represented that persons selected for employment would not be required to sell or engage in any kind of selling activity. While respondents and some of their witnesses indulged in considerable hair splitting as to what constitutes selling, the great preponderance of the evidence shows that anyone seeking to place vending machines or keep them on location must possess considerable persuasive powers to induce the owners of the location to permit the machines either to be placed or to be retained.

8. Respondents falsely represented, directly or indirectly, that persons selected for employment would earn an income of from \$400 to \$800 monthly, or \$5,000 per year. The words of one classified ad specifically so state. Other promotional material promised a net profit of from 100 percent to 300 percent on the amount of the total investment. There is no qualification that it might take years of hard work and the purchase of numerous vending machines to acquire such an income. The exaggerated promise of earning \$5,000 per year on a \$400 investment seems ludicrous on its face but on this record members of the public who answered the ads credibly testified that they believed that they could make such a large sum for such a small investment with very little time devoted thereto. The fact that some large

and successful operators testified that it was possible with good attention to business and with machines in good locations for a first class operator to earn substantial sums, furnishes no absolute or reliable criterion of success for the type of persons who answered respondents' ads and tried to engage in such a business for the first time.

9. Respondents falsely represented, directly or indirectly, in their promotional material that their said vending machines dispensing Hershey candy or other types of candy or gum would sell out their entire contents at least once and usually twice a week. The evidence is entirely contrary to this. Even respondent Roland S. Jenkins admitted it would take from four to six weeks for the entire contents of a vending machine to be emptied in a good location, and other of respondents' witnesses, long experienced in the business, testified it would take from six weeks to two months to empty a machine if filled with Hersheyettes, particularly as in summer such product was unsalable to any great degree because of the seasonal change affecting chocolate sales. The experience testimony of the purchasers who testified shows that their machines emptied in about from one up to seven months, dependent upon location. No witness testified that these machines did regularly, on the average, sell out even once a week, let alone twice a week.

10. Respondents falsely represented, directly or indirectly, by their promotional material that profitable locations were easily secured where vending machines would sell out their entire contents at least once or twice a week. Much of the promotional material of respondents so represented, but the evidence of experienced and extensive operators testifying for respondents established that in fact good locations are unusual; that it is very difficult to secure profitable locations for vending machines; and that it is the average of numerous machines on location from which profit must be derived.

11. Respondents falsely represented, directly or indirectly, in their promotional material that the business opportunity offered by respondents was permanent and depression-proof. While in some aspects such representations might be considered mere "puffing," it is clear that in their context and in the entire circumstance of the sale of the machines in each of the several instances testified to, those purchasing them believed that they assuredly would make regular and easy money in substantial amounts through any kind of economic conditions. Although the evidence discloses

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that pennies still circulate during depressions or recessions, and in some instances certain vending machines in certain areas do even better than in good times, the evidence clearly shows that the general situation over the country is such that there is no such thing as a permanent loss-proof business in the vending machine line, and that economic conditions affect that business the same as most others in bad times.

The alleged specific misrepresentation that Roland S. Jenkins held himself forth as a manufacturer of vending machines as charged in paragraph 6, subsection 12, and paragraph 7, subsection 12, is not sustained by the evidence and is therefore dismissed.

The protection of the gullible and unwary is one of the basic functions of the Federal Trade Commission in situations such as that which is so vividly presented in the instant case. As hereinbefore stated, it would unduly lengthen this decision to refer in detail to the evidence in all particulars whereby the unsuspecting readers of the ads were persuaded to go deeply into debt or to invest substantial savings in a precarious business in which such persons had utterly no experience. One need only read this record however, to see and understand that the practices of respondents are exactly those which are referred to in respondents' Exhibit 3. This exhibit is a business service bulletin, prepared and promulgated by the U.S. Department of Commerce, entitled, "Summary of Information on Automatic Merchandising," dated May 1956. It was offered by respondents generally, and was received generally in evidence by the examiner because of certain relevant information it appeared to contain. It gives a brief and illuminating history of the development of the vending machine business in all of its aspects, and while much of the material is disregarded since it has no relevancy of materiality to the particular type of vending machines in evidence in this case, that is bulk merchandise vending machines, nevertheless, much of its contents illustrate the vexing and difficult problems confronting the vending machine operators, particularly inexperienced ones, which were not disclosed by respondents to their prospective purchasers, either in their glowing advertising and promotional materials or in the ardent sales pitches of their representatives and agents. The following quotation from page 4 of said exhibit discloses the basic elements of this case far more succinctly and eloquently than the examiner could possibly state them:

During the past few years, the "Business Opportunity" columns of many newspapers have contained advertisements describing golden opportunities for people who could invest a few hundred dollars (or a few thousand dollars) and their spare time in an automatic vending machine route. Usually there is a clear implication that good locations are under contract and all the investor needs to do is to visit the machines once or twice a week, fill them with merchandise, and collect the receipts. In many cases, however, salesmen have merely obtained trial locations for the equipment, and often the entrepreneur finds that after a few weeks he is requested to remove the equipment and has no other location in which to install it. Such selling methods have done much harm to the whole industry and have been and are being fought by the more stable elements of the industry.

While there are undoubtedly opportunities for men of ability to enter the industry, both in the fields which have become reasonably well established and in those where new types of machines are creating new markets, success will require skilled salesmanship, mechanical aptitude, infinite attention to detail, and the efficiency necessary to operate on small profit margins.

Nothing stated in this initial decision must be taken to infer that the automatic merchandise business is not a legitimate business. The respondents' business of manufacturing and selling vending machines and the merchandise to be dispensed therefrom is a legitimate business in itself. It must be clearly distinguished from automatic machines which are devised for gambling purposes, that is, slot machines and the like. All that the complaint attacks and all that is decided herein are that certain specific sales methods and practices heretofore used by respondents are contrary to law and that respondents must purge their business thereof.

The public interest in this proceeding is manifest. The vending machine business when honestly conducted is a substantial business and as an industry in its entirety has permanence as indicated in respondents' Exhibit 3, hereinafter referred to. Nevertheless, the operating profits of such business to the investment are not large, and as shown on page 3 of said exhibit a 1950 survey of operators' costs and profits revealed that certain types of vending machines among those reporting who had sales of \$100,000 or less only showed operating profits varying from one percent up to eight percent. The solicitation of the public for the purpose of selling vending machines on profits even of 100 percent, let alone an annual return of 10 to 12 times an investment of about \$500, is so grossly mischievous as to require the Commission's intervention on behalf of the public to prevent such practices in the future. It must be recognized that the respondents may possibly manufacture and sell other types of vending machines than bulk

candy or gum dispensers in the future. It is therefore important that they be prohibited from using the sales methods heretofore employed in any future operations of their business; hence the breadth of the order herein issued. As far back as 1952 the value of shipments of automatic merchandising machines (except refrigerated) amounted to \$22.8 millions (respondents' Exhibit 3, p. 2). The industry's substantial growth after 1947 (*id.*) and the increasing size and spread of the vending machine industry in interstate commerce requires that it be subjected to regulation by this Commission. It cannot be permitted to prosper on illicit methods any more than other types of businesses can.

The respondent Wallace Jenkins is sometimes referred to in the record as Wallace Jenkins, Sr., or Wallace A. Jenkins, Sr. Another son, Wallace A. Jenkins, Jr., appeared in this proceeding throughout as the attorney for all respondents except Phillip Schwimmer, their former attorney. The record does not disclose that the attorney son has had any connection with any of the acts and practices herein involved, but only acted professionally in this adjudicative proceeding. He and Commission's counsel represented their respective sides in a highly professional manner and their frequent stipulations as to evidence and the like made possible a much shorter record than would otherwise have been made, for which they have the unreserved commendation of the hearing examiner.

There being jurisdiction of the persons of the respondents, upon the findings of fact hereinbefore made, the hearing examiner makes the following conclusions of law:

1. The acts and practices of the respondents hereinabove found to be false, misleading, and deceptive are all to the prejudice and injury of the public and constitute unfair and deceptive acts or practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

2. The Federal Trade Commission has jurisdiction over all of the respondents' acts and practices which have been hereinabove found to be false, misleading, and deceptive.

3. The public interest in the proceeding is clear, specific, and substantial.

Upon the foregoing findings of fact and conclusions of law, the following order is hereby entered:

ORDER

It is ordered, That respondents The Atlas Manufacturing & Sales Corp., a corporation, and American Products Corporation, a corporation, and their officers, and Wallace Jenkins, individually and as an officer of each of said corporate respondents and Frank Olsak, individually and as an officer of The Atlas Manufacturing & Sales Corp., and Roland S. Jenkins, an individual, trading as Atlas Enterprises, or trading under any other name, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of vending machines, vending machine supplies or any other kind of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly, that:

1. Employment is offered or that employment is offered to specially selected persons either by respondents or by any other person, firm, or corporation;
2. Persons will be selected to operate and service a vending machine route owned by respondents;
3. Respondents are affiliated with, approved by or are agents or representatives of the Hershey Chocolate Corporation, Hershey, Pa., or of any other person, firm or corporation;
4. Purchasers of respondents' aforesaid products must own an automobile or be able to drive an automobile or furnish references or have a specified sum of money;
5. The money required to purchase respondents' aforesaid products is for the purpose of providing working capital for the purchase of an inventory of merchandise to be dispensed in vending machines; or otherwise representing that money is required for any purpose other than its true purpose;
6. The money required to purchase respondents' aforesaid products is secured or that there is no risk of losing the money so invested;
7. Purchasers of respondents' aforesaid products will not be required to sell or engage in any kind of selling activity in establishing or maintaining a vending machine route;
8. Purchasers of respondents' aforesaid products will derive any amount of earnings or profits from the operation of said vending machines in excess of the earnings or profits received by persons contemporaneously engaged in the operation of similar

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vending machines situated in similar locations and dispensing the same kind of merchandise;

9. Vending machines will sell out their entire content within any time less than the time required by similar machines contemporaneously located in similar locations and dispensing the same kind of merchandise;

10. Locations for vending machines returning a rate of profit higher than that contemporaneously returned by similar vending machines, located in the usual and customary locations available to the purchaser and dispensing the same kind of merchandise may be secured with the expenditure of less time, money, effort or ingenuity than is in fact required;

11. The sale of merchandise by vending machines is a permanent business operation for individual purchasers of respondents' aforesaid products;

12. The sale of merchandise by vending machines is unaffected by economic depressions or other changes in the business cycle.

It is further ordered, That the complaint be and the same hereby is dismissed as to the respondent Phillip Schwimmer, individually and as an officer of said corporate respondent, The Atlas Manufacturing & Sales Corp.

It is still further ordered, That the alleged specific misrepresentation that Roland S. Jenkins held himself forth as a manufacturer of vending machines as charged in paragraph 6, subsection 12, and paragraph 7, subsection 12, is not sustained by the evidence and should be and hereby is dismissed.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

This matter is before the Commission on the appeal of respondents from the initial decision and order. The respondents filed an appeal brief and counsel in support of the complaint filed a reply brief. Oral argument was not requested.

The complaint charged respondents with violation of the Federal Trade Commission Act by the making of false representations in connection with the sale of vending machines.

The false statements charged against the respondents in the complaint and which are the basis of the initial order are as follows:

1. Respondents offered employment to certain specially selected persons;

2. Persons selected would operate and service vending machines owned by respondents;

3. Said advertisement was placed by the Hershey Chocolate Corporation of Hershey, Pa., or by respondents as the agents or representatives of the said Hershey Chocolate Corporation;

4. Persons selected must own or be able to drive a car, have references, or a specified sum of money;

5. Persons selected must invest \$594 or \$575 to \$1,250, depending on which advertisement is read, which was to be used as working capital for the purchase of an inventory of merchandise to be dispensed in said vending machines;

6. Any amount invested as aforesaid was secured by an inventory worth the amount invested and there was no risk of losing the investment;

7. Persons selected would not be required to sell or engage in any kind of selling activity;

8. Persons selected could expect to earn an income of \$400 to \$800 monthly, or \$5,000 per year, depending on which advertisement was read, and could expect to receive a net profit of from 100% to 300% on the amount of their total investment;

9. Respondents' said vending machines would sell out their entire content at least once and usually twice each week;

10. Profitable locations for vending machines purchased from respondents were easily secured;

11. The business opportunity offered by respondents was permanent and depression proof.

The initial order dismissed the complaint as to Phillip Schwimmer, individually and as an officer of The Atlas Manufacturing & Sales Corp. and dismissed the specific misrepresentation that Roland S. Jenkins held himself forth as a manufacturer of vending machines as charged in paragraph 6, subsection 12, and paragraph 7, subsection 12, of the complaint, as not sustained by the evidence.

Respondent, The Atlas Manufacturing & Sales Corp., is an Ohio corporation, with its principal place of business located at 12220 Triskett Road, Cleveland, Ohio. It is a manufacturer of vending machines.

Respondents, Wallace Jenkins and Frank Olsak are individuals and are president, and vice president and secretary, respectively, of The Atlas Manufacturing & Sales Corp. The former owns 52 percent of the corporation stock and the latter owns 42 percent. Both are active in the management of the corporation. While

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respondent Olsak denies he had anything to do with the sales policies and activities of the corporation, the record shows that the major sales programs are voted on at the stockholders' meetings and that all policies and programs relating to sales and production are discussed by these two major stockholders and principal officers of the corporation.

Respondent, American Products Corporation, is an Ohio corporation with its principal place of business at 12220 Triskett Road, Cleveland, Ohio. Until August 1956 this corporate respondent was engaged in the business of manufacturing, selling and distributing vending machines and vending machine supplies. Respondent Wallace Jenkins is the sole owner of stock and the sole officer of this corporation and in this capacity, formulates and directs the policies and practices of this corporate respondent. The record shows that this corporation was engaged in sales of vending machines to the ultimate purchaser and utilized the same sales plan and technique as is now utilized by Roland S. Jenkins.

Respondent Roland S. Jenkins is an individual trading and doing business as Atlas Enterprises, with office and principal place of business at 8693 Lynnhaven Road, Cleveland 30, Ohio, and is engaged in the sale of vending machines.

This case is concerned with representations made in connection with the sale of coin-operated bulk vending machines. These machines have a large glass bowl filled with candy, nuts, gum or trinkets and are operated by a penny or nickel.

Respondent Roland S. Jenkins places classified advertisements in newspapers, generally in the form set out below, but may be differently phrased as indicated in the record:

SPARE OR FULL TIME SERVICING HERSHEY CANDY ROUTE

We will select a responsible person in your area to service our new Hershey candy dispensers. No selling or experience necessary. Qualified person will have opportunity of earning \$5,000 per year devoting spare time to start. About six hours per week required to service route, and managing business. To be eligible you must drive car and be able to make small investment of \$594 cash to handle inventory. For personal interview write giving particulars, phone and references to District Manager, Dept. 194, 12220 Triskett Road, Cleveland 11, Ohio.

In addition, certain of the advertising contains the representation "income can run up to \$400 to \$800 monthly with possibility of taking over full time, income accordingly increases. To qualify, applicant must have car, references, and \$575 to \$1,250 working

capital which is secured by inventory. We will allow liberal financial assistance for expansion."

Persons answering the advertisements receive from the respondent, Roland S. Jenkins, a letter of acknowledgment and a form entitled "Confidential Application." The application form requested information of a nature considerably beyond that usually required for credit purposes. Rather, it is of a nature usually associated with an offer of employment.

The prospective purchaser is visited by a representative of the respondents who, by use of certain sales materials and oral representations, attempts to sell vending machines and vending machine supplies.

The initial contact, having been made as a result of classified advertisements placed in newspapers, the prospect is then shown literature containing some of the questioned representations. Certain of this literature is supplied by The Atlas Manufacturing & Sales Corp. Examples of representations contained in such literature are as follows:

6. Its an ALL CASH Business. There are no charge accounts. No BAD accounts. YOUR NET PROFITS approximately 100%, and on some vendors like "OURS" the Net Profit may be 200% to 300%. Your average business is 10%.

20-1¢-5¢ Combination Vendors Emptying Twice a week at \$4.79 net each would return operator \$191.60 per week.

A wide awake operator, with our vendors, should have no difficulty in getting good possible locations.

3. No Selling or Soliciting.

The Safest Surest Business on Earth.

1. NO RISK of losing your investment . . .

8. And it is permanent . . . And it is depression proof.

10. And because you get your original investment back (plus a profit) . . .

It is to each of these representations that the hearing examiner made detailed findings. The respondents challenge these findings as not supported by the evidence. The initial decision reviews the evidence as to each matter in controversy.

Here, the basic sales promotional plan of the respondents is to secure leads to prospective purchasers through representations in newspapers calculated to suggest employment opportunities and to sell the prospects by means of exaggerated and false statements concerning opportunities in the vending machine field.

We agree with the findings of the hearing examiner that the false and deceptive character of the statements alleged in sub-

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sections 1 through 11, inclusive, of paragraph 6 of the complaint have been established by the evidence.

Woven throughout respondents' brief are two basic contentions. Respondents claim each phrase of the challenged representations is literally true and that all they were doing through the advertisements was to set forth their position "in the most favorable light." Stated in another way, respondents contend there was no intent to deceive and that since each of the various representations, isolated from the context, is true, there is no element of deception.

We believe the law and the facts in this case to be to the contrary. The court in *Ford Motor Co. v. Federal Trade Commission*, 120 F.2d 175, stated:

The question does not depend upon the purpose of the advertisement nor upon the good or bad faith of the advertiser. The point for consideration here is whether, under the facts and circumstances in connection with the publication of the advertisement, the language in and of itself, without regard to good faith, is calculated to deceive the buying public . . .

And, in *Rhodes Pharmacal Co., Inc., v. Federal Trade Commission*, 208 F.2d 382, the court stated:

The important question to be resolved is the impression given by an advertisement as a whole. Advertisements which are capable of two meanings, one of which is false, are misleading. *United States v. 95 Barrels of Vinegar*, 265 U.S. 438, 442. Advertisements which create a false impression, although literally true, may be prohibited. *Koch v. Federal Trade Commission*, 206 F.2d 311; *Consolidated Book Publishers v. Federal Trade Commission*, 7 Cir., 53 F.2d 942, 944. The Federal Trade Commission Act provides, "* * * and in determining whether any advertisement is misleading, there shall be taken into account * * * representations made or suggested * * *." 15 U.S.C.A., Sec. 55(a)

Respondents' appeal is hereby denied. The findings and order of the hearing examiner are adopted as the findings and order of the Commission. It is directed that an order issue in accordance with this opinion.

FINAL ORDER

The respondents herein, except respondent Phillip Schwimmer, having filed an appeal from the hearing examiner's initial decision, and the Commission having considered the matter on the briefs of counsel (oral argument not having been requested) and having rendered its decision denying the appeal and adopting as its own the findings and order in the initial decision:

It is ordered, That the respondents, The Atlas Manufacturing & Sales Corp. and American Products Corporation, corporations,

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and Wallace Jenkins, Frank Olsak, and Roland S. Jenkins, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order contained in the aforesaid initial decision.

Complaint

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IN THE MATTER OF
POINT ADAMS PACKING CO., ET AL.

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

Docket 7210. Complaint, July 23, 1958—Decision, Dec. 5, 1958

Consent order requiring a canner of sea food products in Hammond, Ore., and a broker in New York City, to cease violating the brokerage section of the Clayton Act by reducing the net price to certain buyers by reduction of brokerage, by passing on payments out of brokerage as rebates for part of advertising or promotional allowances, and by passing on a part of the brokerage by agreement between the seller and broker to share one-half of price reductions granted in the form of promotional allowances; and to cease violating Sec. 2(d) of the Act by making special advertising allowances to certain favored customers but not to their competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have been and are now violating the provisions of subsections (c) and (d) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Count I

PARAGRAPH 1. Respondent Point Adams Packing Co., hereinafter referred to as Point Adams or as seller respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at Hammond, Ore. Respondent Point Adams has been for the past several years, and is now, engaged in canning, packing, selling and distributing salmon, tuna and crab meat, all of which are hereinafter referred to as seafood products. Seller respondent is a substantial distributor of seafood products, particularly Columbia River Salmon.

Respondent Charles L. Rogers, Sr., is an individual and is president and general manager of the seller respondent, with his principal office and place of business the same as that of the seller respondent. Respondent Rogers owns a substantial amount of the outstanding capital stock of the seller respondent, and as