

(60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

WINDSOR DISTRIBUTING COMPANY ET AL.

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

Docket 8773. Complaint, Feb. 3, 1969—Decision, Mar. 6, 1970

Order requiring three companies engaged in distributing vending machines and supplies and six of their individual officers to cease making deceptive representations as to earnings, required qualifications of purchasers, sales routes, machine locations, repurchase of machines and supplies, nature of respondents' businesses, and other misrepresentations in selling their vending machines and supplies.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Windsor Distributing Company, a corporation, Pentex Distributing Company, a corporation, Pen-Ida Distributing Company, a corporation, and Roger A. Gerth and Sanford A. Middleman, individually and as officers of said corporations, and John F. Thomas and Frank Halavonic and Jerome Scott and Kenneth Bedingfield, individually and as office managers of said respective corporations hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Windsor Distributing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office

and place of business located at 6 North Balph Avenue, in the city of Pittsburgh, State of Pennsylvania.

Respondent Pentex Distributing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 3130 Stemmons Freeway, in the city of Dallas, State of Texas.

Respondent Pen-Ida Distributing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 2520 South State Street, Suite 202, in the city of Salt Lake City, State of Utah.

Respondents Roger A. Gerth and Sanford A. Middleman are individuals and are officers of each of the corporate respondents. Their address is the same as the corporate respondent, Windsor Distributing Company. Respondent John F. Thomas is an individual and is office manager of Windsor Distributing Company. His address is the same as the said corporate respondent, Windsor Distributing Company. Respondent Frank Halavonic is an individual and is officer manager of Pentex Distributing Company. His address is the same as said corporate respondent, Pentex Distributing Company. Respondent Jerome Scott is an individual and was office manager of Pen-Ida Distributing Company. Respondent Kenneth Bedingfield is an individual and is office manager of Pen-Ida Distributing Company. Their address is the same as said corporate respondent, Pen-Ida Distributing Company.

Respondents Gerth and Middleman together with the aforementioned manager of each of said corporate respondents cooperate and act together to formulate, direct and control the acts and practices of each of said corporate respondents, including the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of vending machines and vending machine supplies to the public.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their respective places of business in the States of Pennsylvania, Texas and Utah to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of

trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of their said products, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers and in promotional material and in oral representations and statements by their salesmen and representatives to prospective purchasers with respect to employment, profits, nature of business, investment, and other business opportunities and benefits to be derived by purchasing said products.

Typical and illustrative of said representations and statements appearing in advertising and promotional material, including "help wanted" and other columns, but not all inclusive thereof, are the following:

SPARE TIME INCOME

Refilling and collecting money for NEW TYPE high quality coin operated dispensers in this area. No selling. To qualify you must have car references, \$600 to 1900 cash. Seven to twelve hours weekly can net excellent monthly income. More full time. For personal interview write WINDSOR DISTRIBUTING COMPANY, 6 N. BALPH AVENUE, PITTSBURGH, PENNSYLVANIA, 15202. Include phone number. (Substantially the same advertisement is used by each of the other corporate respondents under its separate corporate name and address).

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of their salesmen and representatives, the respondents have represented, and are now representing, directly or by implication, that:

1. Respondents offer employment or are making a bona fide offer to sell established businesses to persons who respond to their advertisements.
2. Purchasers of respondents' products must own an automobile, furnish references, have special qualities or be specially selected to qualify for purchase of respondents' products.
3. Persons who purchase respondents' products will not be required to engage in any type of selling activity.
4. Respondents grant exclusive territories to purchasers for the location of their vending machines and sales of respondents' machines will not be made to other persons in such territories.

5. Each vending machine purchased from respondents will produce a minimum \$35 gross profit during each month of operation; purchasers of said machines could reasonably expect a return on their investment of \$9,000 net per year by purchasing 50 machines.

6. Sales routes have been previously established by respondents for said purchasers; that satisfactory and profitable locations have been, or will be, secured for the purchaser; and that respondents will relocate the machines if the original locations are unsatisfactory.

7. Persons who have previously purchased respondents' machines are making substantial earnings from the operation.

8. Machines purchased from respondents are of specified quality, performance, structural design or type.

9. Respondents will repurchase machines at any time if the purchasers are not satisfied with the vending machine business.

10. Respondents are a nut and candy company; are seeking to establish future markets for said products; and in so doing are selling vending machines to purchasers at or near cost.

PAR. 6. In truth and in fact:

1. Respondents do not offer employment nor are they making a bona fide offer to sell established businesses to persons responding to their advertisements. Their sole purpose is to sell their vending machines and vending machine supplies and equipment to such persons.

2. It is not necessary, for purchasers of respondents' products to own an automobile, to furnish references, have special qualities or be specially selected to qualify for purchase of respondents' products. The only requirement is that the purchase price be paid.

3. Persons who purchase said products are required to engage in extensive selling or soliciting in order to establish, operate and maintain locations for said products.

4. Purchasers of respondent's products are not granted exclusive territories within which machines purchased by them may be placed and operated, and sales of machines are made to other parties in said territories.

5. \$35 per machine is greatly in excess of the gross profit that can be expected by purchasers of said machines for each month of operation; \$9,000 net per year is greatly in excess of the net income purchasers make from the operation of 50 machines. In a substantial number of instances, persons who purchase respondents' products and engage in said vending machine business make little or no profit.

6. Neither respondents nor their agents have established sales routes for the purchasers prior to the purchase of respondents' machines, and in those instances where respondents' agents do locate or assist in locating the machines for the purchasers, the locations are generally found to be unsatisfactory and unprofitable. Respondents do not relocate machines for purchasers.

7. In most instances persons who purchased respondents' products and engaged in said vending machine business did not make substantial earnings; but made little or no profit.

8. Purchasers frequently find, upon delivery, that the machines sold to them by respondents are of a different quality, performance, structural design, or type than as represented.

9. Respondents will not and do not repurchase the machines sold by them in the event the purchasers are not satisfied or for any other reasons.

10. Respondents are not a nut and candy company; are not seeking to establish future markets for said products; but are primarily engaged in the sale of vending machines for profit and do not sell said machines to purchasers at or near cost.

PAR. 7. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of vending machines and supplies of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices have had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public, and of respondents, competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. Frank P. Dunn and Mr. Harry G. Shupe for the Commission.

Mr. Sanford A. Middleman (Middleman & Dixon), and Mr. Patrick J. Basial, Pittsburgh, Pa., for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

OCTOBER 21, 1969

PRELIMINARY STATEMENT

A complaint was filed in the above entitled matter on February 3, 1969, and mailed to respondents on February 12, 1969. Issue was joined by the filing of an interim answer on March 13, 1969. This interim answer following respondents' motion for a more definite statement filed on March 25, 1969, subsequently became the final answer of respondents as indicated by the record. Essentially the allegations of the complaint charged respondents under the Federal Trade Commission Act with engaging in deceptive practices emanating from misrepresentations made by them to the public in seeking customers for their vending machines and the products which they dispensed.

A prehearing conference in the above entitled matter was held June 2, 1969. Subsequent thereto hearings were held on June 30, 1969, through July 3, 1969, in Washington, D.C., on July 7, 1969, and July 8, 1969, in Casper, Wyoming, and on July 22 and July 23, 1969, at Pittsburgh, Pennsylvania.

Proposed findings were filed by complaint counsel and counsel for respondents on October 13, 1969.

The hearing examiner has carefully considered the proposed findings of fact and conclusions of complaint counsel and counsel for respondent, and such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent Windsor Distributing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 6 North Balph Avenue, in the city of Pittsburgh, State of Pennsylvania. Admitted by answer. See also Tr. 39-40 and Tr. 588-89 for name change.

2. Respondent Pentex Distributing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 3130 Stemmons Freeway, in the city of Dallas, State of Texas. Admitted by answer. See also Tr. 39-41.

3. Respondent Pen-Ida Distributing Company is a corporation or-

ganized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 2520 South State Street, Suite 202, in the city of Salt Lake City, State of Utah. Admitted by answer. See also Tr. 39-41.

4. United Distributing Company, successor to respondent Windsor Distributing Company (Tr. 588), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 6 North Balph Avenue in the city of Pittsburgh, Pennsylvania. See CX 52 and 54 and Tr. 39 and 42. This corporation as an entity aside from its ownership by respondent Roger A. Gerth has not been made a party to the complaint. Findings holding it to be a participant in the deceptive practices as such a corporate entity would therefore be inappropriate. The complaint counsel's proposed findings in this regard have therefore been disallowed except to the extent that Roger A. Gerth as owner and this corporate entity are one and the same.

5. Respondent Roger A. Gerth, is an individual and is an officer of each of the corporate respondents. His address is the same as the corporate respondent, Windsor Distributing Company. Admitted by answer. See also Tr. 38, 39, 45, 46 and 50.

6. Sanford A. Middleman is an individual and is counsel for each of the corporate respondents, and of United Distributing Company, and was an officer and director of Windsor Distributing Company from March 1965 to March 1968 and of Pentex Distributing Company from May 1966 to September 1967. Admitted by answer in part. See also Tr. 46 and 50. However, the evidence does not establish that the respondent Sanford A. Middleman has acted in a capacity other than as attorney and counsel for respondent corporations in a legal capacity or as a lawyer representing respondent corporations. In fact substantial evidence establishes that the respondent Sanford A. Middleman, at all times acted as an attorney representing the respondents, his clients, as he was professionally and ethically obligated to do. Evidence to this effect was adduced during complaint counsel's case. See Tr. 77, 83, 86, 88, 668-69.

7. Respondent John F. Thomas is an individual and was office manager of Windsor Distributing Company from April 1964 to April 1967 during which time his address was the same as the said corporate respondent, Windsor Distributing Company. John F. Thomas was not served with a copy of the complaint and did not participate in these proceedings, and accordingly the complaint must

be dismissed as to him individually and as manager of corporate respondent Windsor since jurisdiction in personam has not been obtained. Admitted in part by answer and established by testimony. See Tr. 52-53 and 95.

8. Respondent Frank Halavonic is an individual and is office manager of Pentex Distributing Company. His address is the same as said corporate respondent, Pentex Distributing Company. Admitted by answer. See also Tr. 54, 100-01 and 696-97.

9. Respondent Jerome Scott is an individual and was an office manager of Pen-Ida Distributing Company, and his address was the same as that of this corporate respondent. Jerome Scott was not served with a copy of the complaint and did not participate in these proceedings. Accordingly, the complaint must be dismissed as to him individually and as a former manager of corporate respondent Pen-Ida since jurisdiction in personam has not been obtained. See Tr. 54-55 and 103-04.

10. Respondent Kenneth Bedingfield is an individual and is office manager of Pen-Ida Distributing Company. His address is the same as said corporate respondent, Pen-Ida Distributing Company. Admitted by answer. See also Tr. 54, 105-06.

11. Respondent Roger A. Gerth, Frank Halavonic of Pentex Distributing Company and Kenneth Bedingfield of Pen-Ida Distributing Company, with the managers of the corporate respondents have cooperated and acted together to formulate, direct and control the acts and practices of each of said corporate respondents. See Tr. 46, 50, 51, 55, 64, 65, 69, 78, 82, 96, 98, 100-09, 600 and 699.

12. Respondents including Windsor Distributing Company and its successor (Tr. 588) United Distributing Company are now, and or for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of vending machines and vending machine supplies to the public. Admitted by answer. See also Tr. 57, 58, 59, 60, 61, 62, 67, 68, 111, 589, 679, 680, 681, 682, 683, 684 and 685. See advertising, CX 1-CX 19, CX 68, CX 69. See sales invoices CX 60, CX 91, CX 113F including United Distributing Company sales, CX 59A-59Z and 109. See distributorship agreements, CX 41A-43-C, and lists of sales representatives, CX 35-CX 39 and CX 74A-74B. For purchasers see Tr. 188-89, 282, 311-12.

13. In the course and conduct of their business, as aforesaid, respondents other than Sanford A. Middleman, and United Distributing Company now cause, and for some time last past have caused, their said products, when sold, to be shipped from their respective places of business in the States of Pennsylvania, Texas and Utah to

purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Admitted by answer. See also Tr. 57, 58, 59, 102, 104, 106, 109, 112, 113 and 679-682. See United Distributing Company sales invoices CX 59A-59Z and 109.

14. In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of their said products, the respondents and United Distributing Company have made, and are now making, numerous statements and representations in advertisements inserted in newspapers and in promotional material and in oral representations and statements by their salesmen and representatives to prospective purchasers with respect to employment, profits, nature of business, investment, and other business opportunities and benefits to be derived by purchasing said products. Admitted in part by answer. See also Tr. 62, 63, 67-69, 124, 137-38. For copies of ads and sales presentations see, CX 1-23, 45-50 and CX 69; also, Tr. 141, 143 and 144. For customer experiences see Tr. 194, 290-91, 344-45, 426-27, 472-73, 474, 493, 499-501, 516, 526, 543 and 565.

Typical and illustrative of said representations and statements appearing in foregoing advertising and promotional material, including "help wanted" and other columns, but not all inclusive thereof, are the following:

SPARE TIME INCOME

Refilling and collecting money for NEW TYPE high quality coin operated dispensers in this area. No selling. To qualify you must have car references, \$600 to 1900 cash. Seven to twelve hours weekly can net excellent monthly income. More full time. For personal interview write WINDSOR DISTRIBUTING COMPANY, 6 N. BALPH AVENUE, PITTSBURGH, PENNSYLVANIA, 15202. Include phone number. (Substantially the same advertisement is used by each of the other corporate respondents and United Distributing Company under its separate corporate name and address).

15. By and through the use of the foregoing statements and representations, and others of similar import separately and incident to oral and written representations of their salesmen and other agents or nominal successors¹ respondents have represented, and are now representing, directly or by implication as hereinafter set forth in Findings 16 through 25.

16. Respondents represent they offer employment or are making a

¹ E.g., United Distributing Company a nonparty and successor to respondent Windsor Distributing Company in selling vending machines and products is solely owned and controlled by respondent Roger A. Gerth along with other corporations named in the complaint. See CX 52; Tr. 46, 50-51, 182, 372-73, 588-89.

bona fide offer to sell established businesses to persons who respond to their advertisements. This is a reasonable interpretation of the language of the advertisement quoted in Finding 14 and others referred to in CX 1-19, CX 68 and CX 69. Such advertisements were placed under "help wanted" or "wanted" columns. For examples see CX 9, CX 10, CX 12 and CX 13. The language of the second paragraph of the telephone presentation (CX 20) still used (Tr. 143) clearly indicates that an appointment is being offered to the prospective customer. The fourth paragraph leads the prospect to believe that he is applying for some type of employment or distributor arrangement. It is apparent that CX 21A and CX 57A reflect instructions to the salesman to "always remember that you are there to interview them (*i.e.*, the customers) for a job which they must qualify for."

17. Respondents represent purchasers of respondents' products must own an automobile, furnish references, have special qualities or be specially selected to qualify for the purchase of respondents' products. Admitted by answer. See also CX 1-19, 45-50, CX 68 and CX 69.

18. Respondents represent persons who purchase respondents' products will not be required to engage in any type of selling activity. Admitted in part by answer. See also advertisements, and customers' understandings Tr. 194, 282, 312. See sales presentation, CX 21B, where salesman recited advertisement: "no selling—that's right, there is no selling."

19. Respondents represent they grant exclusive territories to purchasers for the location of their vending machines and sales of respondents' machines will not be made to other persons in such territories. Salesmen are instructed to inform prospects as follows: "My job is to appoint a distributor for this area tomorrow." CX 20; also see CX 21A as to the following representation: "My job is to interview until I find a man * * * When I do I will immediately assign him to an area route." The language of the sales presentation in CX 21D is designed to give the impression to the customer that he is being granted an exclusive franchise such as, "It is easier to do business with one person in an area * * * I'm only going to select one." Designations or assignments of exclusive territories, areas or routes appear on the following purchase orders (contracts): CX 69a, CX 79, CX 89, CX 100, CX 102, CX 105, CX 113B, CX 115A, CX 116E, CX 117F, CX 118B, CX 119E, CX 120I, CX 122A, CX 123F, CX 124A, CX 125E, CX 126A, CX 128A, CX 129A-130A. Witnesses also testified to being assigned or granted exclusive territories by respondents' salesmen. See Tr. 238-41, 283, 284, 313-14, 431,

440-41, 485, 493, 518, 526, 545-47, 552 and 562-63. Such words as "focal point" or "assigned area," were understood to mean exclusive territory. CX 86A.

20. Respondents represent each vending machine purchased from respondents will produce a minimum \$35 gross profit during each month of operation; purchasers of said machines could reasonably expect a return on their investment of \$9,000 net per year by purchasing 50 machines. Various profit figures were quoted to the prospective customers by the respondents' salesmen; and these in particular, by salesman Auslander to customer Scott. See Tr. 204, 205 and 270. Also see Tr. 286-87, 445-46, 475, 500, 526, 544-55 and 564-65. Some customers were shown Revenue Schedules. See CX 25A-25C, CX 28A-29B and CX 76. Customers were lead to believe they could achieve such profits. Tr. 194, 303-31, 427, 516, 543-44 and 762.

21. Respondents represent sales routes have been previously established by respondents for said purchasers; that satisfactory and profitable locations have been, or will be, secured for the purchaser; and that respondents will relocate the machines if the original locations are unsatisfactory. Admitted in part by answer. It is also represented "Satisfactory locations are procured after the contract is executed." and "Now our Company insists on securing the original locations for these units." See CX 57E and 57G. That these locations will be profitable is communicated to the prospect by telling him: "After that (*i.e.*, securing original locations) the amount of extra profit he makes depends on how he attends to business." See CX 21C, 22B, 57E and 57G. As to the use of these sales presentations see Tr. 142-44. For customer testimony see Tr. 194, 198, 204, 218, 289, 312, 313, 315, 344-45, 381, 399, 427, 473, 497, 516, 519, 526, 549 and 563.

22. Respondents represent persons who have previously purchased respondents' machines are making substantial earnings from the operation. Admitted by answer in part. See also sales presentations, CX 21A-21B, 21C, 21D, 22B, 57B, 57C and 57D. For customer testimony see Tr. 218-19, 291, 324, 344, 445-46, 472, 499-500, 516, 519 and 529.

23. Respondents represent machines purchased from respondents are of specified quality, performance, structural design or type. Admitted by answer. See also sales presentations CX 21C, 22A, 24, 26, 27 and 57D. For representations made to customers see Tr. 219-20, 261-62, 292, 391, 431, 528 and 543-44. All advertisements feature the language: "—New Type, high quality coin operated dispensers. * * *"

24. Respondents represent they will purchase machines at any time if the purchasers are not satisfied with the vending machine business. See Tr. 222, 266 and 336.

25. Respondents represent they are a nut and candy company; are seeking to establish future markets for said products; and in so doing are selling vending machines to purchasers at or near cost. Admitted in answer that respondent companies are nut and candy companies, seeking to establish future markets. Also see CX 21C and 57D. For customer testimony, see Tr. 223-25, 296-97, 353, 389, 448, 504, 535, 555 and 574.

26. Contrary to their representations respondents do not offer employment nor are they making a bona fide offer to sell established businesses to persons responding to their advertisements. Their sole purpose is to sell their vending machines and vending machine supplies and equipment to such persons. Admitted in part by respondents. See Tr. 114-115 and 126-27.

27. Contrary to respondents' representations it is not necessary for purchasers of respondents' products to own an automobile, to furnish references, have special qualities or be specially selected to qualify for the purchase of respondents' products. The only requirement is that the purchase price be paid. Admitted in part by respondent. See also Tr. 116, 117, 119 and 592. For customers' statements see Tr. 202, 284-85 and 386. It is evidenced that respondents' customers were seeking to supplement their incomes, whether they were working full-time or living on retirement pensions. The evidence further indicates respondents sold their machines to anyone who could make the necessary down payment, without regard to qualifications, including several housewives. See Tr. 184, 207-08, 310, 342, 380, 384, 386, 390, 424-26, 491-92, 515 and 541-43. The entire sales presentation is built around the deception that references and special qualifications are needed in order "to be selected as a distributor." See CX 21A, 21D, 57A and 57D.

28. Contrary to respondents' representations persons who purchase said products are required to engage in extensive selling or soliciting in order to establish, operate and maintain locations for said products. This part of the finding rests essentially on the experiences of customer-witnesses who were required to do extensive selling in relocating their machines. See Tr. 200, 202-03, 285, 289, 348, 350, 388, 453-54, 501-02, 551 and 573.

29. Contrary to respondents' representations purchasers of respondents' products are not granted exclusive territories within which machines purchased by them may be placed and operated, and

sales of machines are made to other parties in said territories. Testimony is uniformly in accord with this finding since virtually all customers experienced the same deception regarding awards of exclusive territories, distributorships, or assigned routes, or areas. That respondents awarded the same territory or area to more than one person is clearly established. See Tr. 239-41, 314, 348, 384-85, 431-33, 476, 485, 493-94, 511, 518, 521, 526, 528-29, 533, 553 and 565-66; also see CX 86A and 86B. In fact respondents continued to advertise and sell their machines, after "selecting" an area distributor, until the area became saturated, or all leads exhausted. CX 117H, 118D and 118E.

30. Contrary to respondents' representations \$35 per machine is greatly in excess of the gross profit that can be expected by purchasers of said machines for each month of operation; \$9,000 net per year is greatly in excess of the net income purchasers make from the operation of 50 machines. In a substantial number of instances, persons who purchase respondents' products and engage in said vending machine business make little or no profit. This finding is based on the testimony of all customers. See Tr. 204-06, 288, 295, 321-22, 335, 354-56, 391, 434-35, 449-53, 458-63, 479-83, 502-03, 530-31 and 554. Even if these machines produced the exact number of sales respondents claim as the national average, per week, they would not reach the gross profit figures represented by the salesman. Tr. 736-40.

31. Contrary to respondents' representations neither respondents nor their agents have established sales routes for the purchasers prior to the purchase of respondents' machines, and in those instances where respondents' agents do locate or assist in locating the machines for the purchasers, the locations are usually found to be unsatisfactory and unprofitable. Respondents do not relocate machines for purchasers. This finding is supported by the testimony of several customers. See Tr. 218, 284, 285, 290, 315-17, 319, 348-49, 357, 383-84, 387-88, 429, 443-45, 473, 498-99, 527, 551 and 52. Frequently when relocations were made, they were unsatisfactory (Tr. 398-99) or the location owners had not given permission to the company locator. Tr. 399.

32. Contrary to respondents' representations in most instances persons who purchased respondents' products and engaged in said vending machine business did not make substantial earnings. See transcript references cited under Findings 31; also, see Tr. 433-34 and 436; and CX 82 and 83 for earnings and profits reported by customer Abbott. A typical customer, Mr. Schalk, stated that he invested nearly \$3,000 and in three years took only \$500 out of the ma-

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chines, *i.e.*, his total gross revenue. Tr. 370-91. At the time of his testimony he had five machines out of an original thirty that he had purchased, still on location, Tr. 401, and had to seek other employment in order to live. This witness was led to believe that he would make \$7,500 per year from the machines, or at least "an average fixed income." Tr. 405-406.

33. Contrary to respondents' representations purchasers frequently find, upon delivery, that the machines sold to them by respondents are of a different quality, performance, structural design, or type than represented. The testimony in this connection was also consistently uniform. For example witness Scott testified: "He (the salesman) stated that they were the highest quality vending machines on the market. * * * I found by opening the first carton that it was just about the cheapest piece of material that you could possibly get hold of." Tr. 219, also see Tr. 220-21, 292-93, 383, 431, 474-75, 505, 528, 544 and 549.

34. Contrary to their representations respondents will not and do not repurchase the machines sold by them in the event the purchasers are not satisfied or for any other reasons. See Tr. 222-24 and 336.

35. Contrary to their representations respondents are not a nut and candy company. They are not seeking to establish future markets for said products but are primarily engaged in the sale of vending machines for profit and do not sell said machines to purchasers at or near cost. See Tr. 125-27, 131-32, 297, 353, 392 and 448; also CX 59A-59Z and 109.

36. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of vending machines and supplies of the same general kind and nature as those sold by respondents. See Tr. 134-36.

37. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and has induced them to purchase substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

CONCLUSIONS

It is well established that officers of a corporate respondent may themselves be individually enjoined from participating in the prac-

tices engaged in between corporations of which they are an officer in violation of the Federal Trade Commission Act. For example in *Federal Trade Commission v. Standard Education Society*, Sup. Ct. 1937, 301 U.S. 112 and 86 F.2d 692, 2d Cir. 1936, the authority to hold corporate officers and to prevent them from using unfair methods of competition in commerce, is clear. In *Surf Sales Co. et al. v. Federal Trade Commission*, 7th Cir. 1958, 259 F. 2d 744, the corporate manager was held subject to an order regardless of his title because it was found that he did exercise authority, responsibility and direction of the affairs of the company.

Officers and directors were held to be liable where they participated in the deceptive practices and could not avoid individual responsibility on the ground that they were acting on behalf of the corporation only, and although an officer resigned and entirely withdrew from any active roll in the corporation before the order was entered, it did not exclude him from the effect of the order because he had individually engaged in the deceptive acts and practices. *Consumer Sales Corporation v. Federal Trade Commission*, 2d Cir. 1952, 198 F.2d 404. The court stated: "Little need be said in answer to the contention that the individual petitioners should not have been included in the order. They had organized the corporate petitioner approximately two years before this proceeding was commenced. They were its officers—they directed and guided the corporation in matters of policy." In reference to the officer's resignation, the court explained that he was held liable not only because he had participated, but also because, "Consumer Sales Corporation is not the only vehicle through which such acts may be accomplished in the future." (*Supra* page 408). The court also rejected the argument that respondent's salesmen were not authorized to make false statements and that the officers had no knowledge of such statements. It was found by the Commission and upheld by the court that the officers furnished the order forms which contained false statements and "actively encouraged and participated in making the said false representations." Also when the respondents sought to avail themselves of the *de minimis* concept concerning the testimony of only fourteen housewives among thousands of purchasers, the court ruled that since all salesmen used the same order blanks and other sales materials, it indicated that the fourteen were but few of the many deceived. (*Supra*, page 407). Also cited in this case is *Steelco Stainless Steel, Inc. v. Federal Trade Commission*, 7th Cir. 1951, 187 F. 2d 693, 696.

The corporate responsibility for the representations and acts of its salesmen regardless that they are called independent contractors is also well established. *International Art Co. v. Federal Trade Commission*, 7th Cir. 1940, 109 F. 2d 393, *cert. denied*, 310 U.S. 632.

Substantial proof establishes in the present matter that misrepresentations and deceptions are a part of corporate policy which extends to all the corporations named herein. See identical sales presentations CX 21A and CX 57A. The acts and practices are the same for all. CX 44 In *National Trade Publications Service, Inc. v. Federal Trade Commission*, 8th Cir. 1962, 300 F. 2d 790, the order was supported against the parties by the pattern of conduct of the salesmen indicating such violations were not isolated. Also the improper practices of the salesmen were approved by the corporation and reflect a consistent pattern of deception. In the present matter the misrepresentations of the salesmen were sanctioned by respondents as evidenced by their acceptance of the contracts containing notations of exclusive territories, and other subsequent correspondence.

Complaint counsel in connection with the participation of respondents' counsel in the deception point out that the Commission in *Wilson Chemical Co. et al.*, Docket 8474 [64 F.T.C. 168], "gives sound precedent for subjecting a corporate attorney to an order based on his role in the deceptive selling scheme." In that case the attorney participated almost passively by permitting the use of his name on collection letters, but the Commission found that he prepared the original form, authorized its use, received compensation for the use and occasionally received responses. Apparently in the *Wilson case supra*, the attorney in question was not participating solely on a professional basis in representing the respondent in that case but was deceptively allowing respondent to utilize his presence as an attorney without in fact acting as counsel exclusively. In the instant case, *i.e.*, Windsor Distributing, Mr. Middleman was not acting under the guise of an attorney representing respondents, but his services and participation were of a completely legal and professional nature and he had no participating relationship with respondent Windsor Distributing or with Mr. Gerth, also a respondent other than as their lawyer. It would indeed be a very unrealistic rule if every lawyer were charged with participating in a wrong committed by his client merely because he represented the client in a bona fide attorney-client relationship, where such a relationship was not a fiction but true in fact. It is of course correct as indicated by complaint counsel that Mr. Gerth one of the respondents rented an office in the offices of Mr. Middleman. This in and of itself does not im-

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pute that a relationship other than that of attorney-client existed between Mr. Gerth and Mr. Middleman. In the absence of such evidence it would appear that the charges against Mr. Middleman individually should be dismissed.

It also appears the service of the complaint was not consummated on John F. Thomas and Jerome Scott who were named in the complaint. Since jurisdiction *in personam* has not been obtained as to those named respondents, the complaint as to them must also be dismissed.

As regards the other and remaining respondents named in the complaint, their aforesaid acts and practices are held to be to the prejudice and injury of the public, and respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. See *In the Matter of Atlas Mfg. and Sales Corp. et al.*, Dkt. 6902, 1958 [55 F.T.C. 828]. Accordingly,

ORDER

It is ordered, That respondents Windsor Distributing Company, Pentex Distributing Company and Pen-Ida Distributing Company, corporations, and their officers, and Roger A. Gerth, individually and as an officer of said corporations, and Frank Halavonic, individually and as manager of said Pentex Distributing Company, and Kenneth Bedingfield, individually and as manager of said Pen-Ida Distributing Company, and respondents' agents, representatives and employees, directly or through any nominal successor, corporate or otherwise owned and controlled by respondent Roger A. Gerth or through any other device, in connection with the advertising, offering for sale, sale or distribution of vending machines, vending machine supplies, or other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

(1) Through advertisements published or caused to be published in the "help wanted" or other columns of newspapers or in any manner or by any other means, that employment or a business opportunity is being offered when the real purpose is to obtain leads to prospective purchasers of respondents' products.

(2) Purchasers of respondents' products must own an automobile, furnish references, have special qualities or be specially selected to qualify for purchase of respondents' products; or

misrepresenting, in any manner, the qualifications or requirements for purchase of respondents' products.

(3) Selling or soliciting is not required of those investing in any product or business offered by respondents; or misrepresenting, in any manner, the amount or kind of activity or effort required in connection with any product or business offered by respondents.

(4) Purchasers of respondents' products or businesses are granted exclusive territories within which their machines may be placed for operation; or that sales will not be made to other persons in such territories.

(5) Purchasers of respondents' products will earn any stated or gross or net amount; or representing, in any manner, the past earnings of said purchasers unless in fact the past earnings represented are those of a substantial number of purchasers and accurately reflect the average earnings of these purchasers under the circumstances similar to those of the purchaser or prospective purchaser to whom the representation is made.

(6) Sales routes have been previously established by respondents for purchasers; or that respondents or their sales representatives have obtained or will obtain satisfactory or profitable locations for the purchasers' machines; or that respondents will relocate said machines; or misrepresenting, in any manner, the assistance that will be furnished in obtaining locations or relocations for the product or the business purchased.

(7) Previous purchasers of respondents' vending machines are enjoying substantial earnings from the operation of said machines.

(8) Vending machines or other products sold by respondents are of specified quality, structural design, performance, type or characteristic not actually and fully possessed by said machines or products.

(9) Respondents will repurchase or otherwise assist in the disposition of vending machines or supplies from purchasers thereof.

(10) Respondents are a nut and candy company; that respondents are seeking to establish a future market for their nuts and candy; or that respondents are selling vending machines to purchasers at or near cost; or misrepresenting, in any manner, the kind or character of respondents' business or the cost or price of respondents' products.

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It is further ordered, That the respondents shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and secure from each such salesman or persons a signed statement acknowledging receipt of said order.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents incident to selling their products and services

a. Inform orally all prospective customers and provide in writing in all contracts that (1) the contract may be cancelled for any reason by notification to respondents in writing within three days from the date of execution and (2) that the contract is not final and binding unless and until respondents have completely performed their obligations thereunder by placing the vending machines in locations satisfactory to the customer and said customer has thereafter signed a statement indicating his satisfaction.

b. Refund immediately all monies to (1) customers who have requested contract cancellation in writing within three days from the execution thereof, (2) customers who have refused to sign statements indicating satisfaction with respondents' placement of the machines, and (3) customers showing that respondents' contract, solicitations or performance were attended by or involved violations of any of the provisions of this order.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents, such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this order.

It is further ordered, That the complaint is herein and hereby dismissed as to John F. Thomas, Jerome Scott and Sanford A. Middleman, individually.

FINAL ORDER

This matter having been submitted to the Commission on the cross-appeals of complaint counsel and respondents from the hearing examiner's initial decision filed October 21, 1969, holding that respondents, except for Sanford A. Middleman, John F. Thomas, and

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Complaint

Jerome Scott, had violated Section 5 of the Federal Trade Commission Act as charged: and

The Commission, upon oral argument and consideration of the briefs and record, having determined that the appeals should be denied and that the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the appeals of respondents and complaint counsel be, and they hereby are, denied.

It is further ordered, That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents, Windsor Distributing Company, Pentex Distributing Company, Pen-Ida Distributing Company, Roger A. Gerth, individually and as an officer of said corporations, Frank Halavonic, individually and as manager of Pentex Distributing Company, and Kenneth Bedingfield, individually and as manager of Pen-Ida Distributing Company, shall, within sixty (60) days after service of this order upon them, file with the Commission a report, in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

MAURICE FINKLESTEIN. TRADING AS MAURICE FURS

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

Docket C-1701. Complaint, Mar. 6, 1970—Decision, Mar. 6, 1970

Consent order requiring a Philadelphia, Pa., manufacturing furrier to cease