

clearly and conspicuously states, in immediate conjunction with any such word, that said product does not affect in any way the growth, shape or position of the toenail.

It is further ordered. That respondent shall file with the Commission, within sixty (60) days after service of the order herein upon it, a report in writing setting forth in detail the manner and form of respondent's compliance with the order.

IN THE MATTER OF
OLIVER L. ROHLFING DOING BUSINESS AS
NATIONAL LABORATORIES OF ST. LOUIS

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

Docket 8541. Complaint, Oct. 30, 1962—Decision, Sept. 27, 1963

Order requiring an individual seller of vending machines and vending machine supplies in St. Louis, Mo., to cease representing falsely in advertisements in the "Help Wanted" and other columns of newspapers that he was seeking employees to operate his vending machines, and that the money he required to be invested was for merchandise to be dispensed in his machines and was fully secured by an inventory of such merchandise; to cease, in followup visits to persons responding to such advertisements, falsely representing that purchasers were assured of substantial earnings; and to cease misleading use of the word "Laboratories" as a part of his trade name when he operated no laboratory and did no research.

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 Oliver L. Rohlfing, an individual trading and doing business as National Laboratories of St. Louis, hereinafter referred to as respondent, has violated

the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Oliver L. Rohlfing is an individual trading and doing business as National Laboratories of St. Louis, with his principal place of business located at 4003 Wyoming Avenue, St. Louis, Missouri.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the offering for sale, sale and distribution of vending machines and vending machine supplies to purchasers thereof located in various States of the United States.

PAR. 3. In the course and conduct of his aforesaid business respondent causes said vending machines and vending machine supplies to be transported from the place of business of the manufacturer thereof in the State of California into and through States of the United States other than the State of California to purchasers thereof located in such other States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said vending machines and vending machine supplies in commerce, as "commerce" is defined in the Federal Trade Commission Act. His volume of business in such commerce is, and has been, substantial.

PAR. 4. In the course and conduct of his business, at all times mentioned herein, respondent has been in substantial competition with corporations, firms and individuals in the sale of vending machines and vending machine supplies.

PAR. 5. In the course and conduct of his business, as aforesaid, respondent has published and caused to be published, advertisements in the "Help Wanted" and other columns of newspapers distributed through the United States mail, and by other means to prospective purchasers in the several States in which respondent does business, of which the following is typical.

WANTED

MAN OR WOMAN—SPARE TIME

To refill and collect money from our Hersheyett candy and sport card machines in this area. Easy to do. Excellent income, \$440.00 cash required, secured by inventory. Include phone No. Write P. O. Box 1041, Wichita, Kansas.

PAR. 6. By means of the statements appearing in said advertisements, as set forth in paragraph 5, respondent has represented and is representing, directly or by implication, that:

- (1) The advertisement was an offer of employment;
- (2) Persons selected would operate and service vending machines owned by respondent;

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(3) The amount of money required to be invested was for the purchase of an inventory of merchandise to be dispensed in respondent's vending machines;

(4) Any amount invested as aforesaid would be secured by an inventory worth the amount invested.

PAR. 7. In truth and in fact:

(1) Respondent did not offer employment to persons reading his advertisement. His sole purpose and intent was to sell his products to such persons;

(2) Respondent did not seek employees to operate and service vending machines owned by respondent but sought purchasers of vending machines and vending machine supplies offered for sale by respondent;

(3) The amount of money required was the purchase price of said vending machines and vending machine supplies and was not for the purchase of an inventory of merchandise to be dispensed in respondent's vending machines;

(4) The aforesaid amount of money required is not secured by an inventory worth the amount invested.

Therefore, the statements and representations referred to in Paragraph 6 were false, misleading and deceptive.

PAR. 8. In the course and conduct of his business respondent visits those persons who make inquiries concerning the nature of the offer made in his advertisement. Upon the occasion of such visits, respondent makes numerous oral representations which are intended to induce and do induce the purchase of said vending machines and vending machine supplies. Typical of such representations, but not all inclusive, are the following:

(1) Persons who purchase respondent's vending machines and engage in the vending machine business are assured of substantial earnings.

(2) That a person purchasing vending machines from respondent will receive such machines with the freight prepaid thereon.

PAR. 9. In truth and in fact:

(1) Persons who purchase respondent's vending machines and engage in the vending machine business are not assured of substantial earnings. In most instances such persons achieve only limited earnings and make little or no profit.

(2) Persons purchasing vending machines from respondent did not receive such machines with the freight prepaid thereon but were required to pay the cost of such freight before they could obtain delivery of the machines.

Therefore, the statements and representations referred to in Paragraph 8 were false, misleading and deceptive.

PAR. 10. Through the use of the word "laboratories" as a part of his trade name, respondent represents that he operates a laboratory and is engaged in research in connection with his business. In truth and in fact, respondent does not operate a laboratory and does no research in connection with his business. Therefore, the aforesaid statement and representation is false, misleading and deceptive.

PAR. 11. The use by respondent 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 into the purchase of substantial quantities of respondent's vending machines and vending machine supplies by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's 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. Robert J. Hughes supporting the complaint.

Mr. Claude Hanks and *Mr. Charles M. Shaw*, St. Louis, Mo., for respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on October 30, 1962, issued its complaint charging Oliver L. Rohlfing, an individual trading and doing business as National Laboratories of St. Louis, with violation of Section 5 of the Federal Trade Commission Act. The complaint alleges that the respondent, trading and doing business as National Laboratories of St. Louis, has for some time last past been engaged in the interstate sale of vending machines and vending machine supplies.

Respondent, in aid of the first contacting of potential purchasers of the said products, is alleged to have caused advertisements to be published in the "Help Wanted" and other classified advertising columns of newspapers distributed through the United States mail and otherwise in the States in which the respondent does business, which

advertisements, directly or by implication represent that respondent is offering employment to selected persons for the operating and servicing of candy and sport-card vending machines owned by the respondent.

It is alleged that persons replying to the said advertisements are visited by the respondent and that on such occasions oral representations are made by the respondent as to assured substantial earnings to be obtained by persons engaging in the vending machine business. It is further alleged that respondent's said representations as to potential earnings are intended to induce and do induce the purchase of the vending machines and vending machine supplies being offered for sale by the respondent. It is finally alleged that through use of the word "Laboratories" as part of his trade name, that respondent represents that he operates a laboratory and is engaged in research in connection with his business.

The representation that employment is being offered, the inclusion of the word "Laboratories" in respondent's trade name and in various written materials, and the content of the aforesaid advertisements and respondent's oral representations as to earnings are alleged to constitute false, misleading and deceptive statements, representations and practices, and such use by the respondent is alleged to have had and now have 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 the said vending machines and vending machine supplies from the respondent by reason of said erroneous and mistaken belief.

Answer to the complaint both admitting and denying various of the allegations of the complaint was filed November 21, 1962. Following a motion by counsel supporting the complaint, a prehearing conference was set for January 8, 1963, and later postponed until January 29, 1963. Upon motion by counsel for the respondent, the prehearing conference was further postponed until February 18, 1963. Subsequent to the prehearing conference, counsel supporting the complaint filed a motion requesting a Certificate of Necessity to the Commission for the holding of hearings in six different cities. Said motion was denied and the hearing was set to commence on March 19, 1963, in St. Louis, Missouri. Following the denial of a motion to quash a subpoena duces tecum directed to the respondent, the hearing was held in St. Louis, Missouri on March 19 and 20, 1963, and the case was closed on the record.

Eight witnesses appeared and testified during the presentation of the case-in-chief and Commission exhibits marked for identification one through sixteen were offered and received in evidence. Six witnesses also appeared and testified during the presentation of the defense and respondent's exhibits marked for identification one through eleven were offered and received in evidence. The record of testimony, including the prehearing conference made part of the record by agreement of respective counsel, consists of 322 pages. All counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses presented, and to introduce such evidence as is provided for under Section 4.12(b) of the Commission's Rules of Practice for Adjudicative Proceedings.

Proposed findings of fact, conclusions and supporting briefs were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected. After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following findings of fact and conclusions therefrom are made, and the following order issued.

FINDINGS OF FACT

1. Respondent Oliver L. Rohlfing is an individual trading and doing business as National Laboratories of St. Louis, with his principal place of business located at 4003 Wyoming Avenue, St. Louis, Missouri.¹

2. Respondent is now, and for some time last past has been, engaged in the offering for sale, sale and distribution of vending machines and vending machine supplies to purchasers thereof located in various States of the United States.²

3. In the course and conduct of his aforesaid business respondent causes said vending machines and vending machine supplies to be transported from the place of business of the manufacturer thereof in the State of California into and through States of the United States other than the State of California to purchasers thereof located in such other States. Respondent maintains, and at all times mentioned here has maintained, a course of trade in said vending machines and vending machine supplies in commerce, as

¹ Admitted in respondent's answer. See Tr. 67-69 and 289-299 as to the nature of the occupied premises and the extent of respondent's business operations.

² Admitted in respondent's answer. See Tr. 88 and Comm. Ex. No. 5A-F, being a list of the respondent's customers sold in 1962.

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"commerce" is defined in the Federal Trade Commission Act. His volume of business in such commerce is, and has been, substantial.³

4. In the course and conduct of his business, at all times mentioned herein, respondent has been in substantial competition with corporations, firms and individuals in the sale of vending machines and vending machine supplies.⁴

5. In the course and conduct of his business, as aforesaid, respondent has published and caused to be published advertisements in the "Help Wanted" and other columns of newspapers distributed through the United States mail, and by other means to prospective purchasers in the several States in which respondent does business, of which the following is typical:

WANTED

MAN OR WOMAN—SPARE TIME

To refill and collect money from our Hersheyett candy and sport card machines in this area. Easy to do. Excellent income, \$440.00 cash required, secured by inventory. Include phone No. Write P. O. Box 1041, Wichita, Kansas.⁵

6. Respondent, trading under the name "National Laboratories of St. Louis", by his own testimonial admission, does not operate, own, or control a laboratory of any description whatsoever.⁶ While respondent does not use such trade name in his newspaper advertisements,⁷ it is used by respondent in letters to newspapers placing such advertisements.⁸ Said trade name is also used verbally by the respondent in the initial contact of prospective purchasers,⁹ in respondent's contract purchase forms¹⁰ and in related correspondence.¹¹

Respondent's aforesaid use of the word "Laboratories" as part of the trade name under which he does business constitutes a representation to the purchasing public that a laboratory exists for and does research in connection with said business. Said representation is false, misleading and deceptive. Respondent by his own testimonial admission as hereinbefore set forth, does not operate, own, or control a laboratory of any description whatsoever, and no re-

³ Admitted in respondent's answer. See Tr. 73-75 for respondent's description of such offering for sale, sale and distribution. Tr. 107-109 shows that respondent's gross annual sales in 1961 were \$28,530.30 and for 1962 were \$48,968.83.

⁴ Admitted in respondent's answer.

⁵ Admitted in respondent's answer. See also, Comm. Ex. Nos. 1, 2, 3, 4, 11, and Tr. 70-72; 84-85; 189-192. See, further, respondent's admissions at Tr. 76.

⁶ Tr. 84.

⁷ Tr. 94.

⁸ Tr. 97.

⁹ Tr. 94; 195-196; 203; and see Tr. 286, where respondent's own witness states such use by the respondent.

¹⁰ Comm. Ex. Nos. 6, 7, 8, 12, 14, 15; Resp. Ex. Nos. 1, 10.

¹¹ Resp. Ex. Nos. 5, 6, 7, 8, 9.

search is conducted for or by the respondent in connection with the said business. Such a misrepresentation of business status in the course of doing business in commerce as herein set forth and described constitutes an unfair method of competition and an unfair act and practice in commerce.¹²

7. Respondent's aforesaid newspaper advertisements caused to be published and distributed as hereinbefore described in the furtherance and aid of respondent's aforesaid business activities in commerce represent, directly or by implication, that respondent is offering employment to such persons as are selected by the respondent to operate and service vending machines owned by the respondent.¹³ Said representation is false, misleading and deceptive and constitutes an unfair method of competition and an unfair act and practice in commerce.¹⁴ Respondent's sole purpose and intent, by his own testimonial admission, was not to offer such employment but to sell vending machines to potential purchasers replying to respondent's said newspaper advertisements.¹⁵ The required \$440 stated in respondent's said newspaper advertisements, to be secured by inventory, is not an outlay of money for a merchandise inventory to be dispensed in respondent's owned vending machines, as the said advertisements represent or imply, because, in fact, it is the purchase price set by the respondent for the sale of vending machines by the respondent. Included in such sales transactions, as shown in the respondent's purchase forms herein of record, are varying amounts of merchandise for dispensing in said machines "given" by the respondent in connection with such sales when later made to persons replying to the said advertisements.¹⁶ Further, said monetary out-

¹² In *Carter Products, Inc., et al. v. Federal Trade Commission*, (1951) 186 F. 2d 821, the court held that "The law is violated if the first contact or interview is secured by deception (*Federal Trade Commission v. Standard Education Society, et al.*, 302 U.S. 112, 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 Commission*, 7 Cir. 153 F. 2d 103, 104, 105 [42 F.T.C. 882, 4 S.&D. 453])."

See also, the order to cease and desist on this point entered in the prior vending machine matter of *Keith E. McKee* doing business as *National Laboratories of Des Moines*, (1958) 54 F.T.C. 930 at 932. Respondent in this matter adopted the name of *National Laboratories of St. Louis* following his leaving the employ of Keith E. McKee, Tr. 92.

¹³ Tr. 156, witness Hobbs, "Well, I was looking for a part-time job and I seen his job under the help wanted ads in the North County Journal," and Tr. 163, "Well, I thought that somebody wanted someone to service vending machines for them." Witness Bolin, at 228, "I was out of work and I was hunting work. I was answering any ad that looked like it might be something that would appeal to me, and that's the reason I answered this particular ad."

¹⁴ In the Matter of *National Laboratories of Des Moines*, *supra*; In the Matter of *The Atlas Mfg. & Sales Corp., et al.*, (1958) 55 F.T.C. 828 at 845; *Exposition Press, Inc. v. Federal Trade Commission* (1961) 295 Fed. 2d 869 at 872-873.

¹⁵ Tr. 76.

¹⁶ Comm. Exhibits, Nos. 6, 7, 8, 12, 14, 15 and Resp. Exhibits, Nos. 1, 10.

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lay is not secured by a merchandise inventory equal in value to the said \$440 as respondent's newspaper advertisements represent or imply, because, in fact, the merchandise inventory obtained by the purchaser is of a substantially lesser value.¹⁷

For example, a typical transaction¹⁸ shows the sale by respondent of eight vending machines at \$55 each for a total of \$440. The purchaser, for obtaining his own vending machine locations,¹⁹ was offered and received one additional machine, or a total of nine vending machines under the sales contract. The record shows these vending machines²⁰ cost the respondent \$21 each or a total \$189 for the nine machines. The record also shows that at the time of such sale, respondent further entered into a repurchase agreement²¹ valid for six months after the date of purchase under which the repurchase price was set at \$117.44 for the said nine vending machines.

The purchaser in the sales transaction, in addition to obtaining nine vending machines of the then wholesale cost value of \$189, also received from respondent 50 lbs. of gum, 50 lbs. of candy, and 20,500 assorted cards for dispensing in the said machines. This inventory of merchandise was testified by respondent²² to be of the total wholesale value of \$91, which is obviously substantially less than the \$440 cash required, secured by inventory, stated in respondent's newspaper advertisements. Taking the word "inventory" in the broadest possible sense, as contended for by the respondent to include both the vending machines and the merchandise to be therein dispensed,²³ it is clear that, based on the total value of these nine machines at either respondent's cost price of \$189 or the repurchase price of \$117.44, and the wholesale value of only \$91 for the merchandise allegedly given in the transaction, that there can be no inventory value secured in the amount of \$440 as represented or implied in respondent's newspaper advertisements.²⁴

¹⁷ Tr. 89.

¹⁸ Comm. Ex. No. 8.

¹⁹ These locations are usually in small grocery stores, drugstores, supermarkets and the like. The store in which the vending machine is located obtains as space rental a percentage of the take from the machine owner, commonly 25 percent, more or less, of the money taken in by the machine. See Tr. 252-253; 289.

²⁰ Tr. 89.

²¹ Comm. Ex. No. 10.

²² Tr. 89.

²³ Tr. 77; 98-99.

²⁴ Tr. 244-246 discloses testimony by the witness Boyd, with reference to his contract (Comm. Ex. No. 14) for these vending machines, to have made a later inquiry from respondent's manufacturing source and to have found that they could be purchased direct for \$27.95 each by the witness, or a total of \$251.55 for nine such machines.

Respondent's aforesaid representations are, therefore, false, misleading and deceptive and constitute an unfair method of competition and unfair acts and practices in commerce.²⁵

8. Respondent, in the course and conduct of his aforesaid business, visits such persons as make inquiries concerning the nature of the offer made in respondent's newspaper advertisements.²⁶ During such visits, respondent makes oral representations to such persons which are intended to induce and do induce the purchase from the respondent of vending machines and the accompanying necessary merchandise supplies.²⁷ These representations, in the main, are directed to the expounding of the excellent income representation appearing in respondent's newspaper advertisements. It is during this interview that persons replying to respondent's newspaper advertisements are first informed that respondent is not offering employment but is attempting to sell vending machines. Respondent bolsters his sales argument as to assured potential earnings following the purchase of his machines by exhibiting letters from customers which indicate that they are satisfied with respondent's vending machines and are being successful in making sales.²⁸ Respondent's sales argument is further tailored as the occasion may require, to meet the expressed income needs and expectations of the potential purchaser.²⁹

²⁵ *In the Matter of National Laboratories of Des Moines; In the Matter of The Atlas Mfg. & Sales Corp., et al., supra.*

²⁶ In the words of the respondent, at Tr. 75:

"First I get a post office box where my mail comes and I send my ads to the papers, place the ad in their classified section, which I am doing now, for a period of three days, and if cash in advance is needed we will send remittance and upon return of the tear sheet and the statement we will send them a check. Then I will go into the area where I am working and pick up my replies and start contacting the people and then I will set up my interviews."

²⁷ Respondent, at Tr. 314, admitted to having made in the neighborhood of three or four hundred sales presentations during the past two years.

²⁸ Tr. 319-321; Resp. Ex. No. 2 is such a letter written by the witness Sack. This witness testified it was written to respondent in 1959, at respondent's request, a month after the purchase of respondent's vending machines. At Tr. 116, Mr. Sack testified as follows:

"Q. Do you still have the vending machines which you purchased from Mr. Rohlfing?
A. Yes, I do, but I hate to tell you where I have them. I have all ten of them but they are not in any places of business.

Q. Why did you withdraw them from service?

A. They were not paying that we felt it was worth our time to go out and service these machines."

²⁹ With reference to respondent's assured potential income earnings, the witness Boschert, at Tr. 129, testified:

"A. I thought I was going to make—he stated that I could make fifty to sixty dollars a month, a car payment of fifty to sixty dollars a month could be made from operating these nine machines.

Q. Mr. Boschert, did you ever make that amount of money from these vending machines?

A. No, I never did. I only had them for six months, but in that time in my locations it was impossible to make that amount."

See also, witness Hobbs at Tr. 159.

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Respondent's representations as to assured potential earnings to be made in the operation of the vending machines he offers for sale are based on numerous hypothetical merchandise turnovers in hypothetical good locations which respondent, from experience, has reason to know cannot be expected to usually occur. That these exaggerated assured potential earnings in the operation of respondent's vending machines are not usually obtained is clearly demonstrated by the testimony of record in this proceeding.

Respondent's sales argument addressed to the uncritical ears of potential purchasers unacquainted with the problems attendant to the locating and the operating of vending machines, is based on the supposition that if the required number of good sales locations is secured and if the public buys sufficiently and all the vending machines turn over their merchandise content the specified number of times, then assured earnings in certain stated dollar amounts will result. Respondent supported this argument by a series of written mathematical figures³⁰ based on the foregoing supposition which disregarded the fact that, based on respondent's business knowledge and past experience, such a required number of good sales locations³¹ and merchandise turnovers³² were usually obtainable.

Unsupported by the record evidence is the final allegation of the complaint that the purchaser must pay the freight for delivery of the vending machines purchased from the respondent contrary to respondent's alleged oral representation to the purchaser as to prepayment in such regard.³³

Respondent's aforesaid representations as to assured substantial earnings are false, misleading and deceptive and constitute an unfair

³⁰ Comm. Ex. No. 9 and Tr. 197-198; Comm. Ex. No. 16 and Tr. 257-258; 263-264.

³¹ Witness Kelsey was able to locate only two of the nine machines purchased and stated, "When we asked a number of places, they already had some or they didn't want to bother with them, so we were only able to place two of them." This effort extended "for about three to four weeks after they were obtained" (Tr. 259-260). With regard to the products received for sale in the vending machines, the witness testified, "They are still at home" (Tr. 263). Witness Bolin testified that he was unable to place the nine machines he purchased (Comm. Ex. No. 12) stating, "Upon trying in two or three places, they were full up with other machines and they wouldn't let me place them" (Tr. 231).

³² Witness Sack stored his machines because they did not pay out enough to be worth the time of servicing (Tr. 116). Witness Boschert found after six months experience that it was impossible to make the dollar amounts stated by respondent. The witness resold his nine machines costing \$400 back to the respondent for \$117.44 (Comm. Ex. No. 6; Tr. 129-130). Witness Hobbs testified that he was told that within six months time he would have his investment back (Comm. Ex. No. 7). Such did not happen and the machines were stored in his basement (Tr. 159-160). Witness Cowan testified that respondent stated they should have all their money back (Comm. Ex. No. 8, nine vending machines purchased for \$440) except for \$117.44 at the end of six months (Comm. Ex. No. 9, Tr. 198). The machines were on location approximately a year and returned only \$112 (Tr. 200) and not \$322.56, the amount forecast by respondent's assured earnings representation.

³³ Tr. 230. But, see, Tr. 233-235 and Tr. 220; 249-250; 263; 305-307.

method of competition and unfair acts and practices in commerce.³⁴

Appropriate to the instant proceeding is the following from a United States Supreme Court opinion:

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

* * * * *

To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth.³⁵

9. Testifying on behalf of the respondent were the respondent, his part-time office secretary and bookkeeper,³⁶ one purchaser of vending machines from the respondent,³⁷ and three persons who accompanied the respondent on certain different sales trips for the followup interviews of persons replying to respondent's aforesaid newspaper advertisements.

Respondent's testimony on his own behalf, in the main, was directed to an explanation of his various changes in business address³⁸ and a denial of the alleged misrepresentations challenged by the complaint and testified to by the witnesses in support of the case-in-chief.³⁹ In the light of the accepted credible testimony of these witnesses, respondent's testimony to the contrary is given little or no probative weight. Respondent admitted to the making of three to four hundred oral sales presentations during the last two years. Respondent asserted in such connection that while he did not remem-

³⁴ *In the Matter of National Laboratories of Des Moines; In the Matter of The Atlas Mfg. & Sales Corp., et al.*, supra; *Goodman v. Federal Trade Commission* (1957) 244 F. 2d 584 at 595-596 and 598-600.

³⁵ *Federal Trade Commission v. Standard Education Society, et al.*, (1937) 302 U.S. 112 at 115-116. Respondent mistakenly has cited the lower court opinion in support of his position herein. The lower court was expressly overruled by the Supreme Court on this point.

³⁶ This witness testified only as to incidental matters such as various changes in respondent's business address and also served to identify certain correspondence.

³⁷ Witness Politte, a factory worker, testified to the purchase of five vending machines from the respondent for \$275 (Resp. Ex. No. 10) in June, 1960 and five more during 1961 and 1962. The gist of this single witness's testimony was that he was satisfied with the business as a side-line, although, as of January 1, 1963, he had only grossed his original investment in the machines. Such amount, according to the witness, however, did not take into account the cost of merchandise bought and the expenses of doing business and operating his route (Tr. 272-273). It will be also noted that this particular testimony is not relevant to disproof of the issues herein and, further, does not refute the preponderant probative weight of the credible record testimony to the contrary. See, *Independent Directory Corporation, et al. v. Federal Trade Commission* (1951) 188 F. 2d 468 at 471 citing cases.

³⁸ Tr. 296-300.

³⁹ Tr. 303-312.

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ber the conversations that took place in all such presentations, variations in such oral presentations would be very small from customer to customer.⁴⁰

The following testimonial excerpts are herein set forth as speaking most eloquently of the nature of respondent's oral presentations:

Q. Would you please relate in your own words what took place when Mr. Rohlfing visited you? Please tell us who was there and what was said as best as you can remember.

A. Mr. Rohlfing, my husband, and myself. They were the only ones there.

Q. Where did this interview take place?

A. At our home. He gave a very convincing talk on the merits of his proposition, which then turned out to be selling us vending machines.

Q. Let me interrupt for just a second. At the time you saw this advertisement that you responded to, what were you interested in, what led you to respond to the ad?

A. We thought it was a part-time job.

Q. And would you explain just briefly why you were interested?

A. My husband is retired and we were interested in making a little additional income. Part time would give him something to do. I might say, besides just sit around the house. Perhaps I don't mean that quite technically. It would give him something to look forward to, something to occupy spare time.

Q. This was the interest that led you to write in when you saw the ad?

A. Yes.

Q. I am sorry I interrupted you. Please go ahead.

A. May I state here that prior to Mr. Rohlfing's coming to the house he called my husband on the phone and asked if the money was going to be available. My husband told him that it was and he made the appointment to come down. He made a very good presentation of what we thought would be a part-time job in his employ, but, as I said, turned out to be the selling of these two-penny vending machines.⁴¹

* * * * *

Q. When Mr. Rohlfing made his sales talk, did he exhibit to you any literature, any photographs?

A. Yes; a photograph purporting to be their factory.⁴²

* * * * *

Q. I don't want to get you off the track here, but when Mr. Rohlfing came to your home, how did he introduce himself, do you happen to recall?

A. I couldn't say the exact words. I just can't remember.

Q. Now, to get back to the—

⁴⁰ Tr. 315 discloses the following:

"Q. So really, then, your only basis for the statement that you have never made certain representations to your customers is that you always stick to your sales presentation?

A. That is right.

Q. That's what you are relying upon as a basis for your position that you have never said these other things that your counsel asked you about?

A. That is right."

⁴¹ Tr. 193-194.

⁴² Tr. 194-195.

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A. (Interposing) I think he introduced himself as Mr. Rohlfing of the National Laboratories.⁴³

* * * * *

Q. During the sales presentation by Mr. Rohlfing, did he say anything to you about the amount of money you might expect to earn from the machines?

A. Yes.

Q. I would like to show you once again Commission's Exhibit 9, which is a sheet of paper with certain figures on it and certain writing. You have already testified that this is all in your handwriting and these figures were dictated to you by Mr. Rohlfing.

A. That is right; he said Now write, and I wrote what he said.

Q. With the assistance of this document, could you explain just as well as you can what Mr. Rohlfing told you you would make if you bought these vending machines and put them out on locations?

A. Put them out on location at the end of six months we should have all of our money back except \$117.44, and if we were not satisfied with the machines then they would buy them back for \$117.44.⁴⁴

* * * * *

Q. Did you get back everything except—by that I mean, did you get back your investment less \$117 within six months?

A. No, sir.⁴⁵

* * * * *

Q. I have just a few points that I would like to pursue for a few minutes, Mrs. Cowan. Some mention has been made, counsel for respondent has raised a question of you being put under pressure to decide at the time Mr. Rohlfing visited you whether or not you wanted to enter into this transaction. Did Mr. Rohlfing, what, if anything, did Mr. Rohlfing say to you that in any way led you to believe or gave you the feeling of being put under pressure?

A. We felt that since he had taken two weeks to answer our application for what we thought part-time work we should be entitled to a little time to think it over, but he assured us that he was so busy he couldn't give us any time, that he had other people to interview and if we didn't take it, they would, and he had to be on his way, he didn't have any time to tarry and he didn't have any time to give for consideration. It was now or not at all.⁴⁶

Witnesses Missler, Pahle and Moline testified to being present during some of the respondent's oral sales presentations. Witness Missler, who stated he accompanied the respondent solely as a friend and without receipt of any compensation for so doing, testified as to oral sales presentations of the respondent that he had attended. This testimony can be given no probative weight herein.⁴⁷ Witness Pahle, who stated the respondent to be his uncle and that he accom-

⁴³ Tr. 195-196.

⁴⁴ Tr. 197-198.

⁴⁵ Tr. 200.

⁴⁶ Tr. 224.

⁴⁷ Tr. 141 discloses that the witness Missler was not present during respondent's interviews with any of the witnesses testifying in this proceeding, and his testimony, therefore, sheds no light on the conversations stated to have taken place in such interviews.

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panied him on sales trips, without compensation, also testified to being present during certain of respondent's oral sales presentations. In particular, the witness testified he was present during the respondent's sales interview with the witness Kelsey. Mr. Pahle confirmed that the respondent had presented Mr. Kelsey with figures as to certain earnings to be obtained in the operation of the vending machines offered for sale by the respondent⁴⁸ but denied hearing that the respondent stated the machines would earn so much money within a definite period of time⁴⁹ as was testified to by Mr. Kelsey.⁵⁰ The testimony of this witness, under the circumstances shown of record herein, is rejected and that of the witness Kelsey accepted as being of substantially more probative value. Witness Moline, who stated he accompanied the respondent for compensation, confirmed respondent's use of the trade name "National Laboratories of St. Louis" in introducing himself to potential purchasers.⁵¹ This witness, like witness Missler, was not present at respondent's oral sales presentation to any of the witnesses testifying in this proceeding, and his testimony is, therefore, rejected for the like reason.

10. The use by respondent 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 into the purchase of substantial quantities of respondent's vending machines and vending machine supplies by reason of said erroneous and mistaken belief.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.
2. The complaint herein states a cause of action, and this proceeding is in the public interest.

⁴⁸ Comm. Ex. No. 16; Tr. 276-277.

⁴⁹ Tr. 277.

⁵⁰ Witness Kelsey, at Tr. 258, testified:

"Q. What was said to you at the time of your interview with Mr. Rohlfing as to the earnings that you might get from these vending machines?

A. Basically that we would have all of our money back within at least a year's time.

Q. Mr. Kelsey, have you gotten your investment back or did you get it back within a year's time after you purchased the vending machines?

A. No, sir.

Q. Could you tell us, Mr. Kelsey, how much money you have, in fact, grossed from the vending machines that you have had out on locations?

A. Less than \$50."

⁵¹ Tr. 286 discloses:

"Q. You never once heard him say that he was National Laboratories of St. Louis?

A. Oh, yes, the introduction, but not in the sales pitch."

3. The aforesaid acts and practices of respondent, as herein found in the foregoing Findings of Fact, were, and are, all to the prejudice and injury of the public and of respondent's 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.

ORDER

It is ordered, That respondent Oliver L. Rohlfing, an individual, trading and doing business as National Laboratories of St. Louis, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of vending machines and vending machine supplies, or any other products, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

a. Employment is being offered when in fact the purpose is to obtain purchasers of vending machines and vending machine supplies or other products;

b. Persons are being selected and employed to operate or service vending machines;

c. The dollar amount of money required for the purchase of vending machines and vending machine supplies is only for the purchase of an inventory of vending machine supplies to be dispensed in vending machines; that said inventory is secured in said dollar amount; that there is no risk of losing the money invested; or that money is required for any purpose other than the purpose for which such money is in fact required;

d. The earnings or profits which will be achieved by persons purchasing vending machines and engaging in the vending machine business will be any dollar amount in excess of the actual earnings or profits usually and customarily achieved by persons similarly so engaged in said vending machine business.

2. Using the word "Laboratories" as a part of any business name, or representing in any other manner, directly or by implication, that a laboratory is operated by or for the said business, or that the nature of the said business in any manner differs from the actual fact.

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DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision filed on May 17, 1963, and the Commission having determined that said initial decision is appropriate in all respects to dispose of this proceeding:

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

It is further ordered, That respondent Oliver L. Rohlfing shall, within sixty (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 the order to cease and desist.
