

Complaint

IN THE MATTER OF
ROCHESTER NURSERIES, INC.COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 1949. Complaint, May 8, 1931—Decision, Oct. 31, 1932*

Where a corporation engaged as a sales organization or jobbing concern, for a short period and with small capital, in business of selling and distributing nursery stock, in which permanence, stability, and responsibility are of peculiar importance to customers, and neither owning any nursery nor growing stock dealt in, but purchasing same, under contract, from a nursery which it neither owned directly nor indirectly,

Included word "Nursery" in its corporate name, and in its advertising matter in catalogs, pamphlets, newspapers, etc., referring to its "large nurseries", "farms", and "most careful and scientific management", and "well earned reputation for stock of the highest quality", and making such statements as that it had "had a lot of experience in growing trees and plants" and knew that it was "poor economy to grow stock carelessly or to sacrifice quality", and describing the careful growing, digging, and handling of its stock, its 44 years of nursery stock merchandising and shipping experience, with its own packing houses and organization, and its asserted competitive advantages over such concerns as mail order houses, department stores, etc., "not in position to furnish trees and plants as well taken care of and freshly shipped as can be, being strictly and exclusively in the nursery business—growing the stock we send out in the open field, in a soil and climate adapted to its proper development", etc.;

With capacity and tendency to mislead and deceive purchasers into believing that it actually grew or propagated the nursery products sold and distributed by it, and owned, operated, and controlled nurseries and farms on which aforesaid products were grown, and that it was a large concern long in the nursery business, and to induce purchase of its stock and divert trade from and otherwise injure competitors, including growers of the nursery stocks sold by them:

Held, That such acts and practices, under the circumstances set forth, were to the prejudice of the public and competitors, and constituted unfair methods of competition.

Mr. Richard P. Whiteley for the Commission.

Lewis, Bown, Johnson & Tobin, of Rochester, N.Y., for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, a New York corporation engaged in the purchase of fruit and ornamental nursery stock and in the sale thereof to purchasers in various States, and with principal office and place of business in

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Rochester, with using misleading corporate name, and misrepresenting business status and advantages, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, engaged as aforesaid and neither owning, operating nor controlling a nursery on which the nursery stock dealt in by it as aforesaid is grown, but filling orders from products grown on properties or nurseries which it neither owns, operates, nor controls, employs its corporate name containing the word "nursery", and represents in catalogs, pamphlets, other publications, newspaper advertisements and advertising matter, that it is an old concern, the biggest and strongest organization in the world devoted to the business concerned, its products are grown on its farms under the most careful and scientific management, it ships all orders direct to customer from nursery,¹ and other statements of similar tenor, the facts being that it was not a large concern, and did not grow stock dealt in by it on properties, farms or nurseries which it owned or controlled.

"The designation 'nurseries' in the corporate name of respondent", as alleged, "and the above and foregoing representations and statements made by it by means of which it has offered for sale, sold and sells its products, as above set forth, had and have the capacity and tendency to mislead and deceive, and did and do mislead and deceive the purchasing public into the belief that the said Rochester Nurseries, Inc., actually grows or propagates the nursery products sold and distributed by it in interstate commerce, and that it owns, operates and controls nurseries, farms or properties in or on which the said nursery products sold and distributed by it in interstate commerce are grown, and that it is a large concern and has been engaged in the nursery business for many years, when such are not the facts; and have tended to induce, and have induced the purchase of respondent's nursery stock in reliance upon such erroneous belief, and have tended to divert and have diverted trade from,

¹ The complaint alleged the making of the following statements, among others, by respondent:

"We have the biggest and strongest organization in the world devoted to this business.

"Being strictly and exclusively in the nursery business growing stock, we sell out in the open field * * * and with the expensive equipment to successfully handle it.

"Our nurseries known throughout the world * * *.

"They are grown on our farms under the most careful and scientific management possible, with nothing lacking in equipment.

"Forty-four years of nursery stock merchandising and shipping experience * * *.

"We ship all orders direct to the customer, from nursery to planter.

"Because we are growers * * *.

"Growers of fruit and ornamental trees and plants" and other statements and phrases of like import.

and otherwise injured, competitors of respondent"; all to the prejudice of the public and competitors.

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondent, Rochester Nurseries, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. Respondent having entered its appearance and filed its answer to the said complaint, a hearing was had before a trial examiner theretofore duly appointed and testimony was heard and evidence received in support of charges stated in the complaint and in opposition thereto. Thereafter this proceeding came on regularly for final hearing before the Commission on the complaint, answer, testimony and evidence received and briefs in support of the allegations of the complaint and in opposition thereto and the Commission having duly considered the record and being now fully advised in the premises makes this its report, stating its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Rochester Nurseries, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located in the city of Rochester, State of New York, and said respondent, during the period beginning in February, 1929, and ending in July, 1930, was engaged in the sale and distribution of nursery stock to purchasers located in the various States of the United States other than the State of New York. During the aforesaid period respondent caused said nursery stock when sold to be shipped from its place of business in Rochester, N. Y., to purchasers thereof located in the various States of the United States other than the State of New York, and in the course and conduct of its said business respondent was at all times herein referred to in competition with other corporations, and with firms, partnerships and individuals likewise engaged in the sale and distribution in interstate commerce of nursery stock.

PAR. 2. In the course and conduct of its aforesaid business respondent purchased such nursery stock as it required in its operations from Brown Bros. Co., a nursery, growing and propagating its stock under

a contract which provided that the stock furnished respondent should be the same grade of material which was used in filling Brown Brothers' own orders. Respondent did not own or control said Brown Bros. Co. and the only capital stock owned either by respondent or by any of its officers or stockholders in Brown Bros. Co. was 26 shares out of a total share capital of 2,000 shares which was owned by the president of respondent, one Leland C. Brown. In the course and conduct of its business from February, 1929, to July, 1930, in order to promote the sale of nursery stock purchased by it from Brown Bros. the respondent distributed through several States of the United States, catalogs, pamphlets, booklets, circulars, and other publications, and it also caused to be published in newspapers in said States advertisements and advertising matter intended to aid in the sale of its nursery stock purchased as stated. Among the statements made in said advertising pamphlets and other literature during the aforesaid period were the following:

Just bear in mind that you represent a firm of standing and responsibility, with large nurseries and a well earned reputation for stock of the highest quality; who have not sent out, and could not afford to send out, inferior goods. We have had a lot of experience in growing trees and plants and we know what it costs to grow them. We know it is poor economy to grow stock carelessly or to sacrifice quality. You may be sure that what we aim to meet and overcome is competition in quality. Our accomplishment and our record in that are well known * * *.

Whenever a customer tells you he can buy at cheaper prices from some catalogue house or other nursery, ask him to show you the terms on which he will have to buy from the catalogue firm. He will find he has to send his money in advance; also pay carriage and packing charges. Tell him you are selling your trees—not somebody's else. Don't say that the other fellow's trees are no good—say the firm that you represent grows as good trees as can be grown at any price, that they are nurserymen of long experience, and as good business men they sell at prices necessary to cover the cost of growing first quality stock and make a fair profit. * * *

Yet with our prices on the X-grade stock, you can appeal even to them and still give them far better values than they can get in the local stores that are handling nursery stock under conditions that are impossible to the proper care and growth of that stock. Some day we hope to see some sort of legislation that will make these stores and dealers conform to rigid inspection, and regulations just as legitimate growers (nurserymen) do. * * *

Contrast this with even the X-grade stock that we sell. Everything is handled carefully by men who realize its value. It is grown and dug with care, and where necessary to store it over the winter for early spring shipment, or to keep it dormant for late shipment, it is all handled scientifically. The temperature in our storage cellars is all carefully regulated and kept just right, roots are packed in damp moss and handled carefully from the time it is started out in the field until it gets to our customer * * *

Our products are never sold, for resale to catalogue nurseries, mail order houses, department stores, jobbers and peddlers. This competition is not in

position to furnish trees and plants as well taken care of and freshly shipped as can we, being strictly and exclusively in the nursery business—growing the stock we send out in the open field, in a soil and climate adapted to its proper development, best in quality, healthy, thrifty, and of standard nursery size and age and with the expensive equipment to successfully handle it. * * *

DON'T FORGET NO ONE ELSE CAN SELL YOUR LINE

No other nursery, no department store, no mail order house carries your line. Our products are exclusively for you and your customers. They are grown on our farms under the most careful and scientific management possible with nothing lacking in equipment * * *.

The quality of service rendered is often more important than the price. Forty-four years of nursery stock merchandising and shipping experience, our own packing houses and a 100 percent self-contained organization, has made our name a synonym for service.

During the period when the statements and representations, supra, were made by respondent it was a small concern with but \$1,000 capital, owning no nursery, growing no stock, and wholly without the equipment mentioned or implied in the advertisements circulated as inducement to customers and prospective customers in the sale of its nursery stock. It was merely a sales organization or jobbing concern which purchased nursery stock from Brown Bros. Co. and sold it to retail customers. Its sales from February to October, 1929, for spring delivery in 1930 amounted to but \$8,155.56; its sales between October 8, 1929, to July, 1930, when it suspended business, were less.

PAR. 3. Among the competitors of respondent in the sale of its nursery products in the several States of the United States during the period from February, 1929, to July, 1930, were a number of concerns who were growers of nursery stock sold by them in competition with respondent. Permanence, stability, and responsibility on the part of sellers of nursery stock are of peculiar importance to their customers, as it is often some years after sale before the stock purchased bears fruit so as to disclose whether or not the fruit is as represented. Such period in the case of pear and apple trees extends from three to ten years.

PAR. 4. The use of the word "nurseries" in the corporate name of respondent taken in connection with statements made in its literature used as an inducement in the sale of its nursery products had and has the capacity and tendency to mislead and deceive the purchasing public into the belief that respondent actually grows or propagates the nursery products sold and distributed by it in several States of the United States and that it owns, operates, and controls nurseries and farms on which the said nursery products sold and distributed by it are grown. Its literature also gives the impression that it is a large concern long in the nursery business. Such are

not the facts and the false and misleading statements as to these facts contained in respondent's literature and in its name had and have the capacity and tendency to induce the purchase of respondent's nursery stock and have and had the capacity and tendency to divert trade from and otherwise injure competitors.

CONCLUSION

The acts and practices of respondent under the conditions and circumstances as described in the foregoing findings are to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of an act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes".

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, the testimony and evidence introduced, and the briefs of counsel for the Commission, and counsel for the respondent, and the Commission having made its findings as to the facts and its conclusion that respondent has violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

It is now ordered, That respondent, Rochester Nurseries, Inc., and its agents, representatives and employees in connection with the advertising, offering for sale and sale in commerce between and among the several States of the United States and in the District of Columbia of nursery stock, do cease and desist from directly or indirectly—

Using the word "nurseries" or "nursery" or any other word or words of like import in its corporate or trade name, business signs, or advertising matter in combination or conjunction with any other word or words unless and until said respondent actually owns and operates or directly and absolutely controls a nursery or farm in or on which a substantial proportion of the nursery stock sold and distributed by it in interstate commerce is grown.

It is further ordered, That respondent, Rochester Nurseries, Inc., shall, within 60 days after service upon it of a copy of this order file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with and conformed to the order to cease and desist hereinabove set forth.

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IN THE MATTER OF
JACOB GENNET

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

Docket 1970. Complaint, Sept. 22, 1931—Decision, Oct. 31, 1932

Where an individual engaged in manufacture and sale of mattresses, sold said products in competition with genuine, all new material cotton mattresses and at prices lower than those at which such mattresses could be purchased, labeled as all new material and cotton, in purported compliance with laws of state in which thus sold for resale to ultimate consumer, notwithstanding fact said mattresses thus marked with the white labels specified by statute for those of all new material, contained rags, mattress ticking, cloth, clippings, previously manufactured articles worn about the person and other second-hand and filthy material; with effect of misleading and deceiving purchasers in respect of the composition of said mattresses, and with capacity and tendency to deceive both retail dealers and purchasing public in said respect, and to divert trade from competitors truthfully labeling their products:

Held, That such practices, under the circumstances set forth, were to the prejudice of competitors and the public, and constituted unfair methods of competition.

Mr. Richard P. Whiteley for the Commission.

Mr. Nathan H. Berger, of Newark, N.J., for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, an individual engaged in the manufacture and sale of mattresses and quilts, and in selling said mattresses to purchasers in the various States of the United States, and with principal place of business in the city of Newark, N.J., with misbranding or mislabeling as to composition of product, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, for more than two years last past, "has represented, designated, described, and referred to the said mattresses as containing and being composed entirely of new material, and has attached or caused to be attached or affixed to said mattresses so sold and distributed by him in interstate commerce labels", purportedly attached pursuant to State law and setting forth that the particular mattresses so labeled, were composed of all new material,¹ the facts

¹ The label set forth in the allegations of the complaint, may be found reproduced in the findings, in paragraph 2 thereof, on page 103.