

Complaint

IN THE MATTER OF
FIRST NATIONAL NURSERIES, INC., AND
LELAND C. BROWN

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

Docket 2186. Complaint, May 23, 1934—Decision, Dec. 18, 1934

Where a corporation, and the president and substantial owner thereof, engaged in the sale and distribution of nursery stock, in competition with persons and concerns engaged in the business of growing and selling, or buying and selling such stock, in which business permanence, stability, and responsibility on the part of the sellers is of special importance to customers—Employed the words "Nursery" or "Nurseries" as a trade or corporate name and otherwise, and represented themselves as growers of nursery stock, as inducements to purchase, through such representations and statements in catalogs, and other advertising matter as "First National Nurseries, Growers of Fruit and Ornamental Trees and Plants", etc., "Grown and for sale by First National Nurseries", etc., "* * * 'The Nursery of Quality'," etc., and emphasized in its advertising the idea of purchasing "from a complete nursery carefully handled and fresh shipped stock, inspected and certified first quality, big rooted, vigorous, quick growing, free from disease and injurious insect pests, not off a store counter or from a small grower, or a catalog or mail jobber with a limited assortment and without facilities for growing, digging, storing, handling and packing", etc., and stressed the thought of having planting "backed by a recognized nursery of many years' experience", notwithstanding fact they neither owned, leased, nor controlled ground producing the stock dealt in by them, or grew any of the stock sold by them;

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

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

Mr. Morton Nesmith for the Commission.

COMPLAINT

Pursuant to 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", the Federal Trade Commission, having reason to believe that First National Nurseries, Inc., a corporation, and Leland C. Brown, have been and are using unfair methods of competition in commerce, as

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"commerce" is defined in said act, and it appearing to said 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, First National Nurseries, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, having and maintaining its office and principal place of business in the city of Rochester, in the State of New York. Respondent, Leland C. Brown, is the president of and principal stockholder in said respondent company and manages the same and controls its practices and policies. Respondent, First National Nurseries, Inc., has been and is engaged in the business of purchasing for resale nursery stock consisting of shrubbery, fruit, and ornamental trees and plants, and such other things as are included in the words "nursery stock" as commonly used and understood. Said respondent has been and is also engaged in offering for sale and selling said products in commerce between and among the several States of the United States and in causing said products when so sold to be transported from its said principal place of business in the State of New York into and across the several States of the United States to the several purchasers thereof located at various places in said several States.

Said products are so sold at retail by respondent company through the medium of agents, who are employed by said respondent and who receive a commission of 25 percentum on the several amounts of the sales prices of the products sold by them respectively.

Other persons, firms, associations, and corporations have been and are engaged in offering for sale and selling in said commerce like and competitive nursery stock propagated, cultivated, grown, and produced by themselves; and still other persons, firms, associations, and corporations have been and are engaged in offering for sale and selling in said commerce like and competitive nursery stock propagated, cultivated, grown, and produced by others. In the course and conduct of its said business, respondent company has been and is in competition with all such other persons, firms, associations, and corporations so engaged in offering for sale and selling in said commerce between and among the several States of the United States and the District of Columbia, said nursery stock or any articles thereof, and with all other persons, firms, associations or corporations engaged in offering for sale or selling to the public nursery stock or any articles thereof.

PAR. 2. The purchasing public prefers to purchase nursery stock from the producer thereof, to wit, from those who own, control, and

operate the nurseries in which such nursery stock is propagated, cultivated, grown, and produced. The purchasing public greatly desires to procure nursery stock that is genuine and true to the name, kind, and quality for which it is offered for sale. The purchasing public is of the opinion that in making purchases directly from such producers thereof, there is less risk of mistakes in the true name, kind, and quality of the stock so being offered for sale and sold, and a greater probability that the product is genuine and true to the name, kind, and quality for and as which it is so offered and sold.

The use of the word "Nurseries" as a part of respondent company's name means and indicates to the purchasing public that respondent company, owns, controls and maintains nurseries in which it propagates, cultivates, grows, and produces the nursery stock so being offered for sale and sold by it to the public. The use of said word in said corporate name constitutes a representation and assurance to the public that respondent company is the producer of the nursery stock so being offered for sale and sold by it; and is so understood by the public.

In truth and in fact, respondent company does not own, control, or operate a nursery or nurseries, and is not the producer of the nursery stock so being offered for sale and sold by it to the public, but respondent company purchases the same from the producers thereof or from the dealers therein for resale to the public.

PAR. 3. In aid of respondent company's sales of its said product to the public, for use of its said sales agents in so offering for sale and selling said nursery stock to the purchasing public, and for the purpose of inducing the public to purchase the same, respondent company in and by printed catalogs, pamphlets, booklets, circulars, publications, advertisements, and various forms of advertising matter, makes to the public many false and misleading statements and representations in reference to respondent company and its said nursery stock.

Among such false and misleading statements and representations are the following and many others of like or similar tenor and effect, to wit:

Referring to respondent company; "Growers of Fruit and Ornamental Trees and Plants."

Referring to respondent company's nursery stock: "Grown and for sale by" respondent company.

"The Nursery of Quality."

"Growers and Importers of" nursery stock.

"October 25th we picked four quarts of berries from young plants growing in the nursery rows and the plants were in all stages of development."

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"You know that your company grows the finest, hardiest Barberry in America."

"It's to your advantage * * * to get from a nursery carefully handled, fresh shipped stock, inspected and certified, first quality, big rooted, vigorous, quick growing, free from disease and injurious insect pests, not off a store counter, or from a small grower, or a catalog or mail jobber with limited assortment and without facilities for growing, digging, storing, handling, and packing."

PAR. 4. Said use by respondent company of the word "Nurseries" as a part of its corporate name, and the use by it of the false and misleading statements and representations above set forth has the capacity and tendency to deceive and mislead the purchasing public into the erroneous belief that respondent company owns, controls, and maintains a nursery or nurseries, in which it propagates, cultivates, grows, and produces the nursery stock which it so offers for sale and sells to the public; and to induce the public to purchase respondent company's nursery stock in and because of such erroneous belief so induced. Said use of said word "Nurseries" and said false and misleading statements and representations have the tendency and capacity to divert trade to respondent company from its said competitors, to the unfair advantage of respondent company, to the unjust disadvantage of its competitors, and to the deception and injury of the public.

PAR. 5. The above alleged acts and practices of respondents are all to the prejudice of the public and of competitors of respondent company 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", approved September 26, 1914.

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, First National Nurseries, Inc., and Leland C. Brown, the first-named respondent being a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, and the second-named respondent being its president, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. Respondents having entered their appearances and filed their joint answer to the complaint, a hearing was had before a trial examiner theretofore duly appointed, and testimony was heard and evidence

received in support of the 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, First National Nurseries, Inc., is a corporation organized in 1930 under the laws of the State of New York and is existing and doing business by virtue of said laws in said State, with its principal place of business at Rochester, N. Y. The respondent, Leland C. Brown, is the president of said corporation and the owner of all its capital stock, consisting of 100 shares of no par value except two shares outstanding in the hands of the vice president and secretary and treasurer, respectively. Said First National Nurseries, Inc., upon its organization, succeeded to the business theretofore carried on since 1897 by a partnership, and since its organization it has been 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. Since its incorporation, respondent, First National Nurseries, has caused the trees, shrubs, plants, and other items of nursery stock sold by it to be transported when sold, to the respective purchasers thereof from Rochester, in the State of New York, through and into various other States in the United States, and in the course and conduct of its said business has been and is now in active competition with various persons and partnerships and other corporations also engaged in the business of growing and selling or buying and selling nursery stock in interstate commerce. The respondent, Leland C. Brown, owns all the shares of the capital stock in said corporation except two, and is the moving spirit of said corporation.

PAR. 2. In the course and conduct of respondent corporation's business as aforesaid, respondents purchased all such nursery stock from other nurseries, viz: Brown Bros. Company, W. T. Smith Company, Webb Nursery Company, Andrews Nursery Company, Vick Seed Company, Martin Perennial Nurseries, and others. Since its incorporation, respondent, First National Nurseries, Inc., has not owned, leased, or controlled any ground which produces any of the stock which it sells in interstate commerce, and neither of the respondents

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grew or propagated any of the nursery products which they sold in such commerce. In the course and conduct of its business, from its incorporation, the respondent, First National Nurseries, Inc., distributed through the several States of the United States, catalogs, pamphlets, booklets, circulars, publications, and other advertising matter intended to aid in the sale of its nursery stock purchased as aforesaid. Among the statements made in said pamphlets, booklets, and advertising matter during said time were the following:

FIRST NATIONAL NURSERIES

Growers of Fruit and Ornamental Trees and Plants
Home Office, Rochester, N. Y. "Flower City"

Grown and for sale by

FIRST NATIONAL NURSERIES

Growers of Fruit and Ornamental Trees and Plants
Agencies Everywhere
Home Office, Rochester, N. Y.

FIRST NATIONAL NURSERIES

The Nursery of Quality
Home Office, Rochester, N. Y.
The Flower City

* * * to get from a complete nursery carefully handled and fresh shipped stock, inspected and certified first quality, big rooted, vigorous, quick growing, free from disease and injurious insect pests, not off a store counter or from a small grower, or a catalogue or mail jobber with a limited assortment and without facilities for growing, digging, storing, handling and packing * * *

* * * to feel that your planting is a profitable and permanent one, backed by a recognized nursery of many years' experience * * * (Rec. pp. 10-13)

During the period when the statements and representations set out above were made, respondent, First National Nurseries, Inc., neither owned nor controlled a nursery nor grew any stock as stated or implied in the advertisements aforesaid, circulated as inducements to customers and prospective customers in the sale of its nursery stock.

Under the rules and regulations applicable to the nursery industry adopted by the Commission of Agriculture and Markets, State of New York, dealers are defined as persons or firms not acting as agents, who are engaged in selling or peddling nursery stock and who do not themselves grow more than 25 per cent of the stock handled by them. Respondent, Leland C. Brown, acting for and on behalf of respondent, First National Nurseries, Inc., signed an appli-

cation for and received a dealer's certificate from the Commission of Agriculture and Markets of the State of New York.

PAR. 3. Among the competitors of respondent corporation in the sale of its nursery products in the several States of the United States since said respondent's incorporation in 1930, were a number of concerns who were both growers of, and dealers in, nursery stock sold by them in interstate commerce in competition with respondent, First National Nurseries, Inc. Permanence, stability, and responsibility on the part of sellers of nursery stock are of peculiar importance to their customers, as it is often some time after the sale before the stock purchased bears fruit so as to disclose whether or not the fruit is true to type or as represented. Such period in the case of fruit trees, such as apples or pears, extends from 5 to 10 years.

PAR. 4. The use of the word "Nurseries" in the corporate name of the respondent, First National Nurseries, Inc., taken in connection with the 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 corporation actually grows or propagates the nursery products sold and distributed by it in several States of the United States in that it owns, operates, and controls nurseries and farms on which said nursery products sold and distributed by it are grown. Its literature also gives the impression that it is a large concern of long standing and experience in the nursery business. Such are not the facts and the false and misleading statements as to these facts contained in respondent corporation's literature and in its name had and have the capacity and tendency to induce the purchase of its nursery stock, and had and have the capacity and tendency to divert trade from and otherwise injure competitors.

CONCLUSION

The acts and practices of the respondents 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 in competition and commerce within the intent and meaning of Section 5 of the 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

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respondents, the testimony and evidence introduced, and the briefs of counsel for the Commission and for respondents, and the Commission having made its findings as to the facts and its conclusion that respondents have 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 respondents, First National Nurseries, Inc., and Leland C. Brown, and their 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—

(1) Using the word "Nurseries" or "Nursery" or any other word or words of like import in the corporate name of respondent, First National Nurseries, Inc., or in trade names, business signs, advertising matter or otherwise, in combination or in conjunction with any other word or words unless and until said respondent, First National Nurseries, Inc., 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.

Using the word "Nurseries" or "Nursery" or other words of like import as a trade name or otherwise by the respondent, Leland C. Brown, or in his business signs or advertising matter, in combination or conjunction with any other word or words, unless and until said respondent, Leland C. Brown, 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 him in interstate commerce is grown.

(2) Representing that First National Nurseries, Inc., or Leland C. Brown, are growers of nursery stock.

It is further ordered, That respondents, First National Nurseries, Inc., and Leland C. Brown, shall within 60 days after service upon them of a copy of this order file with the Commission a report in writing setting forth the details, amount, and form in which they have complied with and conformed to the order to cease and desist hereinabove set forth.

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IN THE MATTER OF
STEMPEL BROS., INC.COMPLAINT AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5
OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2249. Complaint, Nov. 19, 1934—Order, Dec. 22, 1934*

Consent order requiring respondent, its officers, etc., in connection with the sale and offer of women's garments in interstate commerce, forthwith to cease and desist from submitting or transmitting to its customers or prospective customers, or the customers or prospective customers of its competitors, or to any other part of the trade or to the public, advertisements or illustrations of garments or other wearing apparel manufactured by its competitors, with the representation, express or implied, that respondent is or was the manufacturer of such garments or other wearing apparel, or in any other or similar manner representing it is the manufacturer of particular garments or other wearing apparel when such is not the fact.

Mr. Robt. N. McMillen for the Commission.

Mr. Nathan Kosseff, of New York City, for respondent.

COMPLAINT

Acting in the public interest, pursuant to 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", the Federal Trade Commission having reason to believe that Stempel Bros., Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as commerce is defined in said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, states its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized and existing under and by virtue of the laws of the State of New York, with its place of business at the City of New York, in said State. It is, and at all times hereinafter mentioned has been, engaged in the manufacture and sale of ladies' sportswear, including dresses, coats, skirts, and guimpes. Sales are made to department stores located throughout the several States of the Union, and, pursuant to such sales, shipment is made from its place of business in New York to such purchasers.

PAR. 2. In the course and conduct of its said business respondent is in competition with other persons, firms, and corporations manufacturing and selling similar garments, and, pursuant to such sales, shipping them from their respective places of business to purchasers located in various States other than the States of the location of such competitors.