

IN THE MATTER OF

EARL E. MAY SEED COMPANY AND EARL E. MAY

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

Docket 3063. Complaint, Feb. 16, 1937—Decision, Dec. 14, 1937

Where a corporation engaged in transportation, sale and distribution of nursery stock, in commerce among the various States, and an individual whose name it bore and who was principal stockholder and director and controller of its sales policies and operations—

Represented that they actually grew or propagated the nursery products sold and distributed by them, and owned, operated, or controlled nurseries, farms, or properties in or on which such products were grown, through catalogs depicting views including signs placed by them by roads, walks, and driveways in near-by nurseries and identified by said signs as said individual's "Visitors Drive" or "Flower Garden," as case might be, and fruit trees, flowers, shrubs, etc., and through language featuring and emphasizing the quality and extent and abundance of the nursery products displayed along said individual's "Nursery Drive"; facts being said corporation and individual did not actually grow or propagate nursery products sold by them, said signs were placed beside roads, walks, and driveways in many near-by nurseries containing many acres of land on which nursery stock was being propagated and grown, and stock sold and distributed by them was actually grown and propagated by others on their own nursery farms and properties, and thereafter sold to them in wholesale lots;

With effect of confusing and misleading members of the purchasing public into erroneous and mistaken beliefs that they actually grew or propagated products sold by them and actually owned, operated, and controlled nursery farms or other properties on which such stock was grown or propagated for sale, and with result, as a direct consequence of such mistaken and erroneous beliefs induced by their aforesaid advertisements and representations, that a substantial portion of purchasing public bought a substantial amount of their said stock, and trade was unfairly diverted to them from competitors who do not misrepresent the source of their respective products; to the injury of competition in commerce:

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

Before *Mr. Robert S. Hall*, trial examiner.

Mr. Floyd O. Collins for the Commission.

Mr. Varro E. Tyler, of Nebraska City, Nebr., for respondents.

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 reasons to believe that the Earl E. May Seed Company, a corporation, and Earl E. May, hereinafter referred to as respondents, have been and are 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, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The Earl E. May Seed Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal place of business located in the city of Shenandoah, State of Iowa. Respondent, Earl E. May Seed Company, is now and has been for a number of years last past engaged in the transportation, sale and distribution of nursery stock in commerce between and among various States of the United States. Respondent, Earl E. May, is the principal stockholder of the Earl E. May Seed Company, and directs and controls its sales policies and business operations. The respondents cause said nursery stock, when sold, to be shipped and transported in commerce from the respondents' place of business in Shenandoah, Iowa, to purchasers thereof at various points in States of the United States other than the State of Iowa. The respondents maintain a constant current of trade and commerce among and between the various States of the United States in the nursery stock which they sell and distribute.

PAR. 2. The respondents, in the course and conduct of said business, are now, and at all times herein referred to have been, in substantial competition with other corporations, individuals, firms, and partnerships likewise engaged in the sale and distribution of nursery stock in commerce among and between the various States of the United States, and who do not in any way misrepresent the quality or source of their product, or resort to unfair practices in offering for sale and selling their product.

PAR. 3. The respondents, in the course and conduct of the business as aforesaid, and for the purpose of inducing individuals to purchase said nursery stock, have distributed through the United States mail, and otherwise, to the purchasing public throughout the several States of the United States, circulars and catalogues, in all of which the respondents have caused the firm name, and a purported description of the product, to be prominently and conspicuously displayed.

There are located in and around the City of Shenandoah, Iowa, many nurseries containing many acres of land on which nursery stock has been, and is being propagated and grown, and in and around which are roads, walks, and driveways. The respondents have made and placed and/or have caused to be made and placed

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along and on the side of said roads, walks, and driveways, many large signs on which are written, in large and conspicuous letters, the following:

Earl May's Visitors Drive.

Earl E. May's Flower Garden.

In the aforesaid catalogues the respondents have inserted and/or have caused to be inserted and made a part thereof, certain photographs of different views along said roads, walks and driveways, and in which are depicted fruit trees, flowers, shrubs, etc., and the signs as before described. On the side of said photographs and in direct connection therewith, the respondents represent:

Come take a trip with me through the nursery.

Follow the arrow through Earl E. May's Nursery Drive.

Acres of hardy phlox plants in bloom along Earl May's Nursery Drive. You will get these colorful, thrifty plants when you order them from me.

Look for this arrow. It shows the way through Earl May's Nursery Drive. These Morhelm Blue Spruce are beautiful trees, too.

These pictures on this page will give you an idea of just a few of the things you will see when you take a tour through Earl May's Nursery Drive.

Along our Nursery Drive you will see more than 1,200 acres of growing nursery stock.

Even with this soil we must use this big, extra deep tree digger in order to get all the roots and send them out to you right along with the trees.

In describing the different species of nursery stock advertised, the respondents represent:

The Special Rose Stock De-eyeing Process developed by our rose growers, make it almost impossible for our roses to sucker from the roots.

Our planting of this variety at the seed house have been blooming profusely all summer long.

We usually grow too many of some plants, so I make up the surplus into collections.

We have growers who have been growing and selecting the best of clean, pure-bred, high-yielding strains.

We had a good growing season last year and I don't believe I have ever seen a finer lot of good, plump, bright, shiny seeds.

PAR. 4. The manner and form in which the aforesaid photographs were made, and were, and are being displayed, and the representations in connection with the publication of said pictures, and otherwise, are grossly exaggerated, false and misleading. Said statements and picturizations herein referred to, and others similar thereto not specifically set out, serve as representations on the part of the respondents that the said Earl E. May Seed Company actually grows or propagates the nursery products sold and distributed by it; and that it owns, operates and controls nurseries, farms, or properties

in, or on which the said nursery products sold and distributed by it are grown.

PAR. 5. In truth and in fact, neither of the respondents actually grows or propagates the nursery products sold by them. Neither of the respondents owns, operates, or controls nurseries, farms, or properties in or on which nursery stock is grown or propagated. The nursery stock sold and distributed by them as described herein is actually grown and propagated by others on their own nursery farms or properties, and are sold to respondents in wholesale lots after being grown.

PAR. 6. Said representations on the part of the respondents had, and now have, the tendency and capacity to, and did and do, mislead a substantial portion of the purchasing public into the erroneous belief that when they purchase nursery stock from the respondents they were buying direct from the grower and would, thereby, be the recipient of the advantages to be had by buying direct from the growth.

PAR. 7. Each and all of the false and misleading statements made by the respondents wherein they represent that they grow and propagate the nursery stock sold by them was, and is, calculated to, and had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that all of the said representations are true. Said representations have tended to induce and have induced the purchase of respondents' nursery stock by the public in reliance upon such erroneous belief. As a result thereof trade has been unfairly diverted to respondents from competitors who do not engage in similar false and misleading representations and practices all to the injury of competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 8. The above acts and practices engaged in by respondents, as aforesaid, are all to the prejudice of the public and of respondents' competitors, and constitute unfair methods of competition in interstate commerce, within the intent and meaning of Section 5, 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."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

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 on February 16, 1937, issued and served its complaint in this proceeding upon the respondents herein, charging them with the use of unfair methods of competition in commerce in violation of the provisions of the said act. On April 12, 1937, the respondents filed their answer in this proceeding. Thereafter, on October 1, 1937, a stipulation was entered into whereby it was stipulated and agreed that a statement of facts signed and executed by respondent's counsel, Varro E. Tyler, and W. T. Kelley, chief counsel for the Federal Trade Commission, subject to the approval of the Commission, may be taken as facts in this proceeding and in lieu of testimony in support of the charges stated in the complaint or in opposition thereto; and that the Commission may proceed upon said statement of facts to make its report as to the findings of facts (including inferences which it may draw from the said stipulated facts) and its conclusion based thereon and enter its order disposing of the proceeding without the presentation of argument or the filing of briefs. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, answer and stipulation, said stipulation having been approved and accepted, and the Commission having duly considered the same and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The Earl E. May Seed Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal place of business located in the city of Shenandoah, State of Iowa. Respondent, Earl E. May Seed Company, is now and has been for a number of years last past engaged in the transportation, sale and distribution of nursery stock in commerce between and among various States of the United States. Respondent, Earl E. May, is the principal stockholder of the Earl E. May Seed Company, and directs and controls its sales policies and business operations. The respondents cause said nursery stock, when sold, to be shipped and transported in commerce from the respondents' place of business in Shenandoah, Iowa, to purchasers thereof at various points in States of the United States other than the State of Iowa. The respondents maintain a course of trade in commerce among and between the various States of the United States in the nursery stock which they sell and distribute.

PAR. 2. The respondents, in the course and conduct of said business, are now, and at all times herein referred to have been, in substantial

competition with other corporations, individuals, firms, and partnerships likewise engaged in the sale and distribution of nursery stock in commerce among and between the various States of the United States, and who truthfully represent the quality or source of their products.

PAR. 3. The respondents, in the course and conduct of the business as aforesaid, and for the purpose of inducing individuals to purchase said nursery stock, have distributed through the United States mail, and otherwise, to the purchasing public throughout the several States of the United States, circulars and catalogues, in all of which the respondents have caused the firm name, and a purported description of the product, to be prominently and conspicuously displayed.

There are located in and around the city of Shenandoah, Iowa, many nurseries containing many acres of land on which nursery stock has been, and is being propagated and grown, and in and around which are roads, walks and driveways. The respondents have made and placed and/or have caused to be made and placed along and on the side of said roads, walks and driveways, many large signs on which are written, in large and conspicuous letters, the following:

Earl May's Visitors Drive.
Earl E. May's Flower Garden.

The tract of ground designated on said signs as "Earl E. May's Flower Garden" was, and is, a display garden on ground leased by the respondents, in the exclusive possession and control of respondents, and planted and cultivated by them, and used by them for the display of trees, shrubs, and plants taken from the stock offered for sale and sold by the respondents.

In the 1936 Spring Catalogue, the respondents have inserted and/or have caused to be inserted and made a part thereof, certain photographs of different views along said roads, walks and driveways, and in which are depicted fruit trees, flowers, shrubs, etc., and the signs as before described. On the side of said photographs and in direct connection therewith, the respondents represent:

Come take a trip with me through the nursery.

Follow the arrow through Earl E. May's Nursery Drive.

Acres of hardy phlox plants in bloom along Earl E. May's Nursery Drive. You will get these colorful, thrifty plants when you order them from me.

Look for this arrow. It shows the way through Earl May's Nursery Drive. These Morheim Blue Spruce are beautiful trees, too.

These pictures on this page will give you an idea of just a few of the things you will see when you take a tour through Earl May's Nursery Drive.

Along our Nursery Drive you will see more than 1200 acres of growing nursery stock.

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Even with this soil we must use this big, extra deep three digger in order to get all the roots and send them out to you right along with the trees.

In describing the different species of nursery stock advertised, the respondents represent:

The Special Rose Stock De-eyeing Process developed by our rose growers, make it almost impossible for our roses to sucker from the roots.

Our planting of this variety at the seed house have been blooming profusely all summer long.

We usually grow too many of some plants so I make up the surplus into collections.

We have growers who have been growing and selecting the best of clean, pure-bred, high-yielding strains.

We had a good growing season last year and I don't believe I have ever seen a finer lot of good, plump, bright, shiny seeds.

The words "Our planting of this variety at the seed house have been blooming profusely all summer long," above quoted from said catalogue, referred to a variety of roses named "Red Ideal." The respondents conduct their business at Shehandoah, Iowa, in a building known as "The Seed House," and in front of said building is an area owned by the respondent, Earl E. May Seed Company, and cultivated as a display garden by the respondents. During the summer of 1935, the respondents had a planting of "Red Ideal" roses in said display garden, and said roses bloomed profusely through the said summer. The summer of 1935 was, in fact, a good growing season for garden seeds, and respondents state that the seeds offered for sale by respondent, Earl E. May Seed Company, were good, plump, bright and shiny.

PAR. 4. The manner and form in which the aforesaid photographs were made and displayed in said catalogue and the representations in connection with the publication of said pictures, as above set forth, are susceptible of meaning, and therefore serve as representations, that the said respondents actually grow or propagate the nursery products sold and distributed by them, and also serve as a representation that the respondents own, operate, or control nurseries, farms, or properties in, or on which, the said nursery products sold and distributed by them are grown. The respondents have, since the said seed catalogue was published, recognized their obligation to eliminate the said objectionable features from future catalogues, and have embodied in the 1937 catalogue published by them many changes intended to correct the objectionable features of the said 1936 catalogue.

PAR. 5. In truth and in fact, neither of the respondents actually grows or propagates the nursery products sold by them. Neither of the respondents owns, operates or controls nurseries, farms or prop-

erties in or on which nursery stock is grown or propagated for sale. The nursery stock sold and distributed by them as described herein is actually grown and propagated by others on their own nursery farms or properties, and is sold to respondents in wholesale lots after being grown.

PAR. 6. The use by the respondents of the advertisements and representations herein set out has the tendency and capacity to, and does, confuse and mislead members of the purchasing public into the erroneous and mistaken beliefs that respondents actually grow or propagate the nursery products sold by them and actually own, operate and control nurseries, farms or other properties on which nursery stock is grown or propagated for sale. As a direct consequence of such mistaken and erroneous beliefs induced by the advertisements and representations of respondents as hereinabove enumerated, a substantial portion of the purchasing public has purchased a substantial amount of respondents' products with the result that trade has been unfairly diverted to respondents from respondents' competitors who do not misrepresent the source of their respective products. As a result thereof, injury has been done to competition in commerce among and between the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of the respondents have been and are to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondents, and the agreed stipulation of facts entered into between the respondents herein, Earl E. May Seed Company, a corporation, and Earl E. May, and W. T. Kelley, chief counsel for the Commission, which provides among other things that, without further evidence or other intervening procedure, the Commission may issue and serve upon the respondents herein findings as to the facts and conclusions based thereon and an order disposing of the proceeding, and the Commission having made its findings as to the facts and conclusion that said respondents have violated the provisions of an Act

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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 ordered, That the respondents, Earl E. May Seed Company, a corporation, and its officers, representatives, agents, and employees, and the respondent Earl E. May, individually, and his agents and representatives, in connection with the advertising, offering for sale, and sale and distribution of nursery stock in interstate commerce or in the District of Columbia, do forthwith cease and desist from representing, directly or indirectly:

1. That the respondents, or either of them, grow or propagate the nursery stock sold by them;

2. That the respondents, or either of them, own, operate, or control lands, farms, or properties in or on which nursery stock is grown for sale unless and until they own or directly and absolutely operate and control lands, farms or other properties in or on which they grow nursery stock.

It is further ordered, That the respondents shall within 60 days after service upon them of this order file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Syllabus

IN THE MATTER OF
FOX-WEIS COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3236. Complaint, Oct. 4, 1937—Decision, Dec. 22, 1937*

Where a corporation engaged in distribution and sale of furs and fur coats to members of purchasing public in other States and in the District of Columbia, in substantial competition with others similarly engaged in distribution and sale of such products, and including those who, in selling and distributing furs and fur coats made from skins of rabbit or muskrat, truthfully designate said garments as actually thus made, by use of such words as "Dyed Coney" or "Dyed Muskrat" in equally prominent type and in close proximity and hyphenated to other designations used by them in describing such garments, those engaged in sale of such products actually made from the skins of seal and so designated, and those who do not in any manner misrepresent their business status and, falsely, that they are manufacturers, for the direct purchase of the products of which there is preference on the part of substantial portion of purchasing public as securing, in their opinion, better prices, superior merchandise and other advantages not to be had after product has passed through hands of number of middlemen—

- (a) Made use of designations "Sealine," "Black Seal," "Hudson Seal," and "French Seal" in describing, in its advertisements in newspapers of interstate circulation and in other advertising media, its furs and fur coats, together with qualification, in not easily readable type and widely separated from aforesaid designations, "Dyed Coney" or "Dyed Muskrat," and without qualification in other cases, notwithstanding fact products thus described and represented were not made from the furs and skins of the seal, but, in a number of cases, from rabbit skins so dressed and dyed as to resemble, in appearance only, the more costly seal, with its superior pliability, durability, wearing quality, and luster, and number thereof were made from muskrat skins likewise so dressed and dyed as to resemble garments made from seal, to which they were inferior in aforesaid respects and for which there was a preference on the part of a substantial number of purchasing public; and
- (b) Represented itself as a "manufacturing furrier," through use of such statements on letterheads and other advertising media, and through statement "it makes a difference when you buy from the maker," notwithstanding fact it was not the manufacturer of all the furs and fur coats sold by it, but purchased a substantial majority of such products ready-made for sale to ultimate purchaser;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous beliefs that garments in question were actually made from the furs and skins of seal, and that it was the manufacturer of all such products sold by it, and with result that substantial portion of such public, by reason of such mistaken and erroneous beliefs, were induced to buy such