

Syllabus

IN THE MATTER OF
BERRY SEED COMPANY ET AL.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2873. Complaint, July 7, 1936—Decision, Sept. 9, 1938*

Where a corporation engaged in offer and sale, through catalogs distributed to farmers and other prospective purchasers, of garden and field seed such as oats, wheat, alfalfa, etc., and two individuals, officers thereof and in control of its affairs and business activities; in its aforesaid annual mail order catalogs distributed as above set forth—

- (a) Falsely represented that it was established in the year 1895, or in the year 1905, through such statements as "Berry Seed Company, Established 1895," etc., "Forty Years of Knowing Seeds Safeguards Berry Customers," and statement to effect that one of aforesaid individuals had associated himself with such Berry Seed Co. "the year they incorporated in 1905," facts being corporation in question was not incorporated until 1926, and then succeeded to and carried on business theretofore established;
- (b) Represented, as aforesaid, that all seeds sold to customers had tags attached to containers thereof setting forth percentage of purity and percentage of germination, and that their seed-testing facilities were such that corporation was able to determine exact germination of seed sold by it, and that all seed offered by it was tested "with painstaking accuracy" in its seed-testing laboratories, and that such seed was distinctly a superior product and that germinating power thereof was of the highest and every pound guaranteed to grow, and that customers could rely upon representations appearing on tags and labels, facts being not all containers were tagged and labeled as aforesaid, and every pound of seed sold by it as aforesaid did not grow, many of its said seeds were not of superior quality represented, nor, in many cases, high in germination, and seed labeled and shipped by said corporation as aforesaid was in fact misbranded under the laws of States into which shipped as respects standards of germination and purity and recognized and established tolerances therefor;
- (c) Represented that they were experts in cleaning seed and possessed finest equipment for such purpose, and that all seed sold or offered by them was cleaned with corporation's own cleaning equipment, and featured words "RECLEANED SEED," and repeatedly asserted and called attention to alleged fact that its said seed was re-cleaned and freed of weed seeds and seeds declared noxious under provisions of pure seed laws of many of the States, and emphasized its supposedly superior cleaning machinery used in its cleaning and its expertness in such operations, facts being it did not clean all seed sold or offered by it with its aforesaid equipment, but sold, without cleaning, seed purchased from other houses and dealers engaged in sale of such products and cleaned by them prior to purchase by it, its said seed did in fact contain considerable quantities of weed seed, including noxious weeds and other foreign matter, contrary to its

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aforesaid representation, and including seed declared noxious under pure seed laws of certain States, and in some cases in quantities sufficient to condemn sale thereof or to constitute misbranding under said States' seed laws; and

- (d) Falsely misrepresented certain varieties of sorghum seed offered and sold by it, some of which, for certain purposes, was less valuable and desirable than the asserted variety thereof as offered and sold;

With effect of misleading substantial portion of purchasing public into erroneous and mistaken belief that aforesaid statements and representations were true, and with result that public, acting under mistaken and erroneous belief thus induced, purchased substantial volume of its said seed and trade was thereby unfairly diverted to them from competitors who truthfully represent the seed which they offer and sell:

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

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

Mr. George Foulkes for the Commission.

Townley, Campbell, Clark & Miller, of Chicago, Ill., 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 reason to believe that Berry Seed Co., a corporation, J. Frank Sinn, as president of Berry Seed Co. and individually, Charles M. Kelly, as vice president of Berry Seed Co. and individually, Joseph F. Faassen, as secretary of Berry Seed Co. and individually, and Charles S. McKee, as treasurer of Berry Seed Co. and individually, and each of them, hereinafter designated as respondents, have been and are using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in regard thereto would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Berry Seed Co. is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Iowa, having its office and principal place of business at Clarinda, Iowa; respondent J. Frank Sinn, also of Clarinda, Iowa, is president of the respondent, Berry Seed Co.; respondent Charles M. Kelly, also of Clarinda, Iowa, is vice president of the respondent, Berry Seed Co.; respondent Joseph F. Faassen, also of Clarinda, Iowa, is secretary of the respondent, Berry Seed Co.; and respondent Charles S. McKee, also of Clarinda, Iowa, is treasurer of the respondent, Berry Seed Co.

The said J. Frank Sinn, Charles M. Kelly, Joseph F. Faassen, and Charles S. McKee, individually and as officers of the aforesaid corporate respondent, manage, direct, and control its affairs and activities as hereinafter set out, and have used and do now use said corporation, Berry Seed Co., as an instrumentality and agency to accomplish such things as said J. Frank Sinn, Charles M. Kelly, Joseph F. Faassen, and Charles S. McKee purpose and plan.

PAR. 2. Respondents, and each of them, have been and are engaged in the business of offering for sale and selling field and garden seed in commerce between and among the various States of the United States and in the District of Columbia. They cause said seed, when sold, to be transported from their principal place of business in the State of Iowa into and across the various States of the United States and the District of Columbia to the several purchasers thereof located at various places in States other than the State of Iowa or in the District of Columbia, and they have maintained a constant current of trade and commerce in said seed sold by them between and among the various States and in the District of Columbia.

In the course and conduct of its business as aforesaid, respondents are in substantial competition with other persons, firms, associations, and corporations engaged in offering for sale, selling, and transporting in commerce between and among the various States of the United States field and garden seed used by farmers for planting and sowing for ultimate growth and the development of farm crops therefrom.

PAR. 3. In the course and conduct of their business as aforesaid, respondents, and each of them, distribute among farmers and planters seed catalogs; advertise said seed in newspapers and magazines and other publications having a large circulation among farmers and planters; and sell said seed by mail order as well as through the medium of a large network of local representatives and salesmen, located in the several States in which respondents operate, directly to the farmers and planters. Respondents also sell their products at wholesale to other dealers and to retail merchants.

In offering for sale and selling their seed as aforesaid, respondents, and each of them, have made to the general public exaggerated, false, and misleading statements as to the duration of their corporate existence and the length of time in said business; as to the kind and quality of their seed and its degree or percentage of germination and purity; as to the degree or percentage of its freedom from noxious weeds, dirt, and foreign matter; the source from which obtained and place or State of origin; its desirability for winter planting, its cold-resisting qualities, and as to other matters essential for planters and farmers to know in selecting seed for farm crops, with the effect of

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misleading and deceiving the purchasing public, with the result of promoting the sale in commerce of respondents' seed. These representations, made as aforesaid, have created, and do create, a demand on the part of the purchasing public for respondents' seed in preference to the seed of competitors. These advertisements or oral statements contain assertions or representations, among others, such as the following:

Berry Seed Company
Established 1895 Clarinda, Iowa
40th Year

40 years of Knowing Seeds Safeguard Berry Customers.

J. F. Sinn, President & Manager—associated himself with the Berry Seed Company the year they incorporated in 1905.

Every pound of seed carries a guarantee and you are guaranteed the same satisfaction and that you will save money.

Buy reliable, tested, guaranteed seed at the lowest wholesale prices. This is what the Berry Seed Company's organization offers you.

Quality Guaranteed Seeds Backed by 35 years of seed specialization.

We can't afford to guess at the quality of our seeds. We Know.

Every lot of seed is tested with painstaking accuracy. The analysis shows us exactly what the seed is. The purity of the seed is known to one hundredth of one per cent. The germination is also found. The seed must be satisfactory or it is not shipped.

We guarantee that all shipments will arrive safe and in good condition.

Tested and guaranteed seeds. Every lot shipment should carry our test tag, giving purity, germination, percentage of weed seed and inert matter according to the Iowa State seed law. We are careful to have every sample coming to the office tested before buying, protecting the interest of our customers by eliminating lots containing dangerous weed seeds.

When you buy your seeds from the Berry Seed Company you know they have been carefully tested.

Our tests are very accurate, giving our customers the utmost protection.

Every shipment is made with a tag on it showing purity and germination tests. You know what you've got because our tag gives you the facts.

All of this seed is scientifically cleaned, graded, and tested. You get it in the way you want it and at a decided saving in price.

We have saved the American farmer thousands of dollars on our guaranteed quality seeds.

We know weed seeds and detect them readily while the occasional buyer will overlook most of them.

The said respondents, in the course and conduct of their business in commerce, as aforesaid, also cause labels or tags to be affixed to the bags or other containers in which their farm and garden seeds are sold, which tags or labels purport to set out the true contents of said bags or containers, the true degree of purity of the seed contained therein, the true amount of inert matter contained therein, the true percentage of weed seeds, if any, contained therein and the

true degree or percentage of germination of said seed, and other data.

The said respondents, in the course and conduct of their business in commerce, as aforesaid, also advertise in the manner set forth above, and represent, through the medium of their salesmen and agents, that certain of their farm seeds are cold-resistant and highly adaptable for fall or winter planting, which advertisements and statements contain representations, among others, such as:

You will find all of our seeds extra winter hardy.

We do not sell clover from Western Oregon or other sections which produce seed lacking in winter hardiness.

Northern Grown Seed Stock.

We have some extraordinary values of winter wheat for fall seeding.

PAR. 4. In truth and in fact, the respondent, Berry Seed Co., was not founded or established in 1895, and has not been in business for 40 years and has not had 40 years' experience in knowing seeds, but is an Iowa corporation which was chartered in 1926. Neither does every lot of respondents' seed germinate or grow, nor does a proper or legal percentage thereof; nor are respondents' seeds reliable, tested or quality seeds, nor is "nothing left to chance or guesswork" in the preparation of respondents' field seed for marketing nor are respondents' seeds prepared for sale in a scientific manner; nor are respondents' seeds well cleaned, pure, and free from weeds, but in truth and in fact said lots of seed do contain noxious weed seeds such as Dodder, Russian Thistle, Buckhorn, Canada Thistle, Mustard, Horse Nettle, Wild Oats, Fox Tail, French Weed, Dock, Sorrel, Ragweed, Tarweed, and many others. Neither do all the buyers of respondents' seed profit by buying it; nor are all of respondents' seeds which are sold for fall planting able to survive cold temperatures at the place where planted or sold for planting, nor are they winter-hardy, or fit for winter planting and will not survive winter temperatures in many sections where sold for fall or winter planting. Neither do all of respondents' seeds come from the area or section represented by respondents; nor are they of the variety represented by respondents. Neither are orders for seed given to respondents safe; nor do respondents take the very best possible care of orders received; nor can users of farm seed depend upon the seed sold by respondents; nor are the bags or containers in which respondents' seeds are sold tagged according to law; nor do the tags affixed thereto set out the true contents thereof or the true degree or percentage of germination, purity, freedom from weeds and foreign matter; nor is said seed scientifically cleaned, graded, and tested.

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PAR. 5. There are among the competitors of respondents engaged in the sale of farm and garden seed as mentioned in paragraph 1 hereof other individuals, corporations, partnerships, and firms, who do not misrepresent their history or reputation and who do not misrepresent the quality, purity, freedom from noxious weeds, variety, or other characteristics of the seed which they sell.

PAR. 6. The acts and practices of the respondents as above alleged have the tendency and capacity to and do mislead and deceive a substantial portion of the purchasing and consuming public into the erroneous belief that said exaggerated, false, and misleading statements and representations are true. Because of such erroneous belief, many purchasers and consumers purchase respondents' seed, thereby diverting trade to the respondents from their competitors who do not make exaggerated, false, and misleading statements and representations concerning their seed, to the substantial injury of said competitors in said commerce and to the injury of the public.

Respondents have also placed in the hands of jobbers, salesmen, representatives, retailers, and dealers located in the several States in which they operate, and in the District of Columbia, the means of making to the purchasing public the false and misleading representations hereinabove described.

PAR. 7. The above and foregoing acts, practices, and representations of the respondents have been and are all to the prejudice of the public and respondents' competitors, as aforesaid, and have been and are unfair methods of competition within the meaning and intent 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 the Federal Trade Commission Act, the Federal Trade Commission on July 7, 1936, issued and on July 10, 1936, served its complaint in this proceeding upon the respondents Berry Seed Co., a corporation, and J. Frank Sinn, as president of Berry Seed Co., and individually, and Charles M. Kelly, as vice president of Berry Seed Co., and individually, and Joseph F. Faassen, as secretary of Berry Seed Co., and individually, and Charles S. McKee, as treasurer of Berry Seed Co., and individually, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answer thereto, testimony and other evidence in support of the allegations of said complaint

were introduced by George Foulkes, attorney for the Commission, and in opposition to the allegations of the complaint by J. Arthur Miller, attorney for respondents, before Robert S. Hall, an examiner of the Commission, theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral argument of counsel for the Commission and counsel for the respondents, 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 this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent Berry Seed Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Iowa, having its office and principal place of business at Clarinda, Iowa. Said corporation was organized under the laws of that State in the year 1926.

Respondent J. Frank Sinn, also of Clarinda, Iowa, is president and manager of the respondent Berry Seed Co.

Respondent Joseph F. Faassen is secretary of the respondent Berry Seed Co. and manages its office in Clarinda, Iowa.

Respondents J. Frank Sinn and Joseph F. Faassen dominate, direct, and control the affairs and business activities of respondent Berry Seed Co.

Respondents Charles M. Kelly and Charles S. McKee are respectively vice president and treasurer of respondent Berry Seed Co. Said respondents do not actively participate in the conduct of the affairs of respondent Berry Seed Co., their only duties being to attend directors' meetings.

Respondent Berry Seed Co. has since the year 1926 been engaged in the business of offering for sale and selling field and garden seed, that is, agriculture seed such as oats, wheat, barley, rye, and corn, and other types of seed such as alfalfa, red clover, and grains and grasses of various types and varieties.

PAR. 2. Respondent Berry Seed Co. causes its products, when sold, to be transported from its principal place of business in Clarinda, Iowa, into and across the various States of the United States to purchasers located in various places and States other than the State of Iowa, and respondent has maintained and now maintains a course of trade in said products sold by it in commerce between and among

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the various States of the United States and in the District of Columbia.

In the course and conduct of its business as aforesaid, respondent Berry Seed Co. is in substantial competition with other corporations, associations, persons, and partnerships engaged in offering for sale, selling, and transporting field and garden seed used by farmers for planting and sowing for ultimate growth and for the development of farm crops, in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. Respondent Berry Seed Co. conducts its business upon the mail-order plan, publishing and circulating throughout the United States annual catalogs containing descriptions of its business, and the prices, kinds, and grades of seed sold by it. Around 300,000 of these catalogs are distributed annually to farmers and other prospective purchasers.

The catalogs are sent direct to farmers and to those desirous of purchasing seed, and they in turn send their orders to respondent company and the seed is shipped to them.

Respondent employs no selling agents in the conduct of its business under the name of Berry Seed Co., but relies entirely on its catalogs and other advertising matter to effect sales.

PAR. 4. For more than 1 year last past and specifically in its catalogs published in and for the years 1932, 1933, 1934, 1935, and 1936, and distributed by it throughout the various States of the United States as aforesaid, respondent Berry Seed Co. has made statements concerning its business and the manner in which it operates said business and the grade, quality, and variety of its various kinds of seed, which statements are in many particulars false, misleading and untrue and are calculated to, and do, mislead purchasers and prospective purchasers of its seed.

PAR. 5. In the mail order catalogs distributed by respondent Berry Seed Co. during the years 1932, 1933, 1934, and 1935, the following representations were made:

Berry Seed Company, Established 1895, Clarinda, Iowa. Forty Years.

Forty Years of Knowing Seeds Safeguards Berry Customers.

J. F. Sinn, President and Manager, associated himself with the Berry Seed Company the year they incorporated in 1905.

The aforesaid statements constitute representations that respondent Berry Seed Co. was actually established in the year 1895 or in the year 1905.

The testimony shows and the Commission finds that respondent Berry Seed Co. was not in existence in the year 1895 or in the year 1905, and did not come into being until it was incorporated under

the laws of the State of Iowa in the year 1926. The testimony establishes the fact and the Commission further finds that Mr. A. A. Berry, a farmer in the State of Iowa, started to sell seeds in the year 1895 under his own name through the use of mail order catalogs. Subsequently, in 1905, the business was incorporated under the name of A. A. Berry Seed Co. The A. A. Berry Seed Co. carried on business for a number of years until its dissolution. Upon its dissolution, the respondent Berry Seed Co. was incorporated in the year 1926 under the laws of the State of Iowa and it succeeded to the business of the dissolved corporation, A. A. Berry Seed Co.

PAR. 6. In its mail order catalogs for the years 1932, 1933, 1934, and 1935 it is stated and represented by respondent Berry Seed Co. that all seeds sold to its customers had tags attached to the containers of the seed, which tags contained statements setting forth the percentage of purity and the percentage of germination of the seed.

The testimony shows and the Commission finds that farmers and other purchasers of seed desire that the percentage of purity and the percentage of germination of seed purchased by them be stated or otherwise indicated by the seedsmen on tags attached to seed shipments and that farmers rely on such statements. Purchasers of seed are reluctant to plant a seed of low purity in their land, knowing that weed seeds are difficult to eradicate, having once gained a foothold in the land. If the seed is of low germinating power, the crop harvested by the farmer is correspondingly low. Consequently, knowledge of the percentage of purity and the percentage of germination of the seed to the purchaser of seed is of the utmost importance.

The statements and representations in the mail order catalogs that all containers of seed are tagged and labeled by respondent Berry Seed Co. and that the tags set forth the percentage of germination and the percentage of purity of the seed are false, misleading, and untrue. In many instances respondent shipped seed to customers located in States other than the State of Iowa without setting forth on tags and labels attached to said seed shipments, statements of the percentage of purity and the percentage of germination of the seed contained in the shipments.

PAR. 7. In the mail order catalogs for the years 1933, 1934, and 1935 it is stated and represented that respondent Berry Seed Co. and its employees are experts in cleaning seed and possess the finest equipment for that purpose and that all seed sold or offered for sale by respondent is cleaned with its own cleaning equipment. In said catalogs respondent features the words "RECLEANED SEED." These words mean to the prospective purchaser that all respondent's

seed has been cleaned with respondent's cleaning machinery several times.

Respondent Berry Seed Co. has a warehouse in Clarinda, Iowa, in which it maintains and operates said cleaning and seed-testing equipment. In truth and in fact respondent does not clean all the seed it sells or offers for sale with its cleaning equipment. Respondent buys seed from other seed houses and dealers engaged in the business of selling seed which seed had been cleaned by these houses or dealers prior to the time it was purchased by respondent. Respondent Berry Seed Co. then sells this seed to its customers without cleaning the seed with its own cleaning equipment.

PAR. 8. In the year 1935 respondent Berry Seed Co. advertised a seed represented by it to be a variety of sorghum, commonly known as Atlas Sorgo. Relying upon the representation that the seed offered for sale in the catalog was Atlas Sorgo, farmers residing in the State of Kansas purchased a considerable amount of this seed from respondent.

Atlas Sorgo is recognized in the trade as one of the better varieties of sorghums because of the quantity and tonnage of its yield, and was, therefore, in demand among certain farmers of the State of Kansas.

Samples of seed designated Atlas Sorgo sold to purchasers in the State of Kansas by respondent were inspected, grown, and analyzed by the seed analysts of the Kansas State Department of Agriculture and these analysts determined, and the Commission finds, that the grain sold by respondent Berry Seed Co. as Atlas Sorgo was not in fact Atlas Sorgo, but was Hegari and Fererita, which are other varieties of sorghum.

Hegari and Fererita are grain sorghums of distinct varieties and have growing characteristics different from Atlas Sorgo.

Some of the seed sold by respondent as Atlas Sorgo was also upon analysis found to be Cheyenne, a common variety of forage sorghum less valuable and desirable for some purposes than the variety Atlas Sorgo.

PAR. 9. In the annual seed catalogs distributed by the respondent during the years 1932, 1933, 1934, and 1935, respondent Berry Seed Co. repeatedly asserted and called attention to the alleged fact that its seed is re-cleaned and is free of weed seeds and seeds declared to be noxious weed seeds under the provisions of the pure seed laws of many of the States. The customer's attention is also directed in said catalogs to the supposedly superior cleaning machinery used by respondent in cleaning its seeds and the expertness of respondent in using the machinery in cleaning operations. Such statements were,

and are, false and misleading in that respondent's seed did in fact contain considerable quantities of weed seed, including noxious weeds as well as other foreign matter, and said seed had not been cleaned of all these impurities as claimed by respondent.

Respondent Berry Seed Co. made shipments of seed into the States of Indiana and Illinois and analysis of many of these shipments by the State seed analysts of those States showed, and the Commission finds, that respondent's seeds contain various kinds of weed seed, including the seed of weeds declared to be noxious by the pure seed laws of those States, in certain instances in quantities sufficient to condemn the sale of the seeds or to constitute misbranding under the seed laws of the States.

PAR. 10. In the mail order catalogs distributed during the years 1932, 1933, and 1934, respondent Berry Seed Co. represents and guarantees that the germinating power of its seed is of the highest; that every pound of seed it sells is guaranteed to grow; that respondent's seed-testing facilities are such that it is able to determine the exact germination of the seed it sells and that the seed is distinctly a superior product. These statements apply to all seed sold by it. Said statements were, and are, in fact untrue in that every pound of respondent's seed did not, and does not, grow and that many of respondent's seed are not of the superior quality represented by respondent. Respondent's seed is not in many cases high in germination and the testimony of the analysts of State seed-testing agencies shows, and the Commission finds, that respondent has shipped seed into the States of Indiana and Illinois, which seed had germinating power in many cases as low as 54 percent.

PAR. 11. Respondent Berry Seed Co. in preparing seed for shipment to purchasers, usually attaches to bags and containers of such seed, tags, and labels which bear printed or written markings setting forth the percentage of germination and the percentage of purity of the seed.

In the annual catalogs for the years 1932, 1933, 1934, and 1935, statements are made by respondent Berry Seed Co. to the effect that all seed offered for sale by it is tested "with painstaking accuracy" in its seed testing laboratory. In the same catalogs customers and prospective customers are advised that each shipment of seed is tagged and labeled and that customers can rely upon the representations appearing on the tags and labels.

Respondent's customers do rely upon the statements of percentage of germination and percentage of purity set forth on tags and labels attached to seed shipments and these customers, when ordering seed from respondent, are entitled to receive seed which measures up to

the representations of percentage of germination and purity set forth on the tags and labels attached to said containers of seed within tolerances or allowances.

It is recognized among the members of the seed trade that variations will occur in purity and germination tests. For this reason the Association of Official Seed Analysts of North America, an association composed of officials chargeable with the enforcement of the seed laws of the various States and of the United States, has adopted tolerances or allowances for purity and germination tests. These standards of tolerances or allowances are recognized by the seed trade in testing and marking the percentage of germination and percentage of purity of the seed on the tags and labels attached to containers of seed. Commercial seed analysts, that is, analysts in the employ of private seed vending companies, follow these standards of testing and marking seed.

The State seed commissioners of the States of Indiana and Illinois testified, and the Commission finds, that respondent Berry Seed Co. has shipped seed into these States, which, upon testing by the analysts in the Indiana and Illinois seed laboratories, was found to be of low germinating power, and to be misbranded under the laws of such States in that the seed did not germinate within recognized tolerances or allowances.

The following shipment of seed is typical of a number of seed shipments on which were tags and labels misrepresenting the germinating power of the seed:

On April 9, 1936, respondent Berry Seed Co. shipped to H. Roy May of Brookston, Ind., a quantity of corn designated as "Gold-Dent" corn, with labels attached to said shipment representing the germination of the corn to be 90 percent or better. Upon analyses by the Indiana State Seed Department, it was found that the corn germinated only 78 percent.

The testimony shows, and the Commission finds, that many of the shipments of respondent's seed contain tags and labels on which were set forth the percentage of purity contents of the seed, and that said statements were false, in that the purity of the seed was substantially lower than represented by respondent and not within recognized tolerances and allowances.

The Commission finds that the following is typical of a number of shipments of seed into the State of Indiana to which were attached tags and labels representing the purity of the seed to be much higher than the actual purity of the same:

On February 26, 1935, respondent Berry Seed Co. shipped Alsike Clover to Walter F. Knox of Hartford City, Ind., with tags and

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labels attached to said shipment representing the purity of the seed to be 96.50 percent. Upon analysis by the Indiana State Seed Department it was found that the seed was only 92.38 percent pure. Said shipment contained many of the seeds declared to be noxious under the laws of Indiana, such as Buckhorn, Common Plantain, Curled Dock, Canada Thistle, Sorrell, and Yellow Trevail together with other weed seeds.

PAR. 12. The use by respondents Berry Seed Co., J. Frank Sinn, and Joseph F. Faassen, of the acts and practices above set forth, in offering for sale and selling their products, has had, and now has, the tendency and capacity to, and does, mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true. Acting under the mistaken and erroneous belief induced by the false and misleading statements and representations herein referred to, the public has purchased a substantial volume of respondents' seed, with the result that trade has been unfairly diverted to respondents from their competitors who truthfully represent the seed they offer for sale and sell.

CONCLUSION

The aforesaid acts and practices of respondents Berry Seed Co., J. Frank Sinn, and Joseph F. Faassen, are all to the injury and prejudice of the public and respondents' competitors, and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, and answer thereto, testimony and other evidence taken before Robert S. Hall, an examiner of the Commission, theretofore duly designated by it, in support of the allegations of the complaint and in opposition thereto, briefs filed herein, and oral arguments before the Commission, and the Commission having made its findings as to the facts and its conclusion that respondents Berry Seed Co., a corporation, and J. Frank Sinn, as president of Berry Seed Co., and individually, and Joseph F. Faassen, as secretary of the Berry Seed Co., and individually, have violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondents Berry Seed Co., a corporation, its officers, representatives, agents, and employees, and J. Frank Sinn, as president of Berry Seed Co., and individually, and Joseph F. Faassen, as secretary of Berry Seed Co., and individually, in connection with

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offering for sale, sale and distribution of agricultural seed, in interstate commerce, or in the District of Columbia, do forthwith cease and desist from representing, directly or by implication—

1. That respondent Berry Seed Co. was founded or engaged in business prior to the year it was incorporated under the laws of the State of Iowa;

2. (a) That respondents' seed is free from weed seed and other foreign matter; (b) That all seed is cleaned by respondents with their own seed-cleaning equipment; (c) That the germinating power of all respondents' seed is high; (d) That every shipment of seed has tags or labels attached to it showing the purity and germination tests of the seed; (e) That seed is of a stated variety; when such are not the facts.

3. That seed has a higher percentage of germination and purity than the actual germination and purity of the seed, under recognized tests and within recognized tolerances or allowances.

It is ordered, That the proceedings herein against Charles M. Kelly, as vice president of Berry Seed Co., and individually, and Charles S. McKee, as treasurer of Berry Seed Co., and individually, be and the same hereby are dismissed without prejudice.

It is further ordered, That 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.

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IN THE MATTER OF

FLORIDA BUILDING MATERIAL INSTITUTE, INC., ET AL.

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

Docket 2857. Complaint, June 30, 1936—Decision, Sept. 10, 1938

Where a building material "Institute" (1) active membership of which consisted of some 280 Florida retailers engaged in purchase, sale, and distribution of lumber, lumber products, building materials, builders' supplies and millwork, and represented about 70 percent of the purchasing power of such materials in said State, and a group so large and influential in the trade as to be able substantially to influence and affect the flow of trade and commerce therein in aforesaid products and supplies, (2) associated membership of which consisted of some 47 manufacturers, producers, and wholesalers in the building-supply industry, with places of business, in the case of a large majority thereof, in other States, and (3) with which there were associated a number of cooperating dealers and about 288 cooperating manufacturers, producers, and wholesalers, who conformed to its policies, and (4) active membership in which was contingent upon meeting definition of dealer adopted, published and distributed by said Institute, as initially decided upon by its appropriate divisional directors and committees, and as usually confirmed by its executive committee; and the officers, directors, and members of said Institute—

Combined and conspired, with intent and effect of enhancing and promoting the volume of business and trade of such members and cooperators, by common and concerted action, together and with others, to (1) establish such active members and cooperating dealers as a class of recognized dealers in lumber, lumber products, building materials, and builders' supplies in aforesaid State, and to control and confine sale and distribution of such products by manufacturers and producers thereof to or through the medium of such members and cooperating dealers exclusively, (2) require such associate members and other manufacturers, producers, and wholesalers of aforesaid materials, products, and supplies to refrain from selling or distributing same to dealers or other purchasers who were in competition in retail sale and distribution of said products with such active members and cooperating dealers, but who were not recognized by such Institute as cooperating with its policies, (3) prevent nonrecognized and noncooperating dealers from purchasing or securing lumber, lumber products, building materials, and builders' supplies direct from manufacturers, producers, and wholesalers, (4) interfere with business and trade of such nonrecognized and noncooperating dealers in order to enable or assist dealer members of such Institute and cooperating dealers to appropriate and acquire such business and trade and obstruct competition of such nonrecognized and noncooperating dealers, and (5) monopolize business and trade in aforesaid products, materials, and supplies in said State in members of such Institute and those cooperating with it in maintaining its policies; and in pursuance of such combination and conspiracy, and in order to accomplish its aforesaid objectives—