

## Complaint

## IN THE MATTER OF

## GREENING NURSERY COMPANY

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

*Docket 3673. Complaint, Dec. 23, 1938—Decision, Aug. 3, 1943*

Where a corporation, engaged in competitive interstate sale and distribution of fruit trees and other nursery products, to induce purchase thereof, and salesmen and agents to sell its products to the purchasing public—

- (a) Represented, directly and by implication, that it was the only nursery which used the bud selection method of grafting in the propagation of fruit trees, and that fruit trees thus propagated could only be procured from it and its salesmen, through such statements in circulars, newspaper advertisements and other publications as "BUD SELECTION, that remarkable, exclusive Greening feature!"; "For 26 years, Greening \* \* \* have been propagating fruit trees by bud selection, exclusive, amazing, scientific discovery unduplicated in the field"; "Only Greening men can sell BUD SELECTED fruit trees"; and, "Non-competitive field all to yourself;

The facts being that bud selection is a general term used in the fruit industry and the method, known from earliest times, in various forms is followed by most nurserymen; its methods varied from those followed by practically all commercial nurserymen only in the keeping of records of selected trees or limbs; and while it had carried out extensive experimental work in selecting buds for propagation of deciduous fruit trees, and had developed scientific selection to the point where varieties of fruit could be improved thereby, and its method of bud selection might be more scientific than that employed by some of its competitors, said method was not, as aforesaid, exclusive with it;

With effect of misleading and deceiving a substantial portion of the purchasing public into the mistaken belief that such representations were true, thereby inducing its purchase of said products, and inducing a substantial number of salesmen and agents to deal in said nursery products, whereby trade was diverted unfairly to it from aforesaid competitors who truthfully advertised their products:

*Held*, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. John W. Addison* and *Mr. W. W. Sheppard*, trial examiners.

*Mr. Jesse D. Kash* for the Commission.

*Smith, Ristig & Smith*, of Washington, D. C., for respondent.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal

## Complaint

37 F. T. C.

Trade Commission, having reason to believe that Greening Nursery Co., a corporation, hereinafter referred to as respondent, has violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Greening Nursery Co., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Michigan, and having its office and principal place of business in the City of Monroe, State of Michigan.

PAR. 2. The respondent is now, and has been for more than 1 year last past, engaged in selling and distributing fruit trees and other nursery products. Respondent sells said products to members of the purchasing public situated in various states of the United States and causes said products, when sold by it, to be transported from its afore-said place of business in the State of Michigan to the purchasers thereof at their respective points of location in various states of the United States other than the State of Michigan and in the District of Columbia. Respondent maintains, and at all times herein has maintained, a course of trade in said products in commerce among and between the various states of the United States and in the District of Columbia.

PAR. 3. Respondent is engaged in substantial competition in commerce among and between the various states of the United States and in the District of Columbia with other corporations, and with partnerships, firms and individuals selling and distributing fruit trees and other nursery products. Among such competitors in such commerce are many who do not in any manner misrepresent their said products and who do not make any false statements in connection with the sale and distribution of their said products.

PAR. 4. In the course and conduct of its said business and for the purpose of inducing the purchase of its nursery products said respondent has made and makes by means of circulars, pamphlets, folders and by means of advertisements inserted in newspapers and other publications, all of which are circulated between and among the various states of the United States and in the District of Columbia, many representations concerning the nature and quality of its said nursery products and results that may be expected from the use thereof. Among and typical of such representations made by respondent are the following:

Largest Growers of Trees in the World.

World's Largest Tree Growers.

World's Leading Company.

Right now I'm writing monthly

319

## Complaint

Pay checks from  
\$110 Spare Time  
to  
\$882 Full Time.

Non-Competitive field all to yourself.

BUD SELECTION, that remarkable, *exclusive Greening feature!*

For 26 years, Greening

\* \* \* \* \*

have been propagating fruit trees by BUD SELECTION, *exclusive, amazing, scientific discovery UNDUPLICATED IN THE FIELD.*

Bud selection gives fruit trees what blood lines are to livestock "pedigreed" KNOWN PERFORMANCE characteristics, which *eliminate chance or gamble* for fruit tree buyers.

Only Greening men can sell BUD SELECTED fruit trees.

We paid Pifer, month after month \$248, \$413, \$445, \$375, \$282, and he's still going strong!

Lorimer earned \$502 one month, then \$882—yes almost one thousand dollars in a month.

Amazing new nursery development.

Greening famous super-selected Fruit Trees, propagated by our *exclusive* Bud-Selection method.

My offer is different than any nursery company's offer which you may have considered before \* \* \* will be associated with the *largest and oldest* tree nursery in the world. \* \* \* will have as his line, nursery stock of a *decidedly different* character.

Weekly earnings up to \$75.

Greening producers average from \$25 to \$75 a week in Commissions the year 'round.

PAR. 5. Through the use of the statements and representations hereinbefore set out and others similar thereto not herein set out, all of which purport to be descriptive of the nature and quality of respondent's products and the effectiveness of its products, as above described, respondent has represented directly and by implication, among other things, that respondent is the largest grower of fruit trees in the world; that it is the world's leading company; that its salesmen earn from \$110 part time to \$882 full time per month; that the sale of its products is a noncompetitive field which its agents and salesmen will have all to themselves; that bud selection is an exclusive feature of the respondent company only; that respondent has been propagating fruit trees by bud selection exclusively for 26 years and that its bud selection discovery is unduplicated in the nursery field; that its bud selection method gives fruit known performance characteristics which eliminate any chance or gambling on the part of fruit tree growers; that only its salesmen can sell bud selected fruit trees; that the large incomes received by the salesmen mentioned are

## Complaint

37 F. T. C.

examples and truly indicative of the salary its salesmen would ordinarily make; that its products are an amazing new development; that its fruit trees are superselected; that the Greening Nursery is the oldest in the world; that its line of nursery stock is of a decidedly different character from others; that its salesmen average \$25 to \$75 a week as commissions the year around.

PAR. 6. The aforesaid representations made by the respondent in the manner above described are grossly exaggerated, false, misleading, and untrue. In truth and in fact the respondent is not the largest grower of fruit trees in the world; respondent is not the world's leading company; respondent's salesmen do not earn from \$110 part time to \$882 full time per month; the sale of respondent's products is not a field which offers no competition and which its salesmen have all to themselves; and bud selection is not a remarkable exclusive feature of the Greening Nursery Company alone. Respondent's bud selection is not an amazing, scientific discovery which is not duplicated in the nursery field, nor are there known performance characteristics which eliminate any chance or gambling on the part of fruit tree growers; Greening salesmen are not the only salesmen who can sell bud selected fruit trees. The large incomes allegedly received by the Greening salesmen are not truly indicative of the earnings a salesmen would make under usual and ordinary circumstances. Respondent's products are not an amazing new nursery development, nor are its fruit trees superselected or propagated by an exclusive bud selection method. Respondent's nursery is not the oldest or largest nursery in the world, neither is its line of nursery stock of a decidedly different character from that of other nurseries. Respondent's salesmen do not average from \$25 to \$75 in commissions a week the year around.

PAR. 7. The use by the respondent of the foregoing false, deceptive and misleading statements and representations with respect to said products has had, and now has, the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and that respondent's said products possess the properties claimed and represented and will accomplish the results indicated, and that agents selling its nursery stock will earn the sums indicated, and causes a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's said products.

As a result, trade has been diverted unfairly to the respondent from its competitors in said commerce who truthfully advertise their products and the earning of their agents. In consequence thereof,

injury has been done, and is now being done, by respondent to competition in commerce among and between the various states of the United States and in the District of Columbia.

PAR. 8. The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

#### REPORT, MODIFIED FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 23, 1938, issued and subsequently served its complaint in this proceeding upon the respondent, Greening Nursery Co., a corporation, charging it with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before trial examiners 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, this proceeding regularly came on for final hearing before the Commission upon said complaint, answer thereto, testimony and other evidence, report of the trial examiners upon the evidence and exceptions filed thereto, briefs in support of the complaint and in opposition thereto, and oral argument of counsel; and the Commission, having duly considered the matter, on March 10, 1943, issued and subsequently served upon said respondent its findings as to the facts and conclusion based thereon and its order requiring the respondent to cease and desist from the practices charged in the complaint. Subsequent thereto, this cause again came on for hearing before the Commission upon the request of the attorney for the respondent to modify the findings as to the facts issued on March 10, 1943; and the Commission, having duly considered said request and the record herein and being now fully advised in the premises, makes this its modified findings as to the facts and its conclusion drawn therefrom.

#### MODIFIED FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Greening Nursery Co., is a corporation, organized, existing, and doing business under and by virtue of the

laws of the State of Michigan and has its office and principal place of business in the city of Monroe, State of Michigan.

PAR. 2. The respondent is now, and for several years last past has been, engaged in selling and distributing fruit trees and other nursery products. Respondent sells said products to members of the purchasing public situated in various States of the United States, and causes said products, when sold by it, to be transported from its aforesaid place of business in the State of Michigan to the purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce among and between the various States of the United States.

PAR. 3. Respondent is engaged in substantial competition in commerce among and between the various States of the United States and in the District of Columbia with other corporations and with partnerships, firms, and individuals selling and distributing fruit trees and other nursery products.

PAR. 4. In the course and conduct of its said business and for the purpose of inducing the purchase of its nursery products and for the purpose of inducing salesmen and agents to sell said nursery products to the purchasing public, the respondent has made false, deceptive, and misleading statements and representations concerning its said nursery products by means of circulars and pamphlets and by means of advertisements inserted in newspapers and other publications, all of which are circulated between and among the various States of the United States. Among and typical of such representations made by the respondent are the following:

BUD SELECTION, that remarkable, exclusive Greening feature!

For 26 years, Greening \* \* \* have been propagating fruit trees by bud selection, exclusive, amazing, scientific discovery unduplicated in the field.

Only Greening men can sell BUD SELECTED fruit trees.

Non-competitive field all to yourself.

PAR. 5. Through the use of the statements and representations hereinabove set forth and other similar thereto not set out herein, respondent has represented directly and by implication that the respondent is the only nursery which uses the bud selection method of grafting in the propagation of fruit trees and that fruit trees propagated by the bud selection method of grafting can only be procured from the respondent and its salesmen.

PAR. 6. The aforesaid representations, made by the respondent in the manner above described, are grossly exaggerated, false, and misleading. Bud selection is a broad, general term used in the fruit industry and, in various forms, is followed by most nurserymen. Bud

selection is not an exclusive feature of the respondent company only, and the sale of trees propagated by the bud selection method of grafting is not limited to respondent or its salesmen, but, instead, trees propagated by the bud selection method of grafting are sold by many of respondent's competitors.

The selection of buds from trees of known character or type and grafting them onto seedlings in the variety propagation of citrus and deciduous fruit trees has been known and practiced from earliest times, and literature as far back as the 16th century describes the process of budding and grafting just exactly as nurseries in the United States are doing today. In the ordinary propagation of fruit trees it has long been known that when they are grown from seeds they do not come true to name. Seedlings are different from the plant from which they are taken in many respects, and in order to get them to come true to name, a bud is taken from a tree which it is desired to propagate. This bud so selected is grafted onto the seedling by inserting it under the bark of the seedling, where it grows fast when properly inserted. When it starts to grow, the part of the stalk above the grafted bud is cut away, and the above-ground part of the tree is grown from the cutting or bud. The tree so grown from such grafted bud will have the characteristics of the tree or limb from which such bud is taken. The characteristics having been thus established in the grafted tree, the tree is either sold or itself used for bud wood in grafting other seedlings.

One of the sources of variety in fruit trees which has been long recognized is the existence of the mutation or sport, which is a limb on a tree that bears fruit that is different in some respects from the fruit on the rest of the tree. The buds from such a limb can be grafted to a seedling in the manner above described, and the tree so grafted will bear fruit having the characteristics of the mutation or sport limb.

The methods of bud grafting hereinabove described are followed by practically all commercial nurserymen, including the respondent. The mechanics of the actual selection of vegetative buds for grafting may vary with the ideas of the individual doing the selecting. Some may go to an orchard and find an exceptionally productive tree that is bearing very fine fruit of the variety desired and select or obtain their foundation buds from that particular tree. Others may select the buds from a particular limb of a tree that is producing exceptionally large or exceptionally highly colored or attractive fruits. The methods followed by the respondent in its bud selection vary from the above in that records are kept of selected trees or limbs and they are observed from year to year prior to and after the buds are selected for

## Order

37 F. T. C.

the grafting process. The respondent has carried out extensive experimental work in selecting buds for propagation of deciduous fruit trees and has developed the scientific selection to the point where varieties of fruit can be improved by the elimination of undesirable characteristics and the improvement of desirable characteristics. While the method of bud selection followed by the respondent may be more scientific than the method which may be employed by some of its competitors, bud selection is not exclusive with the respondent but, instead, is practiced in some form or other by practically all nurserymen.

PAR. 7. The use by the respondent of the foregoing false, deceptive, and misleading statements and representations with respect to the exclusive nature of its bud selecting process has had and now has the capacity and tendency to and does mislead and deceive a substantial portion of prospective purchasers, salesmen, and agents into the erroneous and mistaken belief that such statements and representations are true and causes a substantial portion of the purchasing public to purchase, and a substantial number of salesmen and agents to deal in, respondent's nursery products because of such erroneous and mistaken belief. As a result, trade has been diverted unfairly to the respondent from its competitors in said commerce who truthfully advertise their products.

## CONCLUSION

The aforesaid acts and practices of the respondent as herein found are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 request of the attorney for the respondent to modify the findings as to the facts issued on March 10, 1943; and the Commission having duly considered said request and the record herein and having issued its order modifying the findings as to the facts issued on March 10, 1943, and having issued its modified findings as to the facts and conclusion pursuant to said order,

*It is ordered*, That the respondent, Greening Nursery Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of fruit trees and other nursery products in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication that the respondent is the only nursery which uses the bud-selection method of grafting in the propagation of fruit trees.

2. Representing directly or by implication that fruit trees propagated by the bud-selection method of grafting can only be procured from the respondent or its salesmen.

3. Representing either directly or by implication that the bud-selection method of grafting is an exclusive feature of respondent's nursery stock.

*It is further ordered,* That the respondent shall, within 60 days after service upon it 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 this order.

IN THE MATTER OF  
THE ELECTROVITA SALES COMPANY OF OHIO

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

*Docket 4858. Complaint, Oct. 22, 1942—Decision, Aug. 3, 1943*

Where an individual, engaged in interstate sale and distribution of an artificial mineral water made by subjection of ordinary tap water from the city water system to a secret electrolytic process, assertedly altering its chemical and mineral composition, and by the addition also thereto of calcium hydroxide; in advertising in circulars and other advertising material, including testimonial letters, and through instructions to salesmen and dealers, the general theme of which was that practically all diseases and disorders are caused by or associated with an acid condition of the stomach and blood—

- (a) Represented that its product was a competent and effective treatment for diseases and conditions due to a calcium deficiency, and would serve as a mineralizing agent where the system had not assimilated the required minerals from ordinary foods; would supply deficiencies where mineral starvation was the basic symptom of any disease or disorder; would supply mineral salts needed to keep the body chemistry in balance; and was an alkalinizing agent which would neutralize the acids of the stomach and blood stream and rid the body of an acid condition, thereby beneficially affecting or overcoming practically all diseases and disorders;

The facts being that while its product might possibly reduce acidity in the stomach slightly, it would have no effect in bringing about a systemic alkalization; diseases and disorders which result solely from a calcium deficiency are rare, and the amount of calcium supplied by its product in the dosage prescribed was insufficient to have any beneficial effect upon any such deficiency; and it had no therapeutic value in supplying minerals which the body had failed to assimilate, would not supply any mineral deficiencies or beneficially affect any disorder or condition resulting therefrom, or supply mineral salts needed to keep the body chemistry in balance;

- (b) Falsely represented that its product activated the kidneys and dissolved the waste material therein, thus allowing the free flow of toxic matter from the system, and that it would purify the blood, remove nerve irritation, rebuild body tissue and cell life, and absorb poisons in the system; and that it acted as an oxidizing agent, burning up waste materials which caused irritation of the vital organs; and

- (c) Falsely represented that its said product was a competent and effective treatment for numerous diseases, including asthma, kidney and bladder trouble, female disorders, arthritis, diabetes, rheumatism, high blood pressure, epilepsy, heart trouble, paralysis, and gangrenous and streptococcal infections; With effect of misleading and deceiving a substantial portion of the purchasing public into the mistaken belief that such representations were true, thereby inducing its purchase of the product in question;

*Held*, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Randolph Preston*, trial examiner.