

Decision

IN THE MATTER OF
MICHIGAN BULB CO. ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 6446. Complaint, Nov. 17, 1955—Decision, Apr. 17, 1958*

Order requiring mail order sellers of nursery stock in Grand Rapids, Mich., to cease representing falsely in advertising in newspapers and magazines and by radio, the types, quality, and value of the plants, bulbs, shrubs, and trees they sold, and their guarantee of refunds.

Donald K. King, Esq., for the Commission.

Linsey, Shivel, Phelps & VanderWal, by *Leland D. Phelps, Esq.*, of Grand Rapids, Mich. and *Henry Junge, Esq.*, of Chicago, Ill., for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On November 17, 1955, the Federal Trade Commission issued its complaint against Michigan Bulb Co., a corporation, and Gerald C. Laug, Forrest Laug, and Louis Laug individually and as officers of said corporation, and with respect to Forrest and Louis Laug, as copartners trading and doing business as Holland Bulb Co. (all hereinafter collectively called respondents) charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of section 5 of the Federal Trade Commission Act (hereinafter called the act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondents.

The complaint alleges in substance that respondents, in connection with the sale and distribution of their products, nursery stock, made certain false representations. Respondents appeared by counsel and filed a joint answer admitting the corporate, partnership, commerce and competition allegations of the complaint and substantially all of the representations set forth therein, but denying any false representations or violations of the act.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner duly designated by the Commission to hear this proceeding at various times and places from February 6, 1956, to May 22, 1957. During the course of the hearings, a motion to amend the complaint and a corresponding motion to amend the answer thereto were granted.

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All parties were represented by counsel, participated in the hearings and afforded a full opportunity to be heard, to examine and cross examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof, and pursuant to leave granted presented oral argument thereon. All such findings of fact and conclusions of law proposed by parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.¹

Upon the entire record in the case and from his observations of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondents

The complaint alleged, respondents admitted, and it is found that Michigan Bulb Co. is a Michigan Corporation with its principal place of business located at 845 Ottawa Street, Grand Rapids, Mich. Said corporate respondent does business under its own name and also as Dutch Bulb Importers, Rapid Specialties Co., and Flower of the Month. Its annual sales volume exceeds \$1 million. Forrest Laug is president and treasurer, Gerald C. Laug is vice president, and Louis Laug is secretary of said corporate respondent. These individual respondents formulate, direct and control the acts, policies, and practices of said corporate respondent. In addition, Forrest and Louis Laug do business as copartners under the name Holland Bulb Co., operated in conjunction with the corporate respondent, Michigan Bulb Co. Each and all of the aforesaid respondents have cooperated and acted jointly in performing the acts and engaging in the practices hereinafter found.

II. Interstate Commerce and Competition

The complaint alleged, respondents admitted, and it is found that they are now and have been for more than 5 years last past engaged in the sale and distribution of bulbs, roots, plants, shrubs, trees and other related items, hereinafter collectively called nursery stock, in commerce between and among the various states of the United States and the District of Columbia. Respondents cause and have caused said nursery stock when sold to be shipped and transported from their principal place of business in the State of Michi-

¹ 5 U.S.C. § 1007(b).

gan, as well as from other shipping points located in the State of Michigan and other States, to purchasers located in the various States of the United States and the District of Columbia. Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in commerce in said nursery stock. In the course and conduct of their businesses, respondents are in direct and substantial competition in commerce with other corporations, firms, and individuals likewise engaged in the sale and distribution of nursery stock.

III. The Unlawful Practices

A. *The Issues Framed*

The principal issues in this case are whether respondents, in connection with certain statements and representations made with respect to various nursery stock offers by means of radio broadcasts, newspaper and magazine advertising, circulars sent through the mail, and other media, which representations are substantially undisputed and admitted in respondents' answer, made certain false representations with respect to their nursery stock offers of 50 perennial plants, 42 rose plants, flowering shrubs and hedge plants, tulip bulbs, gladioli bulbs, an indoor winter flower garden, and evergreen trees.

B. *The False Representations*

There is no dispute in the record, and in fact respondents admitted, that they made the various representations alleged in the complaint and considered hereinafter in connection with the various nursery stock offers set forth above. As stated above respondents denied that any of said representations were false, deceptive or misleading. Since the record establishes beyond dispute that all of the representations alleged in the complaint were made, the primary issues for disposition are whether or not such representations are false and misleading. They are considered *seriatim*:

1. The 50 hardy perennial plant offer.

In connection with the 50 perennial plant offer, respondents disseminated the following advertisement:

50 Magnificent Hardy Perennials Unbelievable—But True!
Our most spectacular garden Offer! Our entire stock of healthy, field-grown Perennial Plants must be sold * * * 50 healthy one year field grown plants in one colorful beautiful display assortment. Will produce hundreds of brilliant blooms year after year without replanting!
\$8.00 to \$10.00 value just \$1.94.
50 Field grown Perennial Plants at an astounding low price, guaranteed flowering size.

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By the foregoing advertisements, respondents represented that such plants were (a) all perennials; (b) live, hardy and in good planting condition; (c) 1 year old, (d) of flowering size which would bloom the first season after planting; and (e) an \$8 to \$10 value for \$1.94.

(a) The plants are not all perennials.

Respondents' perennial offer is made up of 5 each of 10 different plants. Included among the 10 are Canterbury Bells, Fox Glove and Sweet William, which counsel supporting the complaint contends are biennials and not perennials. In addition to calling the plants perennials, respondents' advertising states that the plants will produce "hundreds of brilliant blooms year after year without replanting, and a holiday of radiant color throughout spring and summer, year in and year out." The record establishes that Canterbury Bells and Fox Glove are biennials and not perennials. In addition to the evidence received in the record from numerous experts called by both parties, the parties stipulated that the hearing examiner might consult leading authorities in the field of horticulture, such as Bailey's Standard Cyclopedia of Horticulture, copyright 1942, L. H. Bailey, 1953 edition, and Taylor's Encyclopedia of Gardening, copyright 1956, Norman Taylor, 1957 edition, and liberal references to these outstanding authorities have been made by the undersigned. It is of course well established that it is appropriate and indeed frequently essential to consult dictionaries, lexicons and the like to establish the ordinary meaning of common English words.

Webster's New Collegiate Dictionary, copyright 1956, G. & C. Merriam Co., defines perennial as follows: "Bot., continuing to live from year to year; as, a perennial plant." Biennial is defined as "Continuing or lasting for 2 years, as certain plants producing leaves the first year of their life and fruit and seed the second." These definitions accord with the testimony of the experts in the record as to the meaning of the terms perennial and biennial as applied to plants.

Counsel in support of the complaint called 21 experts to testify in this proceeding, all of whom were qualified as experts in the field and many of whom had outstanding qualifications as experts and specialists in the field of horticulture. Their qualifications are set forth in the record but it would unduly lengthen this decision to reiterate them here.²

Messrs. Boyer, Burgess and Johns, experts called in support of the complaint, as well as Mr. Van Engen, an expert called by respondent-

² For the purpose of reference, their qualifications are summarized in schedule A attached to the proposed findings submitted by counsel in support of the complaint.

ents, all testified that Canterbury Bells and Fox Glove are biennials and not perennials. There is some disagreement in the record among the expert witnesses as to whether Sweet William is a biennial or perennial. Both Bailey and Taylor state that Sweet William (*Dianthus barbatus*) is a perennial, but indicate that it is probably better known or treated as a biennial.³ The evidence in the record is not substantial enough to warrant a finding that Sweet William is a biennial. Both Bailey and Taylor, as well as the U.S. Department of Agriculture, list Canterbury Bells (*Campanula medium*) and Fox Glove (*digitalis purpurea*) as biennials.⁴

Respondents offered proof that certain other nurseries advertised Canterbury Bells and Fox Glove as perennials, but no proof that they in fact are. The misrepresentations of others cannot justify respondents' conduct. The record establishes and accordingly it is found that all of the 50 plants included in respondents' perennial offer do not bloom year after year or year in and year out without replanting, and are not in fact perennials.

(b) The plants shipped are not always alive, hardy and in good planting condition.

Two consumer witnesses called in support of the complaint testified that they purchased and received through the mail from respondents the 50 perennial offer. Mrs. George Williams of Ft. Wayne, Ind., testified that when she received shipment, although the outside of the package was in perfect condition, the plants were deteriorated and none of them grew. Respondents contended that this might have been because the shipment had been delayed in transit, although there is no evidence in the record on this point. Mrs. Walter Kocher testified that when she received the 50 perennial plants some of them were dying but nevertheless she planted them the same day. She said that none of them bloomed except the Sweet William and the rest of them looked like weeds. Mr. James Johns, a nurseryman called in support of the complaint, testified that the 50 perennials which he examined were alive but were late fall seedlings less than 1 year old. This group of plants had been furnished to a Commission investigator by respondents.

Respondents are engaged primarily in the mail-order business and do not grow the nursery stock included in their various offers. They purchased the plants making up the perennial offer from Mr. Van Engen of Kalamazoo, Mich. He testified that all of the perennials he sold to respondents during the spring of 1956 were alive and healthy.

³ *Taylor's Encyclopedia*, p. 289; *Bailey's Cyclopedica*, p. 997.

⁴ *Bailey's Cyclopedica*, p. 1010; *Taylor's Encyclopedia*, p. 376.

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Although he had furnished the perennials sold by respondents for a number of years, no mention was made of those furnished prior to 1956. Both of the consumers' orders discussed above were received in 1954. The record establishes and accordingly it is found that respondents do not always furnish live and healthy plants in good planting condition as represented.

(c) The plants shipped are not all 1 year old.

A Commission investigator obtained two samples of the 50 perennial plants, one selected at random from respondents' shipping line in Grand Rapids, and the other from Mr. Van Engen who supplied the perennials to respondents. These samples were examined by three experts, two experienced nurserymen and Mr. Boyer, chief of the Bureau of Plant Industry of the Michigan Department of Agriculture. The record establishes that in the industry a 1-year-old plant is one which has grown in the field for a full growing season, i.e., planted in the spring and grown through a full growing season. It does not have to be a full calendar year old to be classified as a 1-year-old plant, but must have grown through one full growing season. It is then sold the following spring prior to the second growing season as a 1-year-old plant. All three of the experts stated that the perennials inspected by them were either late summer or fall planted seedlings, or propagated stock which had not had a full growing season, and hence were not 1-year-old plants. The record establishes, and it is found, that the perennial plants shipped by respondents are not 1-year-old plants as represented.

(d) The perennials are not all flowering size which will bloom the first season after planting.

Counsel in support of the complaint concedes that the record does not substantiate this allegation of the complaint, and accordingly no such finding is made.

(e) The perennial plants furnished are not an \$8 to \$10 value.

The same three experts who examined the plants all testified that they were not an \$8 to \$10 value. Mr. Johns said that in his opinion they were worth not more than 2 cents apiece, based on their size. It will be recalled that the plants inspected were furnished by respondents and their supplier. The only testimony in contradiction of this was given by Mr. Van Engen, respondents' supplier of the plants in question, who said that in his opinion they were a \$15 value. A preponderance of the substantial evidence in the record establishes, and accordingly it is found, that the 50 perennial plants were not an \$8 to \$10 value as represented.

2. The 42 rose plant, flowering shrub and hedge plant offer.

Respondents ran a large full-page illustrated advertisement in many newspapers concerning the 42 rose plant offer, and there were received in evidence such advertisements for the years 1954, 1955, and 1956. All of them were in color except the 1954 advertisement. In most respects, the three advertisements are substantially the same, although certain changes were made in them over the years, particularly in 1956 after the issuance of the complaint herein. The largest and most predominant portion of these advertisements was the legend "42 Gorgeous Rose Plants" and the price, "\$2.98." Each advertisement contained relatively large illustrations of the various plants offered. In fact more than half of the full-page advertisement was occupied by such illustrations. In the 1954 advertisement the number "42" was 2 inches high and more than a quarter of an inch wide, the words "gorgeous rose plants" were in large capitals approximately $\frac{3}{4}$ of an inch high, twice as high and as wide as the following words, "flowering shrubs and hedge plants." The same relative size print and illustrations appear in the 1955 and 1956 advertisements, which in addition have the plants illustrated in bright colors.

The excerpts from the 1954 advertisement, disseminated by respondents throughout the United States, set forth in the complaint read as follows:

42 GORGEOUS ROSE PLANTS, FLOWERING SHRUBS AND HEDGE PLANTS.

ALL A \$26.77 CATALOG VALUE, SPECIAL \$2.98.

YES: this is the biggest Flower Bargain in America Today!

STURDY AND FIELD GROWN * * * EACH PLANT IS AT LEAST 1 FT. HIGH. MANY HAVE ALREADY BLOOMED.

If you love the startling beauty that only roses can bring your garden * * * if you thrill to the splendor of flowering shrubs and have always dreamed of a handsome hedge to set off your yard or garden but thought all this far beyond your means, just read this amazing bargain offer! Here is your opportunity to get a total of 42 healthy plants for only \$2.98! Many have already bloomed in the nursery field this past season and matured to the point where they bear large showy blooms. In this Giant Assortment, which includes some specially collected varieties, you get (1) two Rock Roses that bear a profusion of large delicately textured rose-like blossoms and beautify any garden (2) two Rose of Sharon, the 6 to 8 foot tall bush producing those gorgeous large double blooms (3) four Spirea Roses, so popular for borders and groups with their beautiful clustered rose-colored flowers (4) four Spirea Crimson, the favorite of all dwarf shrubs, blossoming out with great masses of lovely rose-crimson flowers. You get 7 flowering shrubs! 2 Hydrangea, a sunburst of immense, pure white rounded flowers; 2 Red Snowberrys with gay pink blossoms followed by clusters of bright red berries; 2 Coralberrys; 1 White Dogwood Tree; 2 Tulip Trees; 2 fragrant Honeysuckle Vines; 2 Trumpet Vines; 2 Red Norway Maple Trees and 30 feet of Amur Privet Hedge. These plants are all field-grown, well-branched, sturdy

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and well-rooted. They are not cuttings. They are all 1 foot tall or taller. A \$26.77 CATALOG VALUE!

We took the catalogs of 6 other nursery organizations and computed the average price for these same varieties. That average price was \$26.77 for the quantities listed above yet you pay only \$2.98 if you take advantage of this amazing bargain offer NOW! We were not able to compare the stock but we guarantee this offer to produce as well as any similar varieties bought from any other mail order firm or your entire order will be replaced FREE!

Michigan Bulb Co., Dept. NS-256, Grand Rapids 2, Mich.⁵

As previously indicated, some slight changes in respondents' advertising of the 42 rose plant offer were made in 1955 and 1956, although basically the advertisement remained the same. Some of the changes consisted of substituting a few different plants for those included in the 1954 offer. The only difference in the plants between 1954 and 1955 was that in 1954 the offer included red Norway maple trees while in 1955 it included red maple trees. Both the 1954 and 1955 offers included a magnolia tree, free of extra charges, making the total actually 43 instead of 42 plants. In 1956 the Red Snowberry, Coralberry, and Spirea Crimson plants were dropped, and in their place were substituted rose acacia, euonymus americana, and multi-flora rose bush plants. In 1954 the offer was described as a \$26.77 catalogue value, in 1955 as a \$26.51 catalogue value, and in 1956 as a \$22.05 value, if ordered separately at respondents' individual prices. The 1955 and 1956 advertisements contained a certification by The American Research and Testing Laboratories that all of the plants had been tested and were certified as alive, healthy, and hardy. This certification was not included in the 1954 advertisement. The 1956 offer actually included 44 plants, as it added a red bud tree if the order was mailed before a certain date.

By the foregoing advertisements, respondents represented that purchasers would receive: (a) True rose plants or bushes; (b) all field-grown plants; (c) plants which are all at least 1 foot high; (d) well-branched, well rooted, live healthy plants in good planting condition; (e) many plants which have bloomed in the nursery fields and which will produce large showy blooms the season after planting; (f) a \$27.66 or a \$26.51 catalogue value for \$2.98, or a regular \$22.05 value at respondents' individual prices; (g) two red Norway maples; (h) a white flowering dogwood tree; (i) two hydrangea bushes; (j) two different kinds of plants known as coralberry and red snowberry; (k) plants which are hardy and will grow in all areas where respondents' advertising is disseminated; (l) shipment during the planting season for such nursery stock; (m) plants tested for condition by a

⁵ Commission Exhibits 7 and 34.

nursery expert; and (n) A magnolia bearing a pink bloom, a hydrangea bearing a blue bloom, a trumpet vine bearing an orange bloom, and a multiflora rose having the shape and petal of a tea rose.

(a) The 42-shrub offer did not include any true rose plants, as the term is understood by the public.

As previously found, the most dominant part of respondents' advertisements of the 42 plants were the words "gorgeous rose plants." In addition thereto, the largest single plant illustrated in the top center of the advertisement appears to be a beautiful pink rose. Also, as will be considered hereinafter under subsection (n), the 1956 advertisement included 4 beautiful pink roses labeled multiflora rose but illustrated as having the appearance, shape and petal structure of either hybrid tea or hybrid climber roses. The descriptive literature of the 1954 advertisement following the bold print heading began as follows: "If you love the startling beauty that only roses can bring your garden * * *." In the lower center portion of each advertisement appears a list of the plants included in the offer under the heading, "Here Is What You Get." In each of the advertisements the first group of plants listed include the word "rose" or something similar thereto. The overall impression obviously conveyed is that the offer includes a substantial portion of rose plants among the 42 plants.

The fact that the words "rose plants" are twice as large as the words "shrub and hedge plants" would convey the impression that the offer is predominantly roses. The first sentence of the descriptive material quoted above further enhances such impression. The fact that the first three groups of plants listed in the 1954 and 1955 advertisements and the first four listed in the 1956 advertisement include the word "rose" or something similar further solidifies the impression that the offer includes a substantial number of rose plants. Actually, the record establishes that none of the plants included in the offer are true roses as the term is understood by the public and used in the industry. Even a conservative or cautious purchaser would be led to conclude that the offer must include about one-third rose plants, inasmuch as three plant categories are set forth in large print; namely, rose plants, flowering shrubs and hedge plants, even ignoring the emphasis upon the rose plants. One-third of 42 would be 14. This impression is enhanced by the fact that the first 12 plants listed in the 1954 and 1955 advertisements either contain the word rose or might be concluded to be roses, and 12 of the plants listed in the 1956 advertisement including the first 10 contain the word rose or something similar thereto.

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The first four plants listed in all of the advertisements are rock roses and rose of sharon. The record establishes and respondents now concede that neither are roses, either in the botanical sense or in the public understanding. All of the experts who testified agreed that neither of the foregoing are members of the rose family, and the use of the word rose in their name has no bearing upon their true horticultural classification. In the 1954 and 1955 offers both spirea rosea and spirea crimson plants were included, while in the 1956 offer rose acacia plants replaced spirea crimson. The record established and respondents conceded that rose acacia is not a member of the rose family but is a subdivision of the locust family. The illustration of rose acacia included in the 1956 advertisement appears to be small pink climbing roses, and is not at all similar to the illustration of rose acacia appearing on page 2968 of Bailey's Cyclopaedia.

Respondents contend that spirea rosea and spirea crimson are rose plants because they are members of the rosaceae family, sometimes loosely referred to as the rose family. Spirea is a member of the rosaceae family, in fact one of its main subdivisions, but is not a rose, which is a member of the rosa genus, one of the many genera making up the rosaceae family. As pointed out in Bailey's Cyclopaedia at page 40, the rosaceae family contains about 90 genera and 50 species, ranging all the way from fruit trees such as peaches, plums, apples, pears, and cherries, to strawberries, raspberries, blackberries and the like. One of the principal subdivisions of the family is the genus rosa, while another principal subdivision is the genus spirea. All true roses are found under the genus rosa. Obviously nobody normally would think of a peach tree or a strawberry plant as a rose.

Taylor's Encyclopedia at page 951 defines rosa, comprising all of the true roses, as a genus of the rosaceae family. On page 954 he lists some of the different genera of the rosaceae family and includes among them rosa and spirea. At page 954, *et seq.*, Taylor further states that true roses may be classified into eight groups: tea roses, hybrid tea roses, polyantha including floribunda, hybrid perpetual roses, moss, bourbon and bengal roses, hardy climbing roses, shrub roses and hybrid rugosa roses. At page 959, he refers to spirea as a rose relative, not as showy as the rose itself, and as pointed out, it is a different genus of the rosaceae family.

In this connection, although not alleged in the complaint, it is interesting to note that in the 1954 and 1955 advertising, respondents listed as separate plants spirea rosea and spirea crimson. They referred to the former as producing rose-colored flowers and the latter rose-crimson flowers. The record establishes that the two plants are

in fact the same, and the names used by respondents are not recognized as the correct names for the plants in question. As noted above, respondents contend that spirea is a rose plant, and the manner of the listing of the two in the advertisement confirmed this impression. Neither Bailey, page 3207, nor Taylor, page 1043, recognize either rosea or crimson as one of the many species of spirea. As will be seen hereinafter under subsection (f) hereof, respondents themselves, in ordering spirea from other nurseries in an attempt to establish their catalogue value, ordered species under recognized names different than rosea and crimson. Actually, the record establishes that the two terms are merely adjectives used to describe the color of the spirea and not to distinguish species. According to Taylor, page 959, rosea means nothing more than rose colored.

Mr. Smith, the Tennessee nurseryman from whom respondents purchased all of the plants used in their 42 plant offers, testified that what he shipped was pink spirea. In respondents' 1956 advertisement spirea crimson was dropped and spirea rosea became rosea spirea. In the 1956 advertisement, respondents for the first time included after each plant its correct botanical name. Rosea spirea is listed as japonica fortunei, one of the well-known pink varieties recognized by both Bailey and Taylor as well as the industry generally. Of course, the use of the word rosea with the word spirea enhances the general impression that the plants in the offer included true rose plants, especially to the uninitiated.

In the 1956 offer, after the issuance of the complaint, for the first time are included two multiflora rose bushes. As previously found, the color illustration of the multiflora was that of a true rose, either a hybrid tea or a climber. Technically, multiflora bushes are a member of the genus rosa, but in no sense constitute a rose as the public normally thinks of a rose. The multiflora bush is a native, wild rose plant with small white flowers about the size of strawberry blossoms, is primarily used as a hedge plant or fence, and does not produce flowers anything like what are normally thought of as roses. All of the many catalogues received in evidence, as well as the expert witnesses who testified concerning it, establish that it is offered for sale by the industry as a living hedge, or fence, and not as a rose plant. Commission's exhibit 65, a picture of a multiflora rose bush in full bloom, as well as an illustration of the multiflora rose at page 2985 of Bailey's Encyclopedia, clearly portrays that there is no resemblance between its flowers and real roses. Over the years it has been crossbred with other varieties which have produced true climbing roses, such as the seven sisters and crimson climbers, which probably are the roses illustrated

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in respondents' 1956 advertisement. In addition to the experts called in support of the complaint, Mr. Smith, respondents' supplier, himself characterized the plant as "Multiflora rose hedge."

There can be no question but that respondents' advertising in all 3 years falsely conveyed the impression that a substantial number of true rose plants were included in the offer. That multiflora rose hedges are not thought of as true roses is further evidenced by respondents, own evaluation of them in its 1956 advertisement, where they listed them as having a value of two for 25 cents, substantially less than any other plant listed thereon. As will be evidenced hereinafter in subsection (f) hereof concerning value, respondents were anything but conservative in stating the alleged value of their various plants. The inclusion of two plants used primarily as hedges or fences for the enclosure of livestock and similar purposes, having an admitted value of no more than 25 cents among a claimed \$22 worth of plants, hardly can be said to justify the representation that the offer consisted of 42 rose plants, flowering shrubs, and hedge plants.

Mr. Whiting, editor and publisher of "Flower Grower," the most widely circulated garden magazine, who was qualified as an expert with 20 years of experience in public reaction to advertising of nursery products, stated that in his opinion persons reading respondents' advertising would definitely think that they would receive true roses. Perhaps the statement found at 2982 of Bailey's Cyclopaedia best illustrates the misrepresentation resulting from respondents' 42 plant advertisements. He says there: "There is probably no flower more popular and better known than the rose. From time immemorial poets have sung its praise, and the love of it can be traced through the most ancient documents in the literature of the Aryan race. * * * It is probably the first flower known and cultivated in a double state, and *it is the double-flowered garden form whose image the word 'rose' almost invariably brings to the mind*, while to the wild single-flowered rose much less attention has been given." [Emphasis added.]

As previously noted, the largest single illustration of a flower in the advertisement is a beautiful pink rose, which in appearance is substantially similar to the colored portrait of a true rose, bridesmaid, appearing at page 3000 of Bailey's Cyclopaedia. Apparently the illustration in the advertisement is supposed to be that of a rose of sharon, inasmuch as every other plant is illustrated and identified by name, this is the only illustration not named, and the rose of sharon is the only name not found under any illustration. Some of the experts testified that it might be an illustration of a double form of rose of sharon known as Althea. However, respondents listed their

rose of sharon as *hibiscus syriacus*, the ordinary rose of sharon. The illustration thereof on page 1487 of Bailey's Cyclopedica is nothing like that of the large pink rose portrayed in the advertisement.

Although not alleged in the complaint, it is interesting to note that respondents do not even ship rock roses. All of their advertisements listed their rock roses as *hypericum*. As pointed out in Taylor's Encyclopedia, page 971, and Bailey's Cyclopedica, page 1629, *hypericum* is called St. John's Wart, whereas rock roses are known horticulturally as *cistus*.⁶ Incidentally, *hypericum* has yellow flowers whereas *cistus* or real rock roses normally have pink flowers, but the colored illustration of the rock rose in respondents' advertising is pink.

A preponderance of the reliable evidence in the record establishes and accordingly it is found that respondents' 42 plant offer does not include any plants which are thought of as true roses by either the public or the industry.

(b) All of the plants shipped are not field grown.

In respondents' 1954 and 1955 advertisements the collection offered is described in bold print as "sturdy and field grown." In 1956 this language was changed to read "field grown and native collected." In 1954 the fine print of the advertisement contained the following statement: "In this giant assortment, which includes some specially collected varieties, you get two rock roses that bear a profusion of large delicately-textured rose-like blossoms and beautify any garden, two rose of sharon, the 6-to 8-foot tall bush producing those gorgeous large double blossoms, four spirea roses, so popular for borders and groups with their beautiful clustered rose-colored flowers, * * * These plants are all field-grown, well branched, sturdy and well-rooted." In 1955 this was changed and in the fine print was added the phrase "some are native collected." The record establishes beyond dispute that at least 25 percent, if not most of the 42 plant collection, is native collected from the wilds in Tennessee by employees of Mr. Smith. Patently, the bold print representations in the 1954 and 1955 advertisements are false and misleading. The term "field grown" is used in the industry to designate stock grown in the fields by nurserymen as distinguished from stock grown in greenhouses. It is also used to distinguish stock grown and cultivated by nurserymen in their fields from that which is native collected from the wilds. Respondents' own witness, Mr. Van Engen, testified that field grown is the opposite of native collected and means stock which is planted and grown by a nurseryman. Another of respondents' witnesses, Mr.

⁶ Taylor's, page 205 and Bailey's, page 776.

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Perry, now employed by respondents as a nursery expert, testified that field grown is an expression used to distinguish stock from that which is grown in hothouses.

Respondents' change in its 1956 advertising is further evidence that field grown means something other than or different from native collected. Mr. Bruer, of the Tennessee Department of Agriculture in charge of the certification of all nursery stock grown in Tennessee, testified that 10 of the 15 different kinds of plants included in the offer were all collected from the wilds, and some of the other 5 kinds were also native collected. Accordingly it is found that respondents did not ship all field grown plants as represented.

(c) The plants are not all at least one foot high.

All of respondents' advertisements represented that each plant is at least 1 foot tall, or taller. Several samples of the 42 plant offer, which were ordered and received through the mail from respondents by various witnesses, were received in evidence. A number of these plants were substantially less than 1 foot tall. One of the samples ordered by mail was produced at the hearing unopened and was then opened for the first time. It contained a number of plants less than a foot tall. Respondents urge that because the American Standards for Nursery Stock, issued by the American Standards Association, Inc., and sponsored by the American Association of Nurseries, Inc., which will be considered hereinafter in more detail, recommends a tolerance of 10 percent under grade for seedling trees and shrubs, respondents' representation should not be found to be false. Many of the plants received in evidence were substantially more than 10 percent shorter than 1 foot. Respondents' contention might carry more weight if they had represented the plants to be 1 foot tall. In such a case a slight variation could probably be overlooked. However, respondents represented that all of the plants were *at least* 1 foot tall or taller. Another contention advanced by respondents was the fact that their contract with Mr. Smith, the supplier of the plants, required that all of the plants in the offer should be at least 18 inches tall. Respondents are, of course, responsible for the acts of their duly authorized agents. It is concluded and found that the plants shipped are not all at least 1 foot tall as represented.

(d) The offer does not consist of well-branched, well-rooted, live healthy plants in good planting condition.

Respondents' advertising described the 42 plants as sturdy, well-branched and well-rooted, and certified them to be alive, healthy, and hardy. The record establishes the opposite.

Dr. Rogers, curator of the New York Botanical Gardens, testified that 17 of the plants in the collection he ordered and received in the

spring of 1956 were dead. Dr. Chadwick of Ohio State University testified that in the collection inspected by him, six of the plants were dead and some of the others were nearly dead. Dr. Creech of the U.S. Department of Agriculture, who inspected the collection opened for the first time in the hearing room in 1956, testified that the 13 privet plants would not live under average garden conditions, and that the multiflora rose seedlings were not well branched. Nurseryman Bauge testified that the collection ordered and received by him was improperly packed, the plants were poorly rooted, were not well-branched, a number of them were dead, and they were inferior in grade to those which meet the standards of the American Standards for Nursery Stock. He classified the plants as culls, not saleable by nursery standards.

Nurseryman Holmes testified that in the collection ordered by his company, six of the plants were dead, two were half dead, five had no roots, and some of the rest were not fit for "lining out," an expression used to designate immature or seedling stock set out by nurserymen for further growth before being saleable to the public. Nurseryman Burgess stated that in his opinion the native collected plants in the offer could not be home grown. While not an expert in this field, it is the opinion of the undersigned based upon his observation of the exhibits received in evidence that many of them were not sturdy, well-branched, or well-rooted. Respondents offered no expert evidence to contradict that in support of the complaint. Mr. Smith, admittedly an interested witness as the sole supplier of the offer for respondents, testified that "most" of the plants he furnished were well-rooted.

The record establishes and it is found that many of the plants making up the 42 plant offer were not well-branched, well-rooted, alive, healthy, and hardy as represented.

(e) Many of the plants have not bloomed in the nursery fields and will not produce showy blooms the first season after planting.

All of the respondents' advertisements contain those representations except that in 1955 and 1956 the word "nursery" was dropped. Apparently this change was in line with the addition in 1956 of the term "native collected" previously considered. The 1954 representation that many of the plants had already bloomed in the nursery field obviously could not have been true concerning the many plants native collected. Even ignoring this fact, inasmuch as the word nursery was eliminated from the 1955 and 1956 advertisements, the record establishes that very few if any of the plants contained in the offer had previously bloomed or would produce large choice blooms the first season after planting.

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Dr. Creech testified that many of the plants he examined could not have bloomed previously and would not bloom the next season after planting because of their size. Dr. Rogers testified that none of the plants he examined had bloomed the preceding year and only a few of them would bloom the next season. Mr. Boyer testified that a rose of sharon, 1 foot high, normally would not have bloomed the previous season nor would it the next, and that privet plants which were 4 inches high could not possibly bloom the summer after planting. Mr. Louis Laug, one of the respondents herein, testified that in the spring of 1956 during the pendency of these proceedings he selected one of the 42 plant offers at random from respondents' warehouse and planted it as an experiment. Even though this proceeding was well along and this particular issue well defined, he was unable to state that any particular plant bloomed and testified only that some of the plants flowered.

The only evidence that respondents offered in contradiction of the foregoing was the submission at the hearing in August of certain plants handpicked by Mr. Smith. He testified that these plants had bloomed during 1956. This, of course, constituted no proof that they had bloomed in 1955 as represented in the advertising. The offers sold in the spring of 1956, of which these were supposed to be samples, were represented to have previously bloomed in the fields, namely, in 1955. Smith's testimony was to the effect that they bloomed after they were planted in 1956. In addition to this, it is significant to note that Smith testified that he personally selected the plants produced at the hearing from his fields. He admitted that all of his plants did not bloom and that he had to pick the ones that bloomed. Mr. Laug's testimony concerning the plants he selected at random in May of 1956 from the 42 plant offer then being sold by respondents is equally infirm inasmuch as the exhibits received in evidence from Mr. Laug showed that included among the 42 plants were spirea crimson, red snowberries, and red Norway maple trees, yet according to respondents' 1956 advertisement, none of these plants were included in the 1956 offer.

The record establishes and it is found that many of the plants had not bloomed in the nursery fields and would not produce blooms the first season after planting as represented.

(f) The 42 plant offer is not a \$26.77 or \$26.51 catalogue value, or a \$22.05 value at respondents' regular individual prices.

In the 1954 and 1955 advertisements, respondents represented that the 42 plant offer had an average mail order catalogue value of \$26.77 and \$26.51, respectively, based upon a comparison with nursery stock from the catalogues of other nurseries. After the complaint was

issued alleging this representation to be false, the 1956 advertisement was changed to claim that the plants were worth \$22.05 based upon individual prices charged by respondents in selling many thousands of the same plants individually. A number of the expert witnesses called in support of the complaint, including Messrs. Boyer, Burgess, Bauge and Jones, testified that the 42 plants were not a \$26.77 or a \$26.51 catalogue value nor anything close to it.

In view of the facts already found: that the offer contains no true rose plants, many of the items are native collected, many are extremely small and immature, many are dead, partly dead, not well-branched or well-rooted, and unlikely to survive in the average garden, many have not bloomed previously and are not sufficiently mature to produce blooms the season after planting, and the facts hereinafter considered, that with respect to many of the items listed in the offer the purchaser does not receive the plants described but a different plant of inferior quality and value, and further that many of the plants are not hardy in large parts of the areas where they are sold, it seems obvious that the offer is not anywhere near in value any of the three figures referred to above. As pointed out by counsel in support of the complaint, the value of plants like any other merchandise is dependent upon the quality. Obviously a plant which is well-branched, well-rooted, larger, older, and more mature is worth more than one which is not. A plant which is dead or so weak that it cannot survive, or is not hardy in an area where it is sold, is not worth anything, let alone the amounts represented by respondents.

Respondents contended that they ordered the items making up the 42 plant offer from various nurseries throughout the country, and arrived at the prices listed in their 1954 and 1955 advertising by this method. The catalogues from which such items were ordered by respondents for comparison were received in evidence. Aside from the fact that many of the respondents' plants were either dead or so weak they could not survive, the record establishes that the plants ordered by respondents from other nurseries were of a much better quality, size, age, and maturity, and in many instances a different species of considerably more value commercially than that furnished by respondents. In this connection, counsel supporting the complaint offered and there was received in evidence the American Standards for Nursery Stock adopted by the American Standards Association and sponsored by the American Association of Nurseries, referred to hereinabove. Respondents objected to its receipt at the time but as noted above, now rely upon it in connection with their contention concerning grade or size tolerance.

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These standards establish an appropriate criteria for plant grades, and the record shows that they are generally followed by all reputable nurserymen in the sale of nursery stock. The record also establishes the manner in which they were adopted and promulgated under impartial conditions, and that they have been accepted for use by the Federal and State Governments including the State of Michigan. As a matter of fact they are recognized by and referred to in the Commission's trade practice rules recently adopted for the nursery industry.⁷ Under rule 4 thereof dealing with size and grade designations appears the following: "Note: It is the consensus of the industry that the grade and size standard set forth in American Standard for Nursery Stock, as revised April 15, 1951, and in the addendum thereto entitled 'Bulbs, Corms and Tubers' (now incorporated in American Standard for Nursery Stock as revised April 15, 1956) is generally recognized in the industry, and that use of the size and grade designations therein set forth, in accordance with the requirements of the standard for the designations, in the marketing of industry products to which such standard relates, will prevent deception and confusion of purchasers and prospective purchasers of such products."

The record herein establishes that the grade of plants included in the 42 plant offer does not meet these standards. This in itself tends to establish that the plants included in the offer are not of a comparative value to those purchased by respondents from other nurseries which recognize and follow the standards established in the American Standard for Nursery Stock. In addition, an analysis of the testimony of Mr. Forrest Laug concerning the various plants he ordered from different nurseries to establish the list of prices used in the 1954 and 1955 advertisements, together with the catalogues received in evidence describing the plants ordered by Mr. Laug, establishes that they were of far better quality and size than the plants contained in respondents' offer. Mr. Laug said that respondents purchased two rock roses from the Akerman catalogue, respondents' exhibit 60(g). (As previously noted this plant was hypericum, or St. John's Wart, not a rock rose.) The plants purchased by respondent were two years old, field grown by the nursery, and a species described as golden St. John's Wart. As previously found herein, respondents' hypericum was younger, had not previously bloomed and was collected from the wilds. Patently it was of far less value than the plants ordered by respondents. This is so even assuming that the plants were received by the customer alive and well-rooted, which frequently was not the case as found above.

⁷ Title 16, Part 34, C.F.R. (1957).

Mr. Laug purchased two rose of sharon plants from the Stark Nursery for \$3.30, and an examination of its catalogue reveals that the plants were 1½ to 2 feet tall and not native collected. The record reveals that substantially all of respondents' plants were not as tall or mature as these plants. In one of the catalogues used by respondents to purchase these comparison plants, the Tennessee Nursery lists rose of sharon 1½ to 2 feet tall at 70 cents each or \$1.40 for two. Again this is a taller, more mature plant than that offered by respondents. Apparently they selected the more expensive plant from the Stark catalogue in making up their list of values even though the item listed in the Tennessee catalogue was larger than their plants. Mr. Laug said respondents purchased four spirea rosea for \$3, two coralberries for \$1, and two honey suckle vines for \$1.20 from the Tennessee Nursery. The spirea purchased were 2 to 3 feet tall, more than two to three times larger than those offered by respondents, and in addition were the billiardi species whereas those sold by respondents were japonica fortunei. The coralberries were 1½ to 2 feet tall, and the honey suckle were 2-year-old No. 1 plants.

Mr. Laug further said respondents purchased four spirea crimson for \$3 and two trumpet vines for \$1.50 from Allison Nursery. As previously found, there was no difference between the spirea rosea and spirea crimson plants offered by respondents. Again a different species was purchased, this being spirea froebeli instead of spirea japonica fortunei. The plants purchased were 1½ to 2 feet tall. The prices quoted were three for \$2, and consequently four could not have been more than \$2.75, instead of \$3. The Allison catalogue does not state the age or size of the trumpet vines, but the record establishes that those included in respondents' offer were collected from the wild. Respondents purchased two hydrangea for \$1.80 from Whitten's Nursery. These plants were strong 1½ to 2 feet bushes, whereas respondents were native collected. Respondents purchased 2 red snowberries for \$1.70 and 15 amurense privet hedge for \$3.22. The red snowberries were 1½ to 2 feet tall and the same size red snowberry could have been purchased from the Tennessee Nursery for \$1. The 15 privet hedge were a different and more valuable variety than that sold by respondents. Respondents furnished ligustrum sinense, a privet hedge not hardy in the north, whereas the privet they purchased was ligustrum amurense, the hardy northern variety. In addition the plants purchased were 2 years old and much larger than those of respondents received in evidence. The Tennessee Nursery catalogue used by respondent to make other purchases listed ligustrum sinense plants 1 to 1½ feet tall 15 for \$1.50. Respondents did not

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explain why they ordered a different species much hardier and worth more than twice as much as the kind they sold, even assuming the size and condition to be comparable.

Mr. Laug testified respondents purchased one white dogwood tree for \$1.39 from Richards Nursery. Aside from the fact that the record shows that respondents usually did not furnish a white dogwood tree but instead a red ozier dogwood bush of far less value, Whittens' catalogue lists a 2- to 3-foot 2-year-old, white dogwood tree for 90 cents, and the Tennessee catalogue a 2- to 3-foot tree for \$1. Mr. Laug said they could find no catalogue listing for tulip and red maple trees comparable in size to respondents', so they listed their own catalogue price of two for \$2 for each. However, the Tennessee catalogue lists tulip trees of the same botanical name 4 to 5 feet tall at \$1.25, and 5 to 6 feet tall at \$1.40. In the Stahling catalogue, tulip trees 3 to 4 feet tall are 2 for \$1.70. In view of the comparative sizes, respondents' claimed valuation is far too high. In the Tennessee catalogue the same red maple trees offered by respondents are listed at \$2, 5 to 6 feet tall. Obviously respondents' plants, being very much smaller, would be proportionately less valuable, even assuming they were well-branched, well-rooted, and healthy. In respondents' 1954 advertisements two red Norway maple trees were listed with a claimed value of \$2.80. In the catalogues which respondents used, red Norway maple trees as distinguished from native red maple trees are far more expensive. As will be noted in the following subsection (g), respondents did not ship a red Norway maple but used the native red or swamp maple.

The foregoing findings establish respondents' misrepresentations concerning their valuation of the offer in 1954 and 1955. With respect to their 1956 advertisement, respondents represented that the plants were worth a total of \$22.05, based upon claimed individual sales of many thousands of the same plants at the prices listed in the advertisement. In support of this claim, Mr. Laug testified that during the 1956 season respondents sold over a million of the same plants individually at such prices. The documentary evidence as well as other testimony from Mr. Laug and Mr. Smith, respondents' supplier of the 42-plant offer, establishes the foregoing testimony by Mr. Laug to be incredible. Mr. Laug admitted that respondents purchased all of the plants listed in the 42-plant offer only from the Smith Nursery. Mr. Smith testified that all of his sales to respondents were made under contracts duplicating Commission exhibit 93. This contract provides for the sale to respondents by Smith of the plants listed *only* in units of the 42-plant offer, and replacements thereof in case of returns. In view of the undisputed provisions of the contract and the testimony of Messrs.

Laug and Smith, it is apparent that respondents could not have sold thousands of these plants individually, inasmuch as they did not purchase them individually from Mr. Smith.

Even assuming that the plants sold by respondents were all alive, healthy, well-branched, and well-rooted, it is obvious they were of a value far less than represented by respondents. When it is also considered that respondents did not supply a white flowering dogwood tree but instead a red dogwood bush, did not supply a red Norway maple tree but instead a native swamp or red maple, did not supply a blue-blooming hydrangea or pink-blooming magnolia tree, together with the facts that many of the plants were not alive, healthy, well-rooted and well-branched, frequently were not of blooming size, many were collected from the wild, and many were not hardy in many of the States where sold, it becomes apparent that not only were they not worth more than \$22 as represented but were not worth the amount charged by respondents. While not, of course, controlling, it is interesting to note that under their 1955 contract respondents paid Smith 85 cents for the entire order of 43 plants, including the magnolia tree as a bonus, or approximately 2 cents apiece. It is also of interest that in 1956 respondents' claimed value was more than \$5 less for approximately the same plants, exclusive of the magnolia tree which was not included among the listed values, yet the expert witnesses testified that the value and price of nursery stock had increased in 1956 from that in 1954 and 1955.

The evidence establishes and it is found that respondents' 42-plant offer does not have the value represented.

(g) The offer does not include two red Norway maples.

As previously found, in 1954 respondents represented that the purchaser would receive two red Norway maple trees. While the word "Norway" was dropped from the 1955 and 1956 advertisements, the colored pictures included in those advertisements portrayed one of the red Norway maple trees, such as the Crimson King variety, according to the expert witnesses called in support of the complaint. Mr. Whiting testified that the public would think they were getting red-leaved maple trees. Dr. Rogers testified that the illustration appeared to be a form of the Norway red maple. Dr. Chadwick said it looked like a Crimson King maple, a type of Norway maple having red leaves throughout the summer. Mr. Rogers said the picture looked like a Japanese red maple, another tree which remains red through the summer. The Norway red maples, including the Crimson King, and the Japanese red maple, are far more valuable than the native red maple. It is undisputed that respondents did not furnish red Norway maples.

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Respondents shipped the *acer rubrum*, commonly known as a native swamp or red maple. The botanical name of the Norway maple is *acer platanoides*, and the red varieties *acer platanoides schwedleri*, of which the Crimson King is a variety. Dr. Chadwick said that the *acer rubrum* is known as a red maple because of its red flowers in the spring rather than its leaves.

The evidence establishes and it is found that the offer does not include red Norway maples as represented.

(h) The offer does not include a white flowering dogwood tree.

Respondents' advertisements state that the purchaser will receive a white flowering dogwood tree (*cornus florida*). In addition, the color illustration portrays a white flowering dogwood tree. The record establishes, however, that respondents shipped instead a red ozier dogwood bush (*cornus stolonifera*), which does not have a good bloom, is a shrub and not a tree, and is not nearly as valuable as the *cornus florida*.⁸

Mr. Bruer, chief of the Tennessee Department of Agriculture Division, testified that he personally observed several hundred shipments of the offer made by Smith during 1954 and 1955 and saw *cornus stolonifera* rather than *cornus florida* being used. In fact, Smith identified one of the plants in the offer produced and opened at the hearing as a red ozier dogwood. Later when Smith produced samples of the plants used in the offer personally selected by him for use at the hearing, he produced a red ozier dogwood instead of a *cornus florida*, and testified that it was the type of shrub that he was putting in the Michigan bulb orders.

The record establishes and it is found that respondents do not furnish a white flowering dogwood tree as represented.

(i) The offer does not include two hydrangea bushes.

Counsel in support of the complaint concedes that the record does not sustain this allegation and accordingly it is not found.

(j) The plants listed as coralberries and red snowberries are in fact the same.

Respondents' 1954 and 1955 advertisements included red snowberries and coralberries as different plants which the purchaser would receive. For reasons not explained in the record, both of them were dropped from the 1956 offer. The record establishes that they are in fact the same plant, commonly known as coralberry. Dr. Chadwick testified that he knew of no such plant as a red snowberry. Neither Bailey's nor Taylor's Encyclopedias recognize red snowberries although both of them recognize and describe coralberry and snowberry.

⁸ Taylor's Encyclopedia, page 240.

Some of the confusion in the record among the witnesses apparently arose from the fact that snowberry and coralberry are of the same family, whereas red snowberry is merely another name for coralberry. According to Taylor, page 1087, and Bailey, page 3293, *symphoricarpos albus* is the botanical name for snowberry, while *symphoricarpos orbiculatus* is the botanical name of coralberry. As might be expected, the fruit of the snowberry is white while the fruit of the coralberry is red.

Five expert witnesses called in support of the complaint testified that coralberry and red snowberry are common names of the same plant. Mr. Smith, when questioned about the matter, admitted that he could not explain the difference between a coralberry and a red snowberry. As previously noted, the coralberry ordered as a sample from the Tennessee Nursery by respondents was called a red snowberry by that nursery. Respondents pointed out that some of the witnesses testified that coralberry and snowberry are different plants. As indicated above in Taylor's and Bailey's Encyclopedias, there is no question but that snowberry and coralberry are different species of the same family. However, the record establishes that *red* snowberry is just another name for coralberry. Prior to 1956 when the coralberry and red snowberry were dropped, respondents in their advertisements did not identify the plants by their botanical names. In addition, when Mr. Smith produced the plants at the hearing which he personally selected he produced a coralberry, but no red snowberry.

The record establishes and it is found that the purchaser does not receive two different plants known as coralberry and red snowberry as represented, but in fact both are the same plant.

(k) A number of the plants included in the collection are not hardy.

In all of their advertising, respondents represented that the plants in this collection were hardy. The record establishes that respondents' advertising is disseminated throughout the entire United States, and that respondents sell their offer in every State of the Union. Respondents' 1955 advertisement contained a statement that respondents sold their stock nationally by mail. Mr. Smith testified that he had shipped the offer to each of the 48 States.

The record reveals that a number of the plants included in the offer are not hardy in the Northern States. At page 1216 of Taylor's Encyclopedia is found a colored map setting forth the various zones of hardiness in the United States, designated 1 to 9 from north to south, based upon average mean temperatures of the coldest months. Throughout this encyclopedia as well as throughout Bailey's Encyclopedia every plant listed carries a designation of the zones or areas in

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which it is not hardy. Mr. Bauge testified hypericum (called rock rose by respondents) cannot be grown in Iowa. Taylor's Encyclopedia, page 971, states that hypericum is not hardy north of zone 4. Zone 4 is a band extending roughly through the center portion of the United States including Maryland, West Virginia, Kentucky, northern Arkansas, and northern Oklahoma. It is south of all of the States in the Middle West and Rocky Mountain areas as well as New York and Pennsylvania, which are in zone 3, not to mention the more Northern States which are in zones 1 and 2. Bailey's Cyclopedia, page 1629, says that hypericum is not hardy in the North. Mr. Bauge also said cornus florida is not hardy in Iowa, and Taylor's Encyclopedia, page 240, states that it is not hardy north of zone 3. Iowa is in zone 2.

As previously found the record establishes that respondents' offer included ligustrum sinense as privet instead of amurense, which is the hardy privet sold in the North. In this connection respondents referred to their privet as Amur privet, which in itself represents that the hardy variety, amurense, was being offered,⁹ and not the southern variety, sinense, which will not survive in the Northern States. Dr. Chadwick testified that respondents' privet was not hardy in Ohio. Dr. Rogers testified that it was not hardy north of Maryland. Messrs. Bruer and Holmes said that it was not hardy in the North. Bailey's Cyclopedia, page 1859, states that amurense is hardy in the North but that sinense is not hardy north of Long Island. Long Island is in zone 4, as previously described. Taylor's Encyclopedia lists sinense as not hardy north of zone 6, which would eliminate three-fourths of the United States.

Taylor's Encyclopedia also states that rose of sharon, coralberry, hydrangea arborescens, spirea japonica and multiflora rose are hardy only from zone 3 south.¹⁰ Taylor, page 650, further states that magnolia acuminata, the type sold by respondents, is not hardy north of zone 4. Respondents argue that because other nurseries sold the same types of stock nationally, it should be concluded that all of the plants are hardy throughout the United States. As previously found herein, the misdoings of others, if any there be, do not justify respondents' representations.

The record establishes and it is found that many of the plants included in respondents' offer are not hardy in substantial portions of the United States as represented.

⁹ Taylor's Encyclopedia, p. 891, says the common name for ligustrum amurense is amur privet.

¹⁰ Pp. 496, 1088, 523, 1043 and 952.

(l) The offer has been shipped after the expiration of the planting season.

As previously found, the complaint alleged and respondents admitted that they represented that the 42 plant offer would be shipped in time for planting during the current planting season. A number of the expert witnesses were asked what would be the latest spring planting date for the collection of 42 plants. The record establishes that the latest spring planting date is earlier the farther south, and conversely later the farther north, the planting takes place. Mr. Boyer testified that the latest spring planting date in Michigan was about June 14, whereas nurseryman Smart testified that the last seasonal planting date in the Chicago area was the end of May. The record shows that the plants ordered in April by Mr. Holmes, Newark, N.Y., were received by him during the first week of June. This portion of New York is in the zone south of the one in which most of Illinois and Michigan appear. Mrs. Smith, a consumer witness, testified that the collection she ordered in the spring of 1954 was not received until the middle of the summer.

Mr. Smith testified that he continued shipping the offer during the 1956 season until June 20, considerably after the latest spring planting date in most of the United States. Many of the plants included in the offer are supposed to bloom and flower in the spring, considerably before June 20. Mr. Boyd, who operates a nursery in the same area as Mr. Smith, testified that the end of the shipping season in McMinnville, Tenn., is considered to be May 10 because after that unless the plants are kept dormant in cold storage they start to grow and the sap starts up in them. This is one reason why the planting season is earlier in the South and later in the North. Mr. Boyd's testimony is in accord with the evidence in the record that as long as plants are kept dormant they may be planted successfully during the season. Respondents' plants were not kept in cold storage.

The evidence in the record establishes and accordingly it is found that respondents frequently shipped the 42 plants after the expiration of their planting season.

(m) Purchasers do not receive plants tested for condition by a nursery expert under proper standards.

Respondents' 1955 and 1956 advertisements contained a printed certificate by the American Research and Testing Laboratories certifying that the plants had been tested and found to be alive, healthy, and hardy. Mr. Stokesberry was called as a witness by counsel supporting the complaint and testified that he was the owner

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and director of the American Research and Testing Laboratories, a private enterprise conducted for profit. He testified that in 1954 at the request of respondents' advertising agency he conducted a test of the plants in the 42 plant offer. He admitted that he was not an expert in either horticultural matters or the packing of plants. He contended that he conducted several tests of the plants but was unable to produce any records concerning any tests other than a report of his April 3, 1954 test, Commission's exhibit 32. He was unable to produce any work sheets or data concerning that report as well as the other alleged tests.

In his report of April 3, 1954, Mr. Stokesberry lists the various plants included in the 1954 and 1955 offers, which incidentally are not all the same as the 1956 offer even though respondents continued to use Mr. Stokesberry's certification in 1956. Mr. Stokesberry certified that all of the plants submitted to him were alive, viable and healthy, that he planted them 24 hours after receiving them, and that at the end of a 10-day observation period all of them were alive and growing. Mr. Stokesberry admitted that viable meant the same as alive. It will be noted that he did not certify the plants to be hardy although respondents quoted him as doing so in their advertisements, and in fact headed the entire quotation in large print with the caption, "Certified Hardy Plants."

Mr. Stokesberry testified that in order to secure an average or representative sample of respondents' offer, he ordered the collection through the mail from a newspaper advertisement, which was offered and received in evidence as respondents' exhibit 8. Although the date of this newspaper page was cut off and hence does not appear upon it, the exhibit proved to be identical with Commission's exhibit 7, a page of the Chicago Sunday Tribune of March 28, 1954. This is evidenced by the reverse side of respondents' exhibit 8, which is identical with the reverse side of Commission's exhibit 7, including the portion of the news article appearing on exhibit 7, as well as all of the other printed matter thereon. Under cross examination, Mr. Stokesberry admitted that undoubtedly the advertisement he produced was from the same day's paper as Commission's exhibit 7. Obviously, Mr. Stokesberry could not have ordered, received, planted and then observed for 10 days before April 3, 1954, plants ordered from an advertisement appearing in a newspaper on March 28, 1954, 6 or 7 days prior to the certification. Mr. Stokesberry was completely unable to explain the discrepancy of dates between his certification and the advertisement which he used in ordering the plants. This fact, as well as the fact that Mr. Stokesberry was unable to pro-

duce any of his test data or work sheets in connection with this test or the other alleged tests concerning which not even final reports were produced, raises a serious question concerning credibility and the weight, if any, to be given to his testimony.

Respondents attempted to explain the discrepancies which Mr. Stokesberry could not explain by later testimony from their advertising agency that the agency furnished the advertisement to Mr. Stokesberry and had secured it from a "bulldog edition of the Chicago Tribune." According to Mr. McMahon, this is an edition published about 2 weeks prior to the date on the publication. This appeared to be a belated attempt by respondents to repair the badly damaged credibility of the witness. No reference was made to a bulldog or predated edition of the newspaper until after the witness was confronted with the date and unable to explain the discrepancy between it and his certification. Even if a bulldog edition of the particular newspaper advertisement was available 2 weeks prior to its actual date of publication, the time element is such that it would have been practically impossible for the witness to have secured the advertisement, mailed it to respondents, in turn mailed by them to Smith in Tennessee, received the shipment of plants from Tennessee through the mails and then planted and observed them for 10 days prior to the issuance of the report.

For all of the foregoing reasons, the testimony of the witness is not credited. The certification printed in respondents' advertisement is clearly a representation to the public that respondents' plants have been tested for condition and hardiness by a reputable organization experienced and qualified in the field. The statement that the plants are certified as alive, hardy and healthy after testing by the American Research and Testing Laboratories would definitely lead the public to believe that appropriate tests under impartial standards had been made by a qualified and experienced organization. The record certainly does not support such a representation. The record establishes and it is found that purchasers do not receive plants tested for condition by a nursery expert under accredited and impartial standards. The evidence further establishes and it is found that such plants, even if certified, were not certified as hardy. It is further concluded and found that there is insufficient substantial evidence in the record to establish that such plants were in fact tested at all.

Even assuming *arguendo* that some plants had been tested and certified as represented by respondents, the representation in the advertisement would still be misleading and deceptive. Patently the impression conveyed to the public and prospective purchasers is that

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the plants *which they will receive* are certified as alive, healthy, and hardy, not one or a few samples of such plants tested a year or more prior to the advertisement. The plants received by the customers answering the advertisement have not been tested or certified in any manner. Only the most analytical and critical appraisal of respondents' representation in this regard might lead one to conclude that the plants to be received were not certified, and that only samples of like plants had been tested. This is further borne out by the fact that many reputable nurseries do in fact certify their stock as mature, healthy and hardy. Such certifications are of the stock sold and delivered, not samples thereof tested some time prior to the offer.

In summation, the record establishes and it is found that respondents' representation, that the plants offered for sale to the public have been tested by an accredited and qualified organization and certified to be alive, healthy, and hardy, is false.

(u) The pictures used in respondent's color advertisements represent that purchasers will receive a pink-blooming magnolia tree, a blue-blooming hydrangea, an orange-blooming trumpet vine, and a multiflora rose with flowers having the shape and petals of a tea rose.

In addition to the foregoing, this section of the complaint also alleged that respondents do not sell the items listed in the 42 plant offer individually by the thousands. This representation has been considered hereinabove in subsection (f) and found to be false. Counsel supporting the complaint concedes that there is no proof in the record to sustain the allegation that respondents falsely represented that purchasers would receive an orange-blooming trumpet vine, and accordingly no such finding is made.

Respondents' 1955 and 1956 color advertisements, as well as the descriptive material in its 1954 advertisement, represented that purchasers would receive a magnolia tree bearing pink and white blooms, typical of the well-known and popular magnolia soulangeana. In the upper left hand portion of respondents' color advertisements appears a picture of several beautiful pink and white magnolia blooms. In the 1954 and 1955 advertisements, a statement also is made that the magnolia tree offered bears large rose-pink blossoms. However, the record establishes that respondents' plant is a magnolia acuminata, which bears a small greenish-yellow flower and which is not generally recommended for home landscaping, the magnolia soulangeana being preferred for this purpose. Four of the expert witnesses called in support of the complaint testified that the colored illustration depicted the bloom of the magnolia soulangeana. Drs. Creech and Chadwick said that the magnolia shipped by respondents bore a greenish-yellow

flower. According to Taylor's Encyclopedia, page 650, the flower of the *acuminata* is 2 to 3 inches high and not showy, whereas the flower of the *soulangeana* is 6 inches and among the most popular and handsome of the flowering shrubs. In 1956, after the issuance of the complaint, respondents changed the printed descriptive material concerning the magnolia to state that it "bears large greenish-white blossoms." However, this appears in the smallest print in the body of the advertisement, while the picture used is still that of three large pink and white blooms of the type found on the *soulangeana*.

At the upper right-hand side of the same color advertisement appears a blue hydrangea bloom. In each of the advertisements in the finer print respondents described their hydrangea as bearing immense blossoms of pure white. The record reveals that respondents sell the hydrangea *arborescens* which bears white blossoms, whereas the hydrangea *macrophylla*, a much more valuable plant grown extensively by florists, is the plant which bears the blue blooms. Taylor's Encyclopedia, page 523, identifies the *arborescens* as the wild hydrangea, commonly called seven-bark, bearing white flowers, and the *macrophylla* as the plant which bears the blue flowers. Respondents' offer does not include the common hydrangea which bears white flowers and is so well known, identified by Taylor as the hydrangea *paniculata*. While there is some discussion in the record about causing varieties of hydrangea to turn blue by the addition of iron or aluminum to the soil, this applies only to the pink blooming hydrangea, which under certain conditions of acid soil will turn blue, and not to white blooming hydrangea.¹¹ Respondents apparently concede that the illustration is incorrect because they sell white blooming hydrangea, but argue that in the printing process a color which is supposed to be white sometimes turns out with a bluish tint. This contention is without substance. Every advertisement received in the record showed the hydrangea with a blue bloom, while the same illustrations contained white blooming dogwood trees and magnolia blooms the inside of which were white, and not a single one of those were blue.

As previously found, the multiflora rose plant was included in the offer for the first time in 1956. Respondents concede that their 1956 advertisement contains an incorrect illustration of a multiflora rose. The illustration appearing in the advertisement, Commission's exhibit 47, shows four beautiful coral colored roses with the appearance, shape and petals of a tea or floribunda rose, i.e., roses as the public normally thinks of them. As has previously been found in

¹¹ Taylor's Encyclopedia, p. 523.

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subsection (a) hereof, the bloom of a multiflora rose is about like that of a strawberry plant and in no way resembles a real rose. Although this illustration appeared in respondents' 1956 advertisement, they testified at the hearing that they have since ordered it changed.

All of the experts who testified concerning the illustration in question said in their opinion it appears to be a garden rose, such as a tea or floribunda. Mr. Foster, the artist employed by respondents to draw the illustrations, testified that he thought the multiflora rose was one of the climbing roses, and copied the Crimson Rambler, a climbing rose, for the illustrations. He testified that he looked the matter up in Taylor's Encyclopedia and ascertained that the multiflora rose was a rambler, and the Crimson Rambler was the most common variety. However, Taylor's Encyclopedia, page 952, under multiflora rose, states that the multiflora rose *bred* with *rosa cathayensis* is "the source of many important climbing or prostrate horticultural varieties, *possibly* entering into the variety known as Crimson Rambler." [Emphasis added.] Bailey's Cyclopedia, page 2985, states that the Seven Sisters and Crimson Rambler roses are hybrid varieties derived from the multiflora rose. There is no resemblance between the bloom of the multiflora rose and the true hybrid climbing roses such as Crimson Rambler and Seven Sisters.

While not alleged in this section of the complaint, respondents' color illustrations contain other misleading depictions as previously found herein, such as the large rose illustration at the top center of the advertisement, the white flowering dogwood tree, and the red leaved Japanese or Norway maple tree. In addition, respondents illustrate a rock rose bearing an orange pink bloom similar to the true rock rose, *cistus purpurea*, whereas what they sell is *hypericum*, known as St. Johns' Wart, which bears yellow flowers instead of rose-colored flowers.

The record establishes and it is found that by their colored illustrations respondents falsely represented that purchasers would receive a pink blooming magnolia, a blue blooming hydrangea, and a multiflora rose with flowers having the shape and petals of a tea, or true, rose.

3. The tulip and gladiolus bulb offer.

The complaint set forth and respondents admitted four advertisements published by them, three offering tulip bulbs and one offering gladiolus bulbs. The respective advertisements were received in evidence as exhibits. The three tulip offers were respectively 100 for \$1.69, 100 for \$ 1.98 and 100 for \$2.98, and the gladiolus offer was 100 for \$1. It was alleged and admitted that by these advertisements

respondents represented that purchasers would receive: (a) bulbs of the size described; (b) bulbs which would bloom during the first flowering season after planting; and (c) bulbs which would produce flowers with an assortment of colors.

(a) The bulbs shipped by respondents are smaller than the size described.

The complaint alleged that the purchasers of respondents' gladiolus offer and the \$1.69 and \$1.98 tulip bulb offers did not receive bulbs as large as described in respondents' advertisements. The gladiolus advertisement, Commission's exhibit 4, described the bulbs as "small blooming varieties already 1 to 1½ inches in circumference." Some 600 of these bulbs obtained through sample orders placed by the Commission's investigators were received in evidence as Commission's exhibits 71 and 83. An examination of these bulbs reveals that in each order of 100 bulbs 30 to more than 40 were less than 1 inch in circumference.

Respondents' 100 for \$1.69 tulip advertisement describes the bulbs as "medium size already 2½ inches in circumference," and their 100 for \$1.98 tulip advertisement describes the bulbs as "medium size." In both advertisements reference is made to the fact that they were selected from the finest planting stock. Again referring to the American Standard for Nursery Stock addendum, tulips are graded as top-size, large, medium, and small. The grade "small" includes bulbs from 3¾ inches to 4 inches in circumference, or more than an inch larger than those described in respondents' \$1.69 offer. The addendum contains the statement that the grades listed therein conform in substance to generally accepted trade usage, and it would appear therefore that bulbs of the size described by respondents are not even offered for sale to the public. Tulips graded medium are from 4 to 4¾ inches in circumference. In both of the tulip advertisements referred to above respondents describe their bulbs as "medium size," when the record establishes that they were substantially less than medium size and, according to their own dimensions with respect to the \$1.69 offer, were more than 1 inch smaller than "small." Actually respondents' bulbs can best be described as planting stock not suitable for sale to the public.¹²

(b) Purchasers do not receive bulbs which generally will bloom the first season after planting.

The foregoing allegation concerns the same three offers: namely, the gladiolus bulbs and the 100 tulip bulbs for \$1.69 and \$1.98, respectively. As previously noted, respondents' gladiolus advertise-

¹² See note to Rule 5, Trade Practice Rules, Nursery Industry, Title 16, Part 34, C.F.R. (1957).

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ment described the bulbs as "blooming varieties" and stated that they would "produce a rainbow of blooms." Both of the tulip advertisements stated the bulbs were guaranteed to give "many blooms the first season and a full normal bloom the second season and many years thereafter." The complaint alleged that as a result of these advertisements purchasers expected to receive bulbs of the size generally sold in the industry which could be expected to bloom the first season after planting, but that in fact many of them would not bloom because the bulbs were immature planting stock or bulblets.

The misrepresentation with respect to gladioli bulbs is the more obvious, inasmuch as respondents specifically described them as "blooming varieties." At the request of the National Better Business Bureau, Mr. Dowd of the Long Island Horticultural Institute test planted 10 samples of over 1,000 bulbs of respondents' gladioli offer, with the result that only 59.8 percent of them bloomed. He testified that these were No. 6 bulbs, $\frac{3}{4}$ of an inch or larger in diameter,¹³ which is larger than the 1 inch circumference described in respondents' advertisement and of course considerably larger than the many found above to be less than 1 inch in circumference.¹⁴ A number of the expert witnesses testified that a large percentage of the size of gladiolus bulbs sold by respondents would not bloom the season after planting. Mr. Dowd said that about 35 percent of them would fail to bloom. Mr. Preston said that a majority of them would not bloom, while Mr. Neff said that 85 percent of them would not bloom. Even respondents' own expert, Mr. Van Dyke, admitted that No. 7 bulbs (less than $\frac{3}{4}$ inch in diameter) would not produce more than 75 percent blooms. Patently it is a misrepresentation to describe bulbs as blooming varieties when from 25 percent to more than 50 percent of them will not bloom.

Respondents throughout their brief contended their gladioli bulbs are No. 6's when the record shows in fact that the majority of them, even assuming them to be as large as represented, were No. 7's. Mr. Van Dyke testified that more than 80 percent of No. 6 bulbs could not be expected to bloom the first year. However, when questioned about No. 7's, he said that about 75 percent of them should bloom "if given good care." He made no such qualification with respect to the bloomability of No. 6's. Actually his experience with No. 7's as testified to later demonstrated a substantially lower percentage. He testified that he planted approximately 400,000 No. 7 bulbs turned over to him by respondents, and that 60 to 65 percent of them bloomed.

¹³ See Addendum, American Standard for Nursery Stock, Comm. ex. 41(a).

¹⁴ One inch in circumference equals less than $\frac{1}{4}$ inch in diameter.

Presumably, as a professional, Mr. Van Dyke gave these bulbs good care.

Respondents' brief with respect to the issue of the bloomability of the gladioli bulb offer seems somewhat confused. At page 75 thereof the statement is made with respect to the gladioli bulbs that no representations whatever were made other than that they would produce a rainbow of blooms, that they were 1 to 1½ inches in circumference and that if they did not flower 5 years they would be replaced. Again at pages 78 and 88, respondents' brief states that "nowhere in respondents' advertising is it represented that the purchaser will obtain 100 percent blooms from these \$1 a hundred gladioli bulbs." Yet on page 80 respondents' brief states that the advertisement plainly sets forth that the bulbs are the blooming variety. As previously found, the latter is correct and the former is not.¹⁵ The advertisement obviously represents that the gladioli bulbs are of blooming size. The fact is that a substantial percentage of such size bulbs cannot be expected to bloom the first season.

Respondents throughout their brief also contend that Mr. Dowd obtained 82.8 percent of blooms from his test planting when in fact only 59.8 percent of the bulbs he planted bloomed. Respondents arrived at this figure by computing the number of blooms against a total of 1,000 instead of the total planted by Mr. Dowd, which was 1,384. The point in issue is what percentage planted may be expected to bloom, and this percentage is indisputably 59.8 percent. It will further be recalled that these bulbs were all No. 6's or larger, whereas a majority in respondents' offer were No. 7's, which do not produce as large a percentage of blooms.

Respondents' brief at page 78 also contends that their gladioli advertisement is in conformity with the Commission's trade practice rules for the gladiolus bulb industry.¹⁶ However, rule 3 of said rules makes it an unfair trade practice to misrepresent directly or indirectly the ability of gladioli to bloom or flower, and also provides: "When industry products are of such immaturity as not reasonably to be expected to bloom and flower satisfactorily the first season of their planting, such fact shall be clearly and conspicuously disclosed in all advertisements and sales promotional literature relating to such products: *Provided, however*, That such disclosure need not be made when the size of the product is specified in accordance with the requirements

¹⁵ In this connection, Comm. ex. 11, a radio commercial used by respondents in 1955 to sell gladioli bulbs of exactly the same size, included the following representations: "But first, let me remind you these are not bulblets but actual bulbs in *blooming varieties* * * * Small but already 1 to 1½ inches in circumference * * * and these *blooming size* gladioli bulbs come in an assortment * * * ready for first *blooms this season* and many years ahead." [Emphasis added.]

¹⁶ Title 16, part 206, C.F.R. (1957).

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of section 206.2 and sales of the products are confined to nurseries and commercial growers for their use as planting stock." [Emphasis supplied.] All of the sizes specified for use in describing gladioli bulbs in the trade practice rules as well as in the addendum to the American Standard for Nursery Stock deal with diameters of the bulbs, whereas respondents' advertised size is the circumference, which necessarily is more than three times larger than the diameter. This in itself might well deceive the public accustomed to sizes specified by diameter. The American Standard for Nursery Stock states that gladioli are designated by inches in diameter according to the trade practice rules, and tulips are designated by circumference.

With respect to the two tulip bulb offers of \$1.69 and \$1.98, the record reveals that substantial numbers of such bulbs do not bloom the season after planting. It is a reasonable interpretation of respondents' advertisements concerning these bulbs that the purchaser would expect to get high quality, medium size, imported bulbs in sizes generally sold commercially to the public which could be expected to bloom the next flowering season. In fact what respondents ship is planting stock, a large percentage of which cannot be expected to bloom the first season. Again referring to the trade practice rules for the nursery industry,¹⁷ rule 5 provides that it is an unfair trade practice to deceive purchasers as to the ability of such products:

"(1) To bloom, flower, or fruit within a specified period of time;" and

"Note: Under this section, when flowering bulbs are of such immaturity as not reasonably to be expected to bloom and flower the first season of their planting, such fact shall be clearly and conspicuously disclosed in all advertisements and sales promotional literature relating to such products; *Provided, however,* That such disclosure need not be made when sales are confined to nurseries and commercial growers for their use as planting stock."

Respondents represented their \$1.69 bulbs to be healthy, hardy bulbs carefully selected from the finest planting stock of famous Danish gardens, a wonderful selection of medium size bulbs guaranteed to give many blooms the first season, and full normal blooms the second season and many years thereafter. Respondents' representations concerning the \$1.98 bulbs were substantially identical except instead of referring to them as a wonderful selection of medium size bulbs, they called them a prize selection of medium size bulbs. As previously found herein, with respect to tulip bulbs the term "medium" refers to bulbs 4 inches or larger in circumference, whereas both

¹⁷ Footnote 13, *supra*.

of these offers were smaller, the \$1.69 offer being described as 2½ inches in circumference. Obviously the use of the descriptive words, "medium size bulb," would lead the uninformed to conclude that the bulbs were of blooming size. The record establishes that very few blooms will result from tulip bulbs of the size contained in respondents' offer.

Substantially all of the witnesses including those called by respondents referred to the circumference of tulip bulbs in centimeters rather than in inches. Two and one-half inches, the circumference of the bulbs in the \$1.69 offer, equals 6+ centimeters. Mr. Nelis, an expert tulip grower from Holland, Michigan, who had raised tulips for 33 years, testified that a bulb at least 8 centimeters in circumference is needed to guarantee blooms, that the majority of 7 centimeter bulbs do not bloom, and that very few blooms can be expected from 6 centimeter bulbs. Mr. Boyer testified that bulbs at least 9 centimeters in circumference are necessary to insure blooms the following spring. Mr. Van Bourgondien, a native of Holland who has been raising tulips commercially for 35 years, testified that no blooms can be expected from 5 centimeter bulbs and very few from 6 centimeter bulbs. Mr. DeGroot, an expert called by respondents, testified that about 60 percent of 6-centimeter bulbs could be expected to bloom.

Mr. Metzen, a consumer witness called in support of the complaint, testified that he purchased and planted respondents' \$1.69 tulip collection, and the following summer approximately one-third of them came up with just one leaf and no flower. He observed them again the following year and there was no increase in the number of blooms. Possibly even more significant than the foregoing is the consumer survey conducted by the National Better Business Bureau of 300 of respondents' customers who purchased and planted the \$1.98 tulip offer in 1953. This survey was conducted during the summer of 1954, and repeated in the summer of 1955. The 1954 survey shows that of more than 10,000 bulbs planted by the various customers of respondents, an average of 39.4 percent grew blooms. The 1955 survey shows that the next year an average of 37.7 percent of the same bulbs grew blooms, including both those left in the ground the two seasons and those dug up and replanted in the fall of 1954. This rather extensive survey establishes that respondents' representations concerning the bloomability of these tulips are false.

Other evidence received in the record concerning the bloomability of such size tulip bulbs consisted of certain test plantings conducted by Mr. Dowd for the National Better Business Bureau. While the record establishes that these were tulip bulbs furnished by respondents,

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they were not the particular bulbs contained in the offers under consideration, because they were purchased by Mr. Dowd in 1951 prior to the respondents' sale of Danish tulip bulbs. However, Mr. Forrest Laug testified that the blooming capacity of tulip bulbs depends upon their size, not their origin, which is substantially the same as the testimony of the various experts. One of the samples of bulbs received from respondents and planted by Mr. Dowd consisted of bulbs ranging from 6 to 9 centimeters in size. A group of photographs, which portray the tulips planted by Mr. Dowd, was received in evidence as Commission's exhibit 70. These photographs graphically show the paucity of blooms which can be expected from tulip bulbs of this size. During the hearing ruling was reserved on respondents' motion to strike Mr. Dowd's testimony concerning this test planting because it dealt with tulip bulbs not contained in the offers set forth in the complaint. The motion is herewith denied because the evidence offered is relevant with respect to the bloomability of bulbs of the particular size involved, regardless of whether they are domestic, Holland, or Danish bulbs.

In addition to the foregoing, certain admissions by respondents are found in a reported decision of the U.S. Customs Court, C.D. 1546, volume 88, No. 34, page 30, 1953, received in evidence as Commission's exhibit 45. This was a suit brought by Michigan Bulb Co. against the United States before the Customs Court, and involved the issue of whether or not tulip bulbs ranging in size from 5 to 8 centimeters in circumference are known commercially as tulip bulbs. It was the contention of plaintiff therein, Michigan Bulb Co., and the court held, that tulips less than 9 centimeters in circumference are not known commercially as tulip bulbs. A number of the expert witnesses called by Michigan Bulb Co. in that case testified on behalf of Michigan Bulb Co. that tulip bulbs of less than 9 centimeters in circumference cannot be expected to produce flowers the first season after planting. One of such witnesses was Mr. Boyer, called in support of the complaint in this proceeding. The witnesses for Michigan Bulb Co. testified, and the court found that a bulb is not designated as a tulip bulb until it is capable of producing a flower, and that bulbs of less than 9 centimeters in circumference cannot be expected to flower the first year. Obviously the position of Michigan Bulb Co. in that proceeding is diametrically opposed to respondents' position herein. Under the well established exception to the hearsay rule, respondents' admissions in that case are admissible in evidence herein as admissions by a party.

The record establishes and it is found that purchasers of respondents' gladiolus offer and \$1.69 and \$1.98 tulip offers did not receive

bulbs of the size generally sold which could be expected to bloom the first flowering season after planting, as represented.

(c) The various tulip offers do not always produce flowers of assorted colors.

Respondents' \$1.69 tulip advertisement states that purchasers will receive an assortment of gorgeous colors. The \$2.98 tulip advertisement states that purchasers will receive 100 bulbs, 25 of each of 4 colors, red, yellow, white, and multicolor. A number of consumer witnesses called in support of the complaint testified to the contrary. Mrs. Sarantos, of South Bend, Ind., testified that she purchased tulip bulbs from respondents in 1953. When they bloomed the next spring they were all white with the exception of a few red ones. Mrs. Wilhelm of Ft. Wayne, Ind., testified that she purchased respondents' \$2.98 offer in the fall of 1953 and that they all came up white. She said that she had ordered mixed colors. She dug them up and returned them to respondents. They advised her that she could have another collection for one-half price. Mrs. Swift of South Bend, Ind., testified that she purchased 100 of respondents' tulip bulbs in the fall of 1953. When they bloomed in the spring they were all red. Respondents contend that these witnesses might have ordered tulip offers not represented to be in assorted colors, but the record reveals the contrary since each witness testified that that was the subject of her complaint.

The record establishes and it is found that purchasers of respondents' assorted color tulip offers did not receive bulbs which produced an assortment of different colored tulips, as represented.

4. The winter flower garden offer.

The complaint alleged and respondents admitted that with respect to their indoor winter flower garden offer they represented that if the purchaser was not entirely pleased respondents would refund the full price. Respondents' advertisement was received in evidence as Commission's exhibit 82. Among other things it stated: "We guarantee every bulb to be blooming size. If not thoroughly pleased, return for full purchase price refund." The parties stipulated the receipt in evidence of Commission's exhibits 74 through 82, inclusive, concerning a transaction in which a Miss Goetz of New York City ordered respondents' indoor winter flower garden during the winter of 1955, and when it turned out to be a complete failure, wrote to respondents requesting a cash refund. Miss Goetz advised respondents that she had planted the bulbs according to directions but that they were dry and dead when they arrived, none of them grew, and that in fact they disintegrated, so that there was nothing left to return.

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other than the cardboard or paper container and the soil therein. As Miss Goetz pointed out, there was no purpose in spending postage to return a paper container with dirt. Instead of a cash refund, respondents sent a replacement certificate. Miss Goetz advised respondents this was not satisfactory in view of their guarantee, and also advised the Commission by letter of the chain of events. Approximately 1 year later after a considerable exchange of correspondence between the parties respondents finally sent Miss Goetz a check refunding her purchase price.

The evidence in the record clearly establishes that Miss Goetz requested a refund and not a replacement certificate. Respondents pointed out that their letter offering to send Miss Goetz a refund of her purchase price if she returned to them the replacement certificate which they had sent to her approximately a year previously was written prior to their receipt of her letter advising them that she had informed the Commission of the matter and sent the certificate to it. While this is correct, it is undisputed that nearly a year expired between the time Miss Goetz originally requested a refund and respondents sent her a refund check, during which interval the complaint in this proceeding had been issued. Mr. Forest Laug testified that it was the policy of respondents to send replacement certificates for merchandise failures unless the purchaser specifically requested refund of the purchase price and returned the nursery stock. As previously pointed out, Miss Goetz advised respondents that the bulbs had disintegrated and there was nothing to return except the paper container and soil. The postage for a round trip of the container and soil from respondents to Miss Goetz was in excess of the purchase price of the offer.

Mr. Laug's testimony, the wording of the guarantee referred to above, and the foregoing sequence of events reveal that respondents' guarantee is misleading and deceptive. The guarantee itself advises the consumer: "If not thoroughly pleased, return for full purchase price refund." Of course a full price refund does not mean a replacement certificate. The wording of the guarantee is misleading further in that it does not specifically advise the consumer to return the merchandise. If that is what was meant, it would have been a simple matter to include a reference to the merchandise or nursery stock instead of the ambiguous phrase, "return for full purchase price refund."

Mr. Laug also testified that if the consumer stated that he did not want a replacement certificate but wanted his money back then he would get it back. However, this is contrary to the facts in the

Goetz transaction. From the beginning, Miss Goetz requested the return of her purchase price but respondents sent her a replacement certificate, even though they had been advised there was no merchandise left to return. While the testimony of Mr. Laug is somewhat confusing on this subject, it appears to be the policy of respondents to send replacement certificates to consumers who request refunds unless such consumers return the merchandise purchased even though it is dead and of no value. This, of course, would require consumers to spend the money necessary to ship the merchandise back to respondents. In the situation such as that of Miss Goetz where the nursery stock was dead and valueless, patently the average person would not spend the money necessary to return something which had no value, nor should they be required to do so in order to get a refund.

If respondents' policy concerning refunds and replacement certificates is as testified to by Mr. Laug, then the guarantee which appears in the various advertisements received in evidence concerning the 42-plant offer previously considered is false and misleading. All of those advertisements contain the following guarantee: "On arrival, deposit \$2.98 plus c.o.d. postage with postman on our guarantee you must be completely satisfied or your purchase price back." There can be no question but that respondents' policy as expressed by Mr. Laug applies also to the 42-plant offer. Mr. Laug was asked the specific question: "Well, what if I wrote to you and said, 'My crop died. My 42-rose shrub offer is all dead.' Then would you write back, and what would you tell me?" Mr. Laug answered: "I would say the chances are you would get a replacement certificate."

The record establishes and it is found that respondents falsely represented that purchasers would receive a full price refund if not satisfied.

5. The evergreen offer.

Respondents' advertisements concerning their evergreen offer represented that the evergreens were all certified by the State department of agriculture. The portion of the advertisement quoted in the complaint reads as follows: "Beautiful young evergreens for spring planting * * * All certified by State department of agriculture * * * Michigan Bulb Co., Grand Rapids 2, Mich." The complaint alleged and respondents denied that the foregoing was a representation that such evergreens had been grown in the State of Michigan and inspected by the department of agriculture of that State prior to shipping.

With respect to this issue, the facts are, as with the 42-plant offer, that evergreens were purchased by respondents from Smith in Ten-

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nessee, inspected by officials of that State, and shipped to the purchasers from the State of Tennessee. The certification of both offers was only that the stock had been inspected and was apparently free of insect pests and diseases, and had nothing to do with the quality of the plants. An analysis of the advertisement in question reveals that it is deceptive in that it leaves the impression that the evergreen trees have been grown in and certified by the State of Michigan. Technically, of course, there is no literally false statement in the advertisement inasmuch as the trees are certified by the State department of agriculture of Tennessee, and the advertisement does not specifically state that the trees are either grown in or inspected by the State of Michigan. However, the name and address of the company would clearly leave the impression that the certification and source is the State of Michigan. It is, of course, well established that representations, although literally true, may still in their overall effect be deceptive by what is reasonably implied.¹⁵

It is accordingly concluded and found that respondents falsely represented that the evergreen trees were grown in the State of Michigan and certified by the Michigan State Department of Agriculture.

6. Additional findings proposed by counsel supporting the complaint.

In addition to the findings hereinabove made, counsel in support of the complaint proposed several findings concerning which there were no allegations in the complaint, and consequently the representations involved therein were not put in issue by the pleadings in this proceeding. In connection with subsection (n) of subsection 2 of section B above dealing with the allegation that the purchaser does not receive certain plants illustrated in the color advertisements, counsel in support of the complaint also proposed a finding that as a result of such color illustrations respondents represented that the purchaser would receive a red-leafed maple tree, either a Japanese or Crimson King Maple, and a finding that the illustrations depicted plants more valuable than those actually shipped by respondents. In view of the fact that a finding has already been made above in subsection (g) that the purchaser does not receive two Norway red maples as represented, and because the complaint did not allege that by the color illustrations respondents represented that the purchaser would receive a red-leafed maple tree, it is unnecessary and inappropriate to make such a finding. The same conclusion applies to the proposed finding of misrepresentation of value by depiction inasmuch as in subsection (f) above it has been found

¹⁵ *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178; *P. Lorillard Co. v. F.T.C.*, 186 F. 2d 52 (C.A. 4, 1950); *Positive Products Co. v. F.T.C.*, 132 F. 2d 165 (C.A. 7, 1942).

that the plants shipped by respondents do not have the value represented by them, and such misrepresentation was not alleged in the complaint.

Counsel in support of the complaint also proposed a finding that respondents' invention of new names for plants, such as red snowberry, spirea crimson, and spirea rosea, as well as their use of names having only a regional application, such as rock rose for the plant hypericum, have the tendency and capacity to mislead and deceive prospective purchasers. This allegation was neither included in the complaint nor litigated at the hearing. While there is some evidence in the record that the aforesaid names were either invented by respondents or had a limited regional application, in the absence of such an allegation and adequate litigation of such an issue it would be a deprivation of due process to make such a finding. Obviously, nobody can tell what kind of proof might have been offered with respect to these matters if respondents had been confronted with such issues.

In addition, counsel in support of the complaint requested a finding that respondents' acts and practices as hereinabove found also violated rules 1, 2, 4, 5, 6, 8 and 11 of the Commission's trade practice rules for the nursery industry.¹⁹ There can be no question but what the practices hereinabove found are in violation of such trade practice rules as well as the trade practice rules of the Commission for the gladiolus bulb industry.²⁰ However, as found above, no such allegation was included in the complaint and the Commission's rules make clear that violations of the trade practice rules as such are not to be alleged as violations of the act, even though such rules also indicate that they are in fact violations of the act. Rule 2.22 of the Commission's rules of practice contains the following statement: "The group I rules are those which define practices which are considered by the Commission to be violative of laws administered by it." (The rules in question here are group I rules.) However rule 2.30 of said rules of practice provides as follows: "Formal complaint proceedings involving practices which are violative of trade practice rules charge violation of the statutory provision on which the rules are premised, and *do not charge violation of the trade practice rule.*" [Emphasis supplied.] Accordingly no such finding is made.

C. Respondents' Defense and Contentions

In addition to respondents' contentions concerning the merits of their representations considered above, respondents also contend

¹⁹ See footnote 13, *supra*.

²⁰ Title 16, part 206, C.F.R. (1957).

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that no order should be issued because there is no showing in the record that the public was actually misled by the various representations, and in any event respondents' guarantee of replacement or refund prevents injury to the public. Neither of these contentions has merit. It is well settled that where persons engage in unfair and deceptive representations of their products in commerce, the Commission may properly infer that such representations mislead the public into the purchase of such products, thereby unfairly diverting trade from competitors and causing substantial injury to competition.²¹

Aside from the fact that it has been found hereinabove that respondents' guarantees are false and misleading, it is well settled that a guarantee to refund the purchase price, even if literally true and fully lived up to, is no defense to or justification for misrepresenting a product to the public.²²

D. The Effect of the Unlawful Practices

The acts and practices of respondents as hereinabove found have had and now have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to such representations and thereby induce the purchase in commerce of substantial quantities of respondents' nursery products. As a result, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors, and substantial injury has been and is being done to competition in commerce.

CONCLUSIONS OF LAW

1. Respondents are engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the act.

2. The acts and practices of respondents hereinabove found are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the act.

3. As a result of the above-found acts and practices of respondents, substantial injury has been done to competition in commerce.

²¹ *F.T.C. v. Raladam Co.*, 316 U.S. 149 (1942); *Progress Tailoring Co. v. F.T.C.*, 153 F. 2d 103 (C.A. 7, 1946); *Herzfeld v. F.T.C.*, 140 F. 2d 207 (C.A. 2, 1944); *Brown Fence & Wire Co. v. F.T.C.*, 64 F. 2d 934 (C.A. 6, 1933).

²² *F.T.C. v. Algoma Lumber Co., et al*, 291 U.S. 67 (1934); *Fairyfoot Products Co. v. F.T.C.*, 80 F. 2d 651 (C.A. 7, 1935); *Capon Springs Mineral Water, Inc., et al v. F.T.C.*, 107 F. 2d 516 (C.A. 3, 1939).

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4. This proceeding is in the public interest, and an order to cease and desist above-found unlawful practices should issue against respondents.

5. Respondents have not, as alleged in the complaint, violated the act by representing, with respect to their perennial plant offer, that such perennial are of flowering size which will bloom the first season after planting, and with respect to the 42-rose plant offer, that such offer includes two hydrangea bushes, and a trumpet vine bearing orange blooms.

ORDER

It is ordered, That respondents Michigan Bulb Co., a corporation, and its officers; Gerald C. Laug, individually and as an officer of said corporation; Forrest Laug and Louis Laug, individually, as officers of said corporation and as co-partners trading and doing business as Holland Bulb Co.; and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of bulbs, bulblets, planting stock, corms, roots, plants, shrubs, trees, and other related items (hereinafter collectively referred to as nursery stock) in commerce, as "commerce" is defined in the act, do forthwith cease and desist from:

A. Misrepresenting directly or indirectly by description, depiction, failure to reveal or otherwise:

1. The name, common or botanical, of said nursery stock;
2. The species, genus, family, appearance, grade, size, maturity, age, color of bloom, extent of bloom, type of bloom, hardiness, condition, vigor, growth or physical characteristics of said nursery stock;
3. The type of testing, inspection or certification given said nursery stock;
4. The catalogue or retail value of said nursery stock; and
5. The origin or place where said nursery stock is grown.

B. Representing directly or indirectly by description, depiction, failure to reveal or otherwise, that:

1. Said nursery stock:
 - a. Is field grown unless such be the fact;
 - b. Has bloomed or flowered, unless such be the fact;
 - c. Is of blooming size or will bloom in the same season planted or any season thereafter unless such be the fact;
 - d. Is well branched, well rooted, live, healthy or in good planting condition, unless such be the fact and unless said stock is delivered to the purchaser in such condition;

e. Will be shipped in time for seasonal planting, unless such be the fact;

f. Has been tested and certified for condition or hardness by an accredited expert, unless such be the fact; and

g. Has been grown in the State of Michigan and inspected and certified by that State's department of agriculture unless such be the fact.

2. The purchaser's money will be refunded if the purchaser is not satisfied with the nursery stock received, unless such be the fact.

It is further ordered, That the allegations of the complaint that respondents falsely and deceptively represented their perennials to be of flowering size which would bloom the first season after planting, and their 42-rose plant offer to include two hydrangea bushes and a trumpet vine bearing orange blossoms, be and hereby are dismissed.

OPINION OF THE COMMISSION

By KERN, Commissioner:

Respondents have appealed from the hearing examiner's initial decision finding that they have engaged in unfair methods of competition and unfair and deceptive acts and practices in violation of the Federal Trade Commission Act substantially as alleged in the complaint heretofore issued in this proceeding. The order to cease and desist contained in the initial decision in substance would prohibit respondents from the use of various misrepresentations in connection with the sale and distribution of nursery stock. There is no dispute that the representations attacked in the complaint were, in fact, made. Respondents, however, deny that the representations were false, deceptive or misleading.

The initial decision in considerable detail digests, reviews and weighs the factual evidence of record as well as the expert and other testimony adduced. In view of our disposition of respondents' appeal, we deem it unnecessary to restate that evidence here.

The hearing examiner in his initial decision made definite and specific findings as to the facts, conclusions of law and included, as indicated, an order to cease and desist. On appeal the issues raised essentially are no different than those presented before the hearing examiner and resolved by him adversely to respondents. Believing, as we do, that the hearing examiner was correct in his resolution of those issues in an extensive initial decision, we abstain from a laborious restatement of such issues. Suffice it to say that, upon the basis of the whole record, including briefs in support of and in opposition to respondents' appeal and oral argument, the Commission has concluded

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that the hearing examiner's evidentiary rulings, his findings, inferences, and conclusions drawn therefrom, are fully and completely substantiated on the record and that the order to cease and desist contained in the initial decision is adequate and appropriate to dispose of this proceeding.

Accordingly, respondents' appeal is denied and the hearing examiner's initial decision is adopted as the decision of the Commission. An appropriate order will be entered.

Mr. Secrest did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal of respondents and adopting the initial decision as the decision of the Commission:

It is ordered, That respondents Michigan Bulb Co., a corporation, and Gerald C. Laug, Forrest Laug, and Louis Laug shall, within sixty (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 the order to cease and desist contained in the initial decision.

Commissioner Secrest not participating.

Complaint

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IN THE MATTER OF

AMERICAN PACKING COMPANY ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2(C) OF THE CLAYTON ACT*Docket 6904. Complaint, Oct. 7, 1957—Decision, Apr. 17, 1958*

Consent order requiring packers of canned salmon in Seattle, Wash.—making sales generally through both primary and subbrokers, each of whom received brokerage at the rate of $2\frac{1}{2}$ percent of the selling price—to cease violating sec. 2(c) of the Clayton Act by making sales direct to certain chain customers on which the price of the product was reduced by the approximate amount of brokerage normally paid, or 5 percent; by making sales to large chain customers where only one broker was used on which they allowed a lower price by approximately one-half the usual brokerage, or $2\frac{1}{2}$ percent; and by making numerous sales through buyers' own purchasing agents on which they allowed a discount in lieu of brokerage of $2\frac{1}{2}$ percent in the form of a lower price.

*Mr. Cecil G. Miles and Mr. John J. McNally for the Commission.
Johnson, Dafoe & Jonson, by Mr. Carl A. Jonson and Mr. B. F. Reno, Jr., of Seattle, Wash., for respondents.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have been and are now violating the provisions of subsection (c) of section 2 of the Clayton Act (U.S.C., title 15, sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent American Packing Co., hereinafter sometimes referred to as American or as respondent corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington with its principal office and place of business located at 711 Second Avenue, Seattle, Wash. Since its incorporation in the spring of 1950 respondent corporation has been and is now engaged in packing, selling and distributing canned salmon. Its sales volume during the year 1955 was in excess of \$1 million.

PAR. 2. Respondents John J. Theodore and Karl V. Sjoblom are individuals and officers of respondent corporation with their principal office and place of business located at 711 Second Avenue, Seattle, Wash. Respondent Theodore is president and owns 49 percent of