

Complaint

92 F.T.C.

IN THE MATTER OF

SAMUEL E. WOMACK, ET AL. T/A NURSERY BARN,
ETC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-2939. Complaint, Dec. 1, 1978 — Decision, Dec. 1, 1978

This consent order, among other things, requires three McMinnville, Tenn. firms engaged in the advertising and mail order sale of viable trees and nursery stock, to cease misrepresenting or making unsubstantiated claims regarding the growth, survival and maturity of their stock; or the existence of government standards and inspections for such products. They are required to make specified disclosures in future advertising; include all conditions and qualifications attached to advertised guarantees; enclose a copy of such guarantee with each purchase; fulfill obligations under those guarantees promptly; and make full refunds to customers whose orders have not been shipped in time for the planting cycle. The order additionally requires the companies to make proper restitution to eligible customers from July 1, 1975, whose orders had never been sent or had failed to survive shipment.

Appearances

For the Commission: *Ronald C. Cougill.*

For the respondents: *Jack Paller, McMinnville, Tenn.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), Morrison Nursery Advertising Company, Inc., and individuals Samuel E. Womack, as an officer of S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), and James E. Savage, as an officer of Morrison Nursery Advertising Company, Inc., and Samuel E. Womack and James E. Savage further doing business as Nursery Barn, Savage Farms Nursery, McMinnville Tree Farm, American Nursery and Seed Company, and Morrison Nursery Company, have violated provisions of said Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Corporate respondent S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), was a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office

and place of business located on Highway 55 in McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements for the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Corporate respondent Womack Nursery Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55 in McMinnville, Tennessee, and is engaged in the sale and offering for sale of trees and nursery stock and is under the exclusive control and direction of individual respondent Samuel E. Womack. Womack Nursery Company, Inc. is a successor corporation to S.W. Advertising Company, Inc. and McMinnville Tree Farm.

Corporate respondent Morrison Nursery Advertising Company, Inc. was a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55 in McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements for the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Individual respondent Samuel E. Womack at relevant times in the past has been an officer of corporate respondent S. W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.). Individual respondent Samuel E. Womack is currently an officer of corporate respondent Womack Nursery Company, Inc. Individual respondent James E. Savage at relevant times in the past has been an officer of corporate respondent Morrison Nursery Advertising Company, Inc. They formulated, directed and controlled the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their addresses are the same as the corporate respondents. Individual respondents are and have been engaged in the advertising, offering for sale, and mail order sales and shipment of nursery stock under the trade names of Nursery Barn, Savage Farms Nursery, McMinnville Tree Farm, American Nursery and Seed Company, and Morrison Nursery Company. All of the foregoing companies were located on Highway 55 in McMinnville, Tennessee.

PAR. 2. In the course and conduct of their businesses, respondents disseminate and cause to be disseminated certain advertisements in newspapers and magazines of general and interstate circulation and by various electronic media broadcasts transmitted in several of the

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States of the United States, and now cause and for some time last past have caused their products to be transmitted through the U.S. Mail and other interstate instrumentalities from their place of business in Tennessee to customers in various other states and have made substantial sales to purchasers in various other states, and maintain, and at relevant times in the past have maintained, a substantial course of trade in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 3. Typical and illustrative of the statements in said advertisements, but not all inclusive thereof, are the following:

Trees advertised in your area will grow in your area. It's guaranteed.

We will acknowledge all orders within the expected time for your order to arrive at the proper planting time in your area.

All orders will be acknowledged and shipped at the proper time.

The one tree experts agree will grow anywhere in the U.S.A.

Grows approximately 25-30 feet over a five year period.

Here is our ironclad 3 year guarantee: if by mere chance any of your trees fail to survive, all you have to do is return them to us and we will replace them absolutely free of charge for a three year period.

All items carry a COMPLETE SATISFACTION ON ARRIVAL GUARANTEE or we will REFUND or REPLACE any unsatisfactory item.

Here is our 2-way, ironclad guarantee:

1. If, upon arrival, you are not completely satisfied, then return for a full refund.
2. Free replacement, for any reason, up to three full years.

Each rose is verified by Gov't inspection to be a living plant. Each must bloom or it will be replaced free of charge.

3-way guarantee:

1. All shade trees regardless of number ordered will be 5 to 7 feet tall, and all bonus trees will be 4 to 6 feet. All shipping paid.
2. Trees advertised in your area will live in your area.
3. All trees are guaranteed to live and if by mere chance any fail to live, they will be replaced free of charge.

. . . beautiful shade tree . . . grows up to 5 and 6 feet a year. This 2 in 1 Scarlet Maple grows anywhere . . . It's guaranteed to grow . . . or money back.

Guarantee

We guarantee to any customer your organization sells to: Free replacement for 3

full years if by mere chance any of their trees fail to live. We will have their name in our records when your organization sends their order in.

PAR. 4. Through the use of such representations disseminated in print and electronic media in many of the several states, respondents have represented and now are representing directly or by implication that:

1. All trees and nursery stock advertised, offered for sale, or sold will grow and survive anywhere in the United States.
2. Trees such as Red Maple (*Acer rubrum*), Thornless Honey Locust (*Gleditsia triacanthos inermis*), and Weeping Willow (*Salix babylonica*) grow five to six feet per year and will be mature shade trees in five years.
3. Rosebushes shipped by respondents and received by the buyer are inspected by the government and verified through such inspection to be living plants and will bloom when planted.
4. A full and complete guaranty or warranty exists on ordered merchandise without condition or qualification.
5. Refund and replacement requests will be honored and the purchase price will be promptly refunded or a prompt replacement tendered.

PAR. 5. In truth and in fact:

1. Not all of the trees advertised are adaptable to the wide range of climatic conditions in the United States.
2. Red Maple (*Acer rubrum*), Thornless Honey Locust (*Gleditsia triacanthos inermis*) and Weeping Willow (*Salix babylonica*) trees do not average five to six feet of growth per year. In fact, under optimum conditions, the yearly growth rate for such trees is less than three feet.
3. Rosebushes are not inspected by the government to verify them to be living plants.
4. A full and complete unconditional guaranty or warranty does not exist. The buyer is obligated to return, at his own expense, the nursery stock for which a refund or replacement is requested.
5. Refund and replacement requests are not timely honored and payment of refunds in many instances is not made.

The statements and representations set forth in Paragraph Four were and are false, misleading and deceptive in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 6. In the course and conduct of their business, respondents have represented in advertisements, as hereinbefore described, the

existence of a "money back refund" and a replacement guaranty for two to three years, but have failed to:

1. Provide a copy of the guarantee or warranty with the shipment of trees and nursery stock. In many instances, purchasers are unable to exercise their rights under the offered guarantee or warranty due to lack of recollection of such terms which appeared in the advertisement some months prior to time of delivery of the ordered stock.

2. Adhere to the terms and provisions of the advertised guarantee or warranty. In certain instances, refund and replacement requests are not honored and performed by respondents and refunds and replacements are not made.

3. Disclose in a clear and conspicuous manner the necessary conditions precedent to obtaining a refund or replacement and the manner in which respondents will perform. In many cases, respondents have represented "free replacement" without disclosing in the same advertisement that return of the shipped nursery stock is an expense to the purchaser. Respondents' failure to disclose all conditions incident to and all expenses to be incurred by the purchaser is a failure to disclose material facts which, if known, would likely affect consumer decisions to purchase.

The aforesaid failures constitute unfair and deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 7. In the further course and conduct of their business and in furtherance of their marketing program, respondents in the advertising, offering for sale and mail order sales of nursery stock have engaged in the following additional unfair and deceptive acts and practices:

1. Conditioning a refund, replacement or other warranty offer to the time of product arrival. The average purchaser cannot determine the viability of dormant nursery stock and therefore is not likely to determine warranty coverage and to exercise the offered warranty provision.

2. In certain instances have labeled rosebushes incorrectly and such incorrect labeling is not discernible to the public under ordinary circumstances. Respondents do not employ and follow reasonable systems and procedures to assure the correct labeling of shipped rosebushes.

3. In certain instances have failed to ship the ordered trees and nursery stock to the purchaser within a reasonable time to insure

arrival for use in the planting and cultivation period nearest the date of the received order.

4. Have failed to provide purchasers with a notice of inability to effect timely shipment; that is, within the planting and cultivation period nearest the date of receipt of order.

5. Have failed to make prompt payment of refunds to purchasers when timely shipment is not made.

6. Have shipped and caused to be delivered trees and nursery stock which are not living or viable. As a result of having shipped or caused to be delivered trees and nursery stock which are not living or viable, respondents have failed to disclose in print and electronic media advertising information to enable the reader to realize that portions of mail order shipments of trees and nursery stock may contain trees and nursery stock which are dead or nonviable and will not survive. Such information is a material factor in the purchase decision and is material to determine the adequacy of any offered warranty.

Therefore, the acts and practices as set forth in Paragraph Seven hereof were and are unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 8. The use by respondents of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices has the capacity and tendency to mislead members of the purchasing public into the mistaken belief that said statements and representations are true, and to induce such persons to purchase from respondents substantial quantities of advertised merchandise.

PAR. 9. In the course and conduct of the businesses, and at all times relevant herein, respondents are in substantial competition in commerce with corporations, partnerships, firms and individuals in the mail order and retail merchandising of nursery stock.

PAR. 10. The acts and practices of respondents as herein alleged, 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 or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a

copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended;

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Corporate respondent S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), was a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located on Highway 55, McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements for the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Corporate respondent Womack Nursery Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55 in McMinnville, Tennessee, and is engaged in the sale and offering for sale of trees and nursery stock and is under the exclusive control and direction of individual respondent Samuel E. Womack. Womack Nursery Company, Inc. is a successor corporation to S.W. Advertising Company, Inc. and McMinnville Tree Farm.

Corporate respondent Morrison Nursery Advertising Company, Inc. was a corporation organized, existing and doing business under

and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55, McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements of the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Individual respondent Samuel E. Womack at relevant times in the past has been an officer of corporate respondent S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.). Individual respondent Samuel E. Womack is currently an officer of corporate respondent Womack Nursery Company, Inc. Individual respondent James E. Savage at relevant times in the past has been an officer of corporate respondent Morrison Nursery Advertising Company, Inc. They formulated, directed and controlled the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their addresses are the same as the corporate respondents. Individual respondents are and have been engaged in the advertising, offering for sale, and mail order sales and shipment of nursery stock under the trade names of Nursery Barn, Savage Farms Nursery, McMinnville Tree Farm, American Nursery and Seed Company, and Morrison Nursery Company. All of the foregoing companies were located on Highway 55 in McMinnville, Tennessee.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), Morrison Nursery Advertising Company, Inc., and Womack Nursery Co., Inc., corporations, their successors and assigns, and their officers, and Samuel E. Womack and James E. Savage, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of trees, nursery stock or any other product in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually or in any other manner, directly or by implication, that:

1. Advertised trees or nursery stock of any kind will grow and survive anywhere in the United States or in any specific geographic area of the United States unless respondents have a reasonable basis to conclude that such representation has a basis in fact and supported by reputable industry authority;

2. Trees, such as Red Maple (*Acer rubrum*), Thornless Honey Locust (*Gleditsia triacanthos intermis*), and Weeping Willow (*Salix babylonica*) or any other tree or nursery stock, under normal growing conditions, will grow five to six feet per year or at any other growth rate or will be mature shade trees or mature nursery stock in five years or in any other time period unless respondents have a reasonable basis to conclude that such representation has a basis in fact and is supported by reputable industry authority;

3. Rosebushes have been officially inspected for compliance with a government viability standard or that such a standard exists;

4. A prompt refund or replacement will be made unless respondents can establish the maintenance of business records sufficient to support a showing of compliance with all such representations; and

5. A full and complete guaranty or warranty without conditions or qualifications exists unless such is the fact.

B. Failing to include in each shipment of trees and nursery stock a written copy of any written guaranty or warranty advertised by respondents disclosing all terms and conditions, if any, and identity and address of guarantor.

C. Failing to promptly and fully perform all of their obligations under the terms of all warranties, whether express or implied.

D. Failing to disclose clearly and conspicuously in all advertisements representing a written guaranty or warranty, the manner in which respondents will perform and all the conditions, including the allocation of cost and expense, necessary for the prompt payment of a refund or replacement. Such disclosure shall be prominently displayed in close proximity to the representation of a guaranty or warranty and in all advertisements broadcast by radio or television, the above required disclosure shall be read at the end of the advertisement at a rate of speed at least as slow as the slowest part of the advertisement. Nothing in this order shall be construed to relieve respondents of their duty to comply with all present and future laws, regulations and rules dealing with warranties and guaranties.

E. Limiting any guaranty or offer to refund or replacement to the time of arrival of the ordered merchandise.

F. Mislabeling rosebushes and failing to employ and utilize

reasonable business systems and procedures to insure the correct labeling of the varieties of rosebushes shipped to the buyer.

G. Failing in each advertisement to disclose clearly and conspicuously the planting period appropriate for the geographic area in which the advertisement is published.

H. Failing to make shipment of viable trees and nursery stock for timely arrival; that is, in time for receipt during the current or next planting period appropriate for the geographic area in which the buyer orders shipment.

I. Failing to pay, without prior demand, and no later than twenty (20) days after the conclusion of the appropriate planting period for the ordered trees and nursery stock, a refund of all monies received from the buyer in the event timely shipment of viable trees and nursery stock is not made as referenced in Paragraph H. If partial orders are timely shipped, this paragraph shall require the refund of monies received only for the portion of the order not timely shipped.

J. Failing to include in all print (including but not limited to direct mail solicitations) and electronic media advertising wherein no express warranty or an express warranty offering other than a full refund of monies paid, is made the following verbatim notice: "WARNING: Due to the natural character of trees and nursery stock, mail order shipments may contain trees and nursery stock which are dead or non-viable and will not survive. Loss of a portion of any order of trees and nursery stock when ordered through the mail is not uncommon. Consult the warranty offered by any mail order nurseryman to determine the degree of protection afforded against such loss."

Said notice shall be prominently and conspicuously placed and in 10 point boldface print in proximity to such warranty and shall not be contradicted directly or by implication by any other statement in the advertisement.

It is further ordered:

A. That if respondents advertise at any time within two (2) years of the date this order becomes final in any newspaper, magazine or other printed media (exclusive of direct mail solicitations) or on radio, television or other electronic media, for the sale of trees and nursery stock, respondents shall place or cause to be placed, in a clear and conspicuous manner, in such media and in each print and electronic media where respondents advertised during the period of July 1, 1975 to the date this order becomes final, the following quoted

notice, causing said notice to appear or be broadcast in each said media on at least four (4) separate instances:

NOTICE TO PAST PURCHASERS of American Nursery and Seed Company, Nursery Barn, McMinnville Tree Farm and Morrison Nursery Company. In order to satisfy our past guarantees, we will honor and pay within thirty days of receipt all requests for refunds for purchases since July 1, 1975 if you received trees and nursery stock which did not survive or failed to receive your order. Please send proof of purchase with any request.

(Signature of applicable Individual Respondent)

B. That respondent shall pay, within thirty (30) days of receipt of request for refund, the full purchase price as evidenced by the purchaser's proof of purchase, without deduction, to all purchasers who purchased trees and nursery stock from respondents during the period July 1, 1975 to the date this order becomes final. *Provided, however,* that the total sum to be paid in restitution under this paragraph of the order shall not be greater than two hundred thousand dollars (\$200,000). Respondents shall evenly divide the refund payment responsibility for all requests for refunds for American Nursery and Seed Company, Nursery Barn, McMinnville Tree Farm and Morrison Nursery Company. Said payments of requested refunds shall be limited to those requests for refunds received within ninety (90) days of the date this order becomes final and when requests are accompanied by proof of purchase in the form of a cancelled check or money order receipt or both. *Further provided,* this obligation to refund shall be extended for each respondent beyond the date this order becomes final when that respondent begins advertising as described in Paragraph A above, and in that event, this obligation shall be limited to requests for refunds received within thirty (30) days of the last date of media advertising required in Paragraph A above, when accompanied by proof of purchase in the form of a cancelled check or money order receipt or both.

C. That respondents shall maintain and allow inspection and copying by the Federal Trade Commission records which show reasonable efforts to comply with the provisions of foregoing Paragraph A through B.

It is further ordered, That respondents shall, for a period of three (3) years subsequent to the date of this order:

A. Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order and any evidence of the results of such efforts, including all customer orders, complaints received and disposition of same,

records of all requests for refunds and replacements and disposition of same. Said records shall, upon reasonable notice, be made available to the Federal Trade Commission for inspection and copying.

B. Maintain records or other documentary proof establishing timely and accurate shipment of viable trees and nursery stock or other merchandise. Said records shall, upon reasonable notice be made available to the Federal Trade Commission for inspection and copying.

C. Maintain and furnish to the Federal Trade Commission, upon request, copies of all disseminated advertisements, along with:

1. Records disclosing the date(s) such advertisements were published;
2. Records disclosing the name and address of the newspaper, broadcast media, in which said advertisement was published; and
3. Scripts of each advertisement published.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten (10) years from the effective date of this order, each individual respondent shall promptly notify the Commission of each affiliation with a new business or employment or use of new trade style. Each such notice shall include respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein, 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 this order.

Interlocutory Order

92 F.T.C.

IN THE MATTER OF
FORD MOTOR COMPANY

Docket 9105. Interlocutory Order, Dec. 4, 1978

ORDER REQUESTING FILING OF ADDITIONAL BRIEFS

By motion of November 7, 1978, complaint counsel has requested that the Commission seek a preliminary injunction compelling Ford Motor Company to disclose certain facts concerning 1974-78 model year four-cylinder vehicles which complaint counsel alleges are afflicted with a latent defect resulting in premature camshaft/rocker arm wear. Ford subsequently filed an opposition to that motion and, in a supplement thereto filed on November 29, 1978, informed the Commission of certain steps it was taking to notify affected owners of the problem. Ford alleges that this action further supports Ford's position that the proposed injunction action would not be in the public interest. Ford further described its intended notification and adjustment program in a motion filed on November 30, 1978, in which it reiterated certain concerns regarding the possible occurrence of *ex parte* communications in violation of Section 4.7 of the Commission's Rules of Practice.

Before any action is taken with respect to complaint counsel's motion, and in order to assess Ford's contention that its intended notification and adjustment program indicates that the proposed injunction action is not in the public interest, the Commission would like to receive further information regarding the precise parameters of respondent's program including the existence of any conditions attached to that program.¹ The Commission particularly requests respondent to submit the text of the letter which Ford proposes to send to vehicle owners, indicating when such letter will be mailed. Ford should describe with specificity the categories of individuals to whom the letter will be sent, indicating whether prospective purchasers of new and used vehicles from Ford dealers will be notified. If respondent's intended rocker arm/camshaft notification and adjustment program differs from the program instituted in 1977 with respect to piston scuffing, the reason for such differences should be provided. The Commission also requests a copy of any instructions sent to Ford dealers advising them of the adjustment program, in addition to the mailgram attached to respondent's filing of November 3, 1978. Accordingly,

¹ While an oral hearing before the Commission would suffice to inform the Commission of the details of Ford's program without raising *ex parte* difficulties, it is the Commission's view that the requisite information can be obtained through additional briefs and that a hearing is unwarranted at this time.