

IN THE MATTER OF
JAMES KELLEY

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

Docket 1610. Complaint, Apr. 24, 1929—Decision, Apr. 7, 1930

Where an individual conducting a mail-order jobbing business in fountain pens, pencils, and specialties, purchased from manufacturers and resold to street fakers and peddlers, doing no manufacturing, though assembling certain of the pens dealt in, and with only a few employees, and a trade of about \$50,000 a year,

- (a) Falsely represented himself as a manufacturer and a large mail-order concern, with factory in Providence, and that persons should patronize him because of the saving of the middleman's profit thereby secured;
- (b) Sold pens with clip and lever branded "Iridium," with intent and effect of causing prospective purchasers and ultimate consumers to infer falsely that the points were tipped with said substance;
- (c) Supplied customers with fictitious price ring tags for said pens, bearing such figures as \$2.50, \$7, \$8, \$10, and others, and furnished customers with coupons advertising pens at a large reduction, for a short time only, from a so-called much larger "regular price," in supposed partial consideration of surrender of the coupons, with intent and effect of causing prospective customers or customers of his vendees to believe they were buying a high-grade pen at a greatly reduced price, the facts being that the pens were of poor quality and low cost, sold by him at \$60, \$72, and \$78 per gross, and that the implied price reductions were fictitious;
- (d) Represented his pen points as "Warranted 14K" and as "Warranted," and sold the higher priced pens with the mountings stamped "14K Water-son," the facts being that said points were not gold, but brass, thinly gold plated, and mountings were of "goldline," or brass, thinly coated with gold wash; and
- (e) Simulated barrel levers and cap clips of the L. E. Waterman Co., and stamped levers and cap clips of his pens and/or pen points "Waterson," with intent and effect of misleading the buyer and ultimate consumer into believing said inferior articles to be the "Waterman pens" made and sold by the L. E. Waterman Co., New York City;

With intent, capacity, and direct tendency to mislead customers and/or the buying public and with the effect in many instances of so misleading and deceiving such customers and public:

Held, That such acts and practices, under the conditions and circumstances set forth, were to the prejudice of the public and competitors and constituted unfair methods of competition.

Mr. Edward L. Smith for the Commission.

Koenig, Bachner & Koenig, of New York City, for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, an individual engaged in a mail order jobbing business in fountain pens, pencils, and novelties with misrepresenting business status or advantages, misbranding or mislabeling, misrepresenting prices and advertising falsely or misleadingly in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, engaged as above set forth, in the sale of fountain pens of poor quality and low cost, with barrel levers and/or cap clips simulating those of the L. E. Waterman Co., and with pen points composed of brass thinly gold plated, and mountings of the higher cost pen made of brass thinly coated with gold wash, and not manufacturing any of the articles sold by him, though assembling and setting in place certain parts of the fountain pens dealt in by him, employing very few persons and with a trade approximating \$50,000 in sales annually, represented himself in his advertisements as a manufacturer of the articles sold by him, with a factory at Providence, and as a large mail order concern and that persons desiring articles dealt in by him should deal with him for the reason, among others, of saving the middleman's profit on the articles concerned.

Respondent further, as charged, stamped on the levers of the fountain pens sold by him and/or on the pen points of those sold at the higher prices, the name "Waterson", with the purpose and effect of misleading the buyer and ultimate consumer into believing that said pens, as a matter of fact of inferior construction as compared with the "Waterman" pens, i. e., those made by the L. E. Waterman Co., with which concern respondent has no relation, were those of that organization, represented his pen points and stamped certain mountings, respectively, made of brass thinly gold plated or coated with gold wash, as "Warranted 14K", "Warranted" and "14K Waterson", respectively, and stamped the brand "Iridium" on the clip and/or the lever of said fountain pens, with the intent and effect of implying and causing the prospective buyer and ultimate consumer of such pens to infer that the pen points thereof, tipped with no element, compound or solution whatever, were tipped with iridium.

Respondent further, as charged, with the purpose and effect of causing prospective customers of his pens, or their vendees, sold to them at \$60, \$72, and \$78 per gross, to believe that they were buying a high-grade pen at a greatly reduced price from the usual price,

supplied customers with fictitious price tags in the shape of a ring, to encircle said pens, bearing the amounts \$2.50, \$7, \$8, \$10, and others; assisting and advising the resale of said pens to consumers by the use of such price tags and fictitious prices placed thereon, and furnishing customers, for the aforesaid purpose and with the aforesaid effect, with coupons advertising that immediate purchasers would obtain fountain pens at a large reduction, for a short time, from a so-called "regular price", stated as of a much greater amount than the prices at which offered, "in supposed partial consideration of the surrender of the said coupons", the fact being that the implied price reductions are fictitious.

According to the complaint, the aforesaid acts, practices, and methods "are all intended to mislead the customers of respondent and/or the buying public to whom respondent's customers resell the goods purchased from respondent", and "the said acts, practices, and methods of competition have the capacity and the direct tendency to mislead and deceive the trade and the public, and in many instances have so misled and deceived the aforesaid" and "are unfair to competitors of respondent and to the public within the intent and true meaning of the aforesaid Federal Trade Commission Act."

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission issued and served its complaint upon the respondent, James Kelley, charging him with the use of unfair methods of competition in commerce in violation of the provisions of section 5 of said act of Congress.

Thereupon the said respondent entered his appearance and filed his answer to the complaint, and thereafter a stipulation of facts regarding certain of the issues raised between the said complaint and the said answer was made between Messrs. Koenig, Bachner & Koenig, attorneys for the said respondent, and W. T. Kelley, assistant chief counsel of the Federal Trade Commission, and Eugene W. Burr, attorney for the Commission, subject to the approval of the Commission, which said stipulation is hereby approved by the Commission, and thereafter a hearing on the other issues raised between the said complaint and answer and not so stipulated was held before an examiner of the Commission duly appointed, and testimony, docu-

mentary evidence, and exhibits were offered and received and duly filed in the office of the Commission; thereafter the said proceeding came on for final hearing before the Federal Trade Commission on such complaint and answer, on such stipulation and on the testimony, evidence, and exhibits on file and on the brief of counsel for the Commission (the respondent having failed and neglected to file a brief), and the Federal Trade Commission having duly considered the said stipulation of facts, testimony, and exhibits on file and the brief of counsel for the Commission, and being fully advised in the premises now makes this its report and states its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent is engaged in New York City, N. Y., in a mail order jobbing business in fountain pens, pencils, and specialties, buying the same from manufacturers and reselling to street fakers and peddlers, causing his said goods to be transported from New York City, N. Y., by mail and express to customers who are located in various States and sections of the United States. Respondent advertises, in order to secure the said customers, in that certain weekly magazine known as the Billboard. In selling his said commodities, respondent is in competition with manufacturers and others likewise engaged in transporting their products, competing with the products of respondent, from their respective places of business to customers located in States other than the respective States in which said competing concerns have their principal places of business and manufacture.

PAR. 2. At various and numerous times during the period of five years and upwards, prior to April 24, 1929, respondent has engaged in certain practices hereinafter set forth in paragraphs 3, 4, 5, 6, and 7 hereof.

PAR. 3. Respondent has represented that he is a manufacturer of the pens, pencils, and specialties which he sells, and has represented that he has a factory at Providence, R. I., whereas in truth and in fact he is not a manufacturer of any article, but is engaged in selling goods purchased from others. Respondent has, however, assembled and set into place certain parts belonging to the fountain pens in which he deals. Respondent also represents that his is a large mail-order concern, whereas, in truth and in fact he employs very few persons, and his trade approximates \$50,000 in sales annually. The respondent also has falsely and in a misleading manner represented that persons desiring articles belonging to respondent's lines should deal with respondent for the reason, among others, that

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the buyer would thereby save the middleman's profit on these articles, whereas respondent himself is but a middleman or jobber of the products he sells.

PAR. 4. Respondent has sold pens under the brand "Iridium" stamped on the clip and the lever of the fountain pens sold by him for the purpose and with the effect of implying and causing the prospective buyer and the ultimate consumer of the fountain pens sold by him to infer that the pen point of respondent's pens are tipped with iridium, whereas in truth and in fact said pen points are not tipped with iridium or any other element, compound or solution whatever.

PAR. 5. The fountain pens sold by respondent are of a poor quality and low cost. The respondent sells them at \$60, \$72, and \$78 per gross. For the purpose and with the effect of causing prospective customers of the said fountain pens or those to whom the respondent has sold the said fountain pens to believe that the said customers are buying a high-grade fountain pen at a price greatly reduced from the usual price thereof, the respondent supplies his customers with fictitious price tags in the shape of a ring to encircle said fountain pens bearing the amount \$2.50, \$7, \$8, \$10, and others. Respondent has assisted, abetted and advised the resale of the fountain pens sold by him as aforesaid to customers thereof by the use of the said price tags and fictitious prices placed thereon. Moreover, for the said described purpose and with the said described effect respondent has furnished his customers with coupons advertising that immediate purchasers would obtain fountain pens at a large reduction for a short time only, from a so-called regular price stated to be of a much greater amount than the prices offered in supposed partial consideration of the surrender of the said coupons. Said implied price reductions are fictitious.

PAR. 6. Respondent has represented his pen point as "Warranted 14K", and as "Warranted", whereas in truth and in fact said pen points are not gold, but are brass thinly gold plated. Moreover, the mounting of the pens sold by respondent at the said higher prices made by respondent have been stamped "14K Waterson", whereas in truth and in fact said mountings are of so-called "goldine" or brass thinly coated with gold wash.

PAR. 7. Respondent has caused to be stamped on the lever and cap clips of the fountain pens sold by him, and/or on the pen points on certain of the said pens the name "Waterson", with the purpose and with the effect of misleading the buyer and the ultimate consumer into the impression or belief that said fountain pens are of that brand of fountain pens known and sold as "Waterman" foun-

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tain pens manufactured and sold by that certain concern manufacturing and selling fountain pens known as the L. E. Waterman Co., New York City; whereas in truth and in fact the said L. E. Waterman Co. is not the maker of any of the pens sold by respondent, which latter are of inferior construction as compared with the "Waterman" fountain pens, nor has respondent any connection with, or relation to the said L. E. Waterman Co., nor has respondent ever sustained any such connection or relation. Moreover, respondent, in the barrel lever and/or cap clips of the pens sold by him in other ways simulates the barrel levers and cap clips of the said L. E. Waterman Co.

PAR. 8. The acts, practices, and methods of competition of respondent described in paragraphs 3, 4, 5, 6, and 7 hereof, are all intended to mislead the customers of respondent and/or the buying public to whom respondent's customers resell the goods purchased by them from respondent. The said acts, practices, and methods of competition have the capacity and the direct tendency to mislead and deceive the customers of respondent and the buying public to whom respondent's customers resell, and in many instances have so mislead and deceived respondent's customers and the buying public.

CONCLUSION

The said acts and practices of the respondent under the conditions and circumstances set forth in the foregoing findings are unfair to, and to the prejudice of, the public and respondent's competitors, and are unfair methods of competition in commerce and constitute violations of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes".

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission on the complaint of the Commission, the answer of the respondent, a stipulation of certain facts entered into between the respondent through his attorneys, Koenig, Bachner & Koenig, and the Commission through its assistant chief counsel, W. T. Kelley, and Eugene W. Burr, attorney for the Commission, and testimony and evidence submitted, and the Commission having made its findings as to the facts and entered its conclusion that the respondent has violated section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

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It is now ordered, That respondent, James Kelley, his representatives, agents, servants, and employees forthwith cease and desist from—

(1) Representing that he is a manufacturer of fountain pens, pencils, and specialties, until and unless said James Kelley engages in the actual manufacturing of fountain pens, pencils, and specialties;

(2) Representing that the business of the said James Kelley is that of a large mail order concern, unless and until the volume of business done by the said James Kelley is such as is usually done by a large mail order concern;

(3) Representing that purchasers from the said James Kelley save the "middleman's profit", until and unless said James Kelley manufactures and sells directly to his customers such articles manufactured entirely by him;

(4) Using the name "iridium" on any part of fountain pens sold by him, until and unless the pen points of such fountain pens are tipped with iridium;

(5) Supplying his customers with fictitious price tags, in the shape of rings to encircle said fountain pens, bearing the figures \$2.50, \$7, \$8, \$10, or any other sum, and supplying his customers with fictitious price tags in any other form.

(6) Assisting, abetting, and advising by the use of fictitious price tags and fictitious prices the resale by his customers of fountain pens sold by him to them;

(7) Furnishing his customers with coupons advertising that ultimate purchasers of fountain pens from such customers may obtain such fountain pens at a large reduction for a short time only from a so-called "regular price", stated in such coupons to be of a much greater amount than the price asked in pretended partial consideration of the surrender of said coupons;

(8) Representing the pen points of his fountain pens as being "Warranted 14K", "Warranted", or "14K", until and unless said pen points are 14 carat gold.

(9) Using as a trade name for his fountain pens the name "Waterson" or any other name in sound or appearance simulating the name "Waterman".

(10) Simulating barrel levers and/or cap clips or any other parts of fountain pens manufactured by L. E. Waterman Co.

And it is hereby further ordered, That said respondent, James Kelley, shall within 60 days from service upon him of this order, file with this Commission a report in writing setting forth in detail the manner and form in which he has complied with the order by this Commission herein set forth.

Syllabus

IN THE MATTER OF

ALBANY BILLIARD BALL COMPANY, F. GROTE & HUBBELL COMPANY, INC., AND PORTLAND BILLIARD BALL COMPANY

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

Docket 1530. Complaint, June 9, 1928—Decision, April 12, 1930

Where a corporation engaged as second largest manufacturer and distributor in the sale of composition billiard and pool balls; the exclusive distributor of such corporation; and a third company, newcomer in the field, engaged in keen competition with said corporation and distributor;

- (a) Entered into and abided by an agreement whereby (1) said company and newcomer should furnish said distributor with its requirements of less than regulation size balls and discontinue manufacture and sale of the regulation size in the United States, (2) said corporation should discontinue manufacture and sale of other than the regulation size and license said company to manufacture under said corporation's patent, secure from suit for any possible infringement, and (3) said distributor should pay to said company a commission of \$2.11 on each set of regulation size balls made by said corporation and sold for the domestic trade exclusively by and through said distributor; to the end that "all concerns interested, might make a fair profit rather than to continue the cutthroat competition that has been going on for the past three years"; and
- (b) Entered into and abided by an agreement whereby (1) said company agreed to discontinue sale of regulation size balls in export trade, and (2) said corporation agreed to pay to said company a sum equal to 25 per cent of the profits realized by it, said corporation, on its export business in the products in question, all for the purpose of arriving "at some method of eliminating competition in England", in which country and its colonies the two were particularly engaged in active export competition with one another;

With the result that competition theretofore existing between and among said various concerns in the products involved in the United States and abroad was eliminated, customers were deprived of the benefits thereof, theretofore enjoyed by them, and compelled to pay higher prices than theretofore paid and than they would have paid in the absence of said agreement first above set forth and in the event of the continuance by said concerns of manufacture, sale, and distribution as theretofore carried on, flow of commerce in such products in the channels of interstate and foreign trade was substantially and unduly hindered, and wholesale and retail distributors of composition billiard or pool balls, competitors of the aforesaid various concerns, and the general public were injured:

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition in interstate commerce.