

Syllabus

IN THE MATTER OF
L. E. WATERMAN COMPANY

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

Docket 4617. Complaint, Oct. 17, 1941—Decision, May 3, 1945

Where a corporation, engaged in the manufacture and interstate sale and distribution of fountain pens and mechanical pencils, including its "100 Year Pen"; making use of a purported guarantee, set forth on a card included in the individual container of said pen, which read "Waterman's HUNDRED YEAR PEN, identified by the words: 'Waterman's Hundred Year Pen' on the point, is guaranteed for one hundred (100) years except against loss or wilful damage, and no charge will be made for putting it in good writing condition at any time within one hundred years from date of purchase provided the pen, complete with all damaged parts, is sent to our factory accompanied by a postage, handling and insurance charge of 35¢ . . ."—

Represented, directly or by implication, through the use of said "Guarantee" and the words "Waterman's Hundred Year Pen" on the pen point, and by said trade-name "100 Year Pen" and the statements "100 Year Guarantee," "Guaranteed for 100 Years," "Guaranteed for a Century" and others similar thereto in advertisements in newspapers, magazines and other publications of general circulation and in catalogs, circulars and other advertising media, that its said pens were unconditionally guaranteed for one hundred years, that is, that if for any reason other than wilful damage or abuse the pen should fail to give satisfactory service for such period of time, it would be repaired or replaced by respondent without charge; and failed to avoid the misleading effect of such representations through the later inclusion in its advertisements, usually in small type and frequently at or near the bottom, of a statement reading, "Waterman's 100 Year Pens are guaranteed for a century against all but loss or wilful damage if returned to factory with 35¢ to cover postage, handling and insurance";

The facts being that in view of the service charge imposed by it, its pen could not properly be represented as guaranteed for one hundred years or for any other period of time; the purported guarantee was not in fact a guarantee of the pen but merely a contract whereby it agreed that for a period of one hundred years it would make necessary repairs and adjustments to the pen at the flat rate of thirty-five cents each time the pen was returned for such service, and the most that could be said of the agreement was that it was a guarantee of repair service on the pen;

With tendency and capacity of misleading and deceiving a substantial portion of the purchasing public into the erroneous belief that its pens were unconditionally guaranteed for one hundred years, and to cause such public to purchase substantial quantities of its pens as a result thereof:

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

As respects the question of the misleading effect of advertisements by a seller of its "100 Year Pen," featuring said name together with statements such as "Guaranteed for One Hundred Years" and "Guaranteed for a century" which included, usually in small type and at or near the bottom the statement "Waterman's 100

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Year Pens are guaranteed for a century against all but loss or willful damage if returned to factory with 35¢ to cover postage, handling and insurance": Latter statement did not avoid the misleading effect of the aforesaid representations since ordinarily it would escape the attention of the reader, and even were it displayed prominently, it would still be insufficient, being inconsistent with and contradictory of the representations that the pen was unconditionally guaranteed for one hundred years; and the imposition of a charge for keeping the pen in usable condition was in direct conflict with its representation that the pen was unconditionally guaranteed for one hundred years.

Before *Mr. Andrew B. Duwall*, trial examiner.

Mr. Karl Stecher for the Commission.

Hughes, Hubbard & Ewing, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that L. E. Waterman Company, a corporation, hereinafter referred to as the respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, L. E. Waterman Company, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business at New York, N. Y. It is now, and has been for more than one year last past, engaged in the business of manufacturing and selling fountain pens and pencils. It causes said fountain pens and pencils, when sold, to be transported from its place of manufacture in New York, N. Y., or from some other distributing point, to the purchasers thereof at their respective points of location in States other than the State from which said fountain pens or pencils are shipped, and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said fountain pens and pencils in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its aforesaid business, and for the purpose of inducing the purchase of certain of its fountain pens, respondent has caused various statements and representations relative to the quality and durability of said fountain pens to be inserted in advertisements in newspapers, magazines and other publications having a general circulation throughout the various States of the United States and in the District of Columbia. Among and typical of said statements and representations relative to said fountain pens are the following:

W A T E R M A N ' S
100 YEAR PENS

* * *

Waterman's new 100 year pen!

* * *

The *only* pen guaranteed 100
years against all but loss or
willful damage.

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WATERMAN'S
100 YEAR PEN

* * *

it's guaranteed 100 Years

No statement is made in these advertisements that any service charge will be exacted as a condition to the performance of this guarantee.

There is prominently featured in the top of boxes in which respondent's "Hundred Year Pens" are displayed to the public by dealers a card which reads:

W A T E R M A N ' S
100 YEAR
GUARANTEE

On the lower right hand end of this card is a gold seal on which are impressed the words: "Waterman's Hundred Year Pen." Beneath this seal is a blue ribbon. In small type at the bottom of the card are the words: "See other side." On the other side, or back side, is the following:

WATERMAN'S HUNDRED YEAR PEN, identified by the words: "Waterman's Hundred Year Pen" on the point, is guaranteed for one hundred (100) years except against loss or wilful damage, and no charge will be made for putting it in good writing condition at any time within one hundred years from date of purchase provided the pen, complete with all damaged parts, is sent to our factory accompanied by a postage, handling and insurance charge of 35¢.

* * *

The above quotations and representations are not all-inclusive, but are merely illustrative of the type and character of those used by respondent in advertising its fountain pens which it allegedly guarantees for one hundred years.

PAR. 3. Through the use of the aforesaid statements and representations by respondent relative to its fountain pens, and others of similar import or meaning not herein set out, respondent represents directly, or by implication that:

1. Said fountain pens are of such superior quality and durability that they will last 100 years without the necessity of repair or adjustment.

2. Said fountain pens are guaranteed for 100 years.

The aforesaid statements and representations so made and used by respondent are false, misleading and deceptive. Respondent's said fountain pens are not of such superior quality and durability that they will last 100 years, without the necessity of repair or adjustment. Said fountain pens are not guaranteed for 100 years. Whenever one of said fountain pens is sent to respondent for adjustment, respondent exacts a charge of 35¢, purportedly for postage, insurance and handling. This charge is made no matter how insignificant the repair or adjustment may be. Respondent's purported guarantee is in no sense a genuine guarantee for 100 years, nor is it a guarantee for any particular time, or at all. It is in fact merely a contract whereby respondent agrees with the purchaser of one of said fountain pens to make necessary repairs and adjustments at a flat rate of 35¢ each time a pen is sent to it for such service, for a period of 100 years.

PAR. 4. The aforesaid acts and practices of the respondent in connection with the advertising and sale of its aforesaid fountain pens had, and now have, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the aforesaid false and misleading representations are true, and into the purchase of substantial quantities of respondent's fountain pens because of such erroneous and mistaken belief so induced.

PAR. 5. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on October 17, 1941, issued and subsequently served its complaint in this proceeding upon the respondent, L. E. Waterman Company, a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. After the filing of respondent's answer, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the complaint, the answer thereto, testimony and other evidence, report of the trial examiner upon the evidence and the exceptions to such report, briefs in support of and in opposition to the complaint, and oral argument; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, L. E. Waterman Company, is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located in New York, N. Y. Respondent is now, and for many years last past has been, engaged in the manufacture and sale of fountain pens and mechanical pencils.

PAR. 2. Respondent causes and has caused its fountain pens and pencils, when sold, to be transported from its place of business in the State of New York, or from some other distributing point, to the purchasers thereof at their respective locations in various States of the United States other than the State from which such products are shipped, and in the District of Columbia. Respondent maintains and has maintained a course of trade in its products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In 1939, respondent adopted for its higher-priced fountain pens a new type of holder or barrel, which was regarded by it as possessing unusual strength and durability. Respondent designated this pen as its "100 Year Pen," and also adopted the policy of "guaranteeing" the pen

for one hundred years. Since that time the pen has been widely advertised by respondent by means of advertisements inserted in newspapers, magazines and other publications having general circulation throughout the United States, and also by means of catalogs, circulars and other advertising media distributed among purchasers and prospective purchasers throughout the nation. In all of these advertisements the trade name "100 Year Pen" is featured, as well as statements such as "Guaranteed for 100 Years" and "Guaranteed for a Century." The name "Waterman's Hundred Year Pen" also appears on the point or nib of the pen.

Each pen is packed by respondent in a separate box for display to the public, and in the top of this box is a card which bears on the exposed side the legend, "Waterman's 100 YEAR Guarantee." At the lower right-hand corner of this side of the card there is attached a gold-colored seal which bears the words, "Waterman's Hundred Year Pen." In small type at the bottom of the card are the words, "See Other Side." On the reverse side of the card is the purported guarantee, which reads as follows:

Waterman's HUNDRED YEAR PEN, identified by the words: "Waterman's Hundred Year Pen" on the point, is guaranteed for one hundred (100) years except against loss or wilful damage, and no charge will be made for putting it in good writing condition at any time within one hundred years from date of purchase provided the pen, complete with all damaged parts, is sent to our factory accompanied by a postage, handling and insurance charge of 35¢.

Charge will be made for any missing parts, but not for the repair or replacement of any defective or broken parts.

This guarantee is rendered void if any parts other than genuine Waterman's parts are fitted to this pen but it may be reinstated by such substituted parts being replaced by us at our regular repair parts prices.

Date of Purchase.....

Authorized Dealer.....

L E WATERMAN COMPANY
344 Hudson St., New York, N. Y.

As indicated above, a service charge of 35 cents is made by respondent each time the pen is returned to it for repair or adjustment. The record shows that the servicing of the pens is done by respondent at a loss, as the average cost of servicing each pen is approximately 47 cents, exclusive of the cost of new parts.

Formerly, respondent's advertisements made no reference to the service charge, but it is now respondent's policy to include in all advertisements a statement reading substantially as follows:

Waterman's 100 Year Pens are guaranteed for a century against all but loss or wilful damage if returned to factory with 35¢ to cover postage, handling and insurance.

This statement is usually in small type and frequently appears at or near the bottom of the advertisement rather than in the principal portion thereof. In some of the advertisements the statement is preceded by an asterisk, which refers to the representation as to the guarantee in the body of the advertisement.

PAR. 4. The Commission finds that through the use of the trade name "100 Year Pen" and of the statements "100 Year Guarantee," "Guaranteed for 100 Years," "Guaranteed for a Century" and others of similar

import in connection with its pens, respondent represents, directly or by implication, that its pens are unconditionally guaranteed for one hundred years—that is, that if for any reason other than wilful damage or abuse the pen should fail to give satisfactory service for such period of time, it will be repaired or replaced by respondent without charge.

PAR. 5. Respondent concedes that only in rare instances, if ever, will the pens last one hundred years without repair or adjustment, and the record affirmatively shows that every year many of the pens are returned to respondent for necessary servicing, repair, or replacement of some part of the pen. At the time of the hearings the number of pens which were being returned for such purposes was approximately three hundred per month, and the number was increasing steadily.

In view of the service charge imposed by respondent, its pens cannot properly be represented as guaranteed for one hundred years or for any other period of time. The purported guarantee is not in fact a guarantee of the pen but is merely a contract whereby respondent agrees that for a period of one hundred years it will make necessary repairs and adjustments to the pen at the flat rate of 35 cents each time the pen is returned to respondent for such service. The most that can be said of the agreement is that it is a guarantee of repair service on the pen. It is in no sense a guarantee of the pen itself.

PAR. 6. The Commission therefore finds that the representations made by respondent with respect to its pens, as set forth in paragraphs 3 and 4 hereof, are erroneous and misleading.

Nor is the misleading effect of respondent's representations avoided by the insertion in the advertisements of the statement (set out in paragraph 3 above) with respect to the service charge. As heretofore pointed out, this statement usually appears in small type and frequently occupies an inconspicuous position in the advertisement. Ordinarily, it would escape the attention of the average reader. Even were it displayed prominently, however, the statement would still be insufficient, because it is inconsistent with and contradictory of the representations in the advertisement that the pen is unconditionally guaranteed for one hundred years. The imposition of a charge for keeping the pen in usable condition is in direct conflict with respondent's representation that the pen is unconditionally guaranteed for one hundred years.

PAR. 7. The use by respondent of these erroneous and misleading representations has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that respondent's pens are unconditionally guaranteed for one hundred years, and the tendency and capacity to cause such portion of the public to purchase substantial quantities of respondent's pens as a result of the erroneous and mistaken belief so engendered.

CONCLUSION

The acts and practices of the respondent, as herein found, are all to the prejudice of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testi-

mony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and the exceptions to such report, briefs in support of and in opposition to the complaint, and oral argument; and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, L. E. Waterman Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of respondent's fountain pens in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Hundred Year," "100 Year," "100 Year Guarantee," "Guaranteed for 100 Years," "Guaranteed for a Century," or any word or words of similar import, alone or in conjunction with any other word or words, to designate, describe, or refer to respondent's pens, or otherwise representing, directly or by implication, that such pens are unconditionally guaranteed for one hundred years, unless respondent does in fact make, without expense to the user, any repairs or replacement of parts which may be necessitated during such period of time by any cause other than wilful damage or abuse.

2. Representing, directly or by implication, that respondent's pens are unconditionally guaranteed for any designated period of time, unless respondent does in fact make, without expense to the user, any repairs or replacement of parts which may be necessitated during such designated period by any cause other than wilful damage or abuse.

Nothing contained in this order, however, shall be construed as prohibiting respondent from representing truthfully that the service on its pens (as distinguished from the pens themselves) is guaranteed for one hundred years or other designated period of time, even though a charge is imposed by respondent in connection with such servicing, provided the terms of such guarantee, including the amount of such charge, are clearly and conspicuously disclosed in immediate conjunction with such representation.

It is further ordered, That the respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF
LEMUEL FIRTH, ET AL.

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

Docket 5065. Complaint, Oct. 20, 1943—Decision, May 4, 1945

Where 19 individuals, owners and masters of fishing boats operating out of the city of Gloucester, Mass., and comprising practically all the boats catching mackerel in fishing grounds located more than three miles off shore from Massachusetts and adjoining States, with fish capacity ranging from 60,000 pounds to over 100,000 pounds each plus ice to preserve the fish and with crews of from ten to fourteen men, compensated by an agreed share of the profit from each catch of fish; and engaged in the transportation and competitive sale of such fish to dealers in New Bedford, Boston, and Gloucester, Mass., for resale to dealers in various States;

Following dissatisfaction on the part of owners, masters and crew members, caused by a glut in the market when prices, particularly in New Bedford—where there were only about three dealers and sale, unlike that at the Boston Fish Exchange at which it was at public auction, was through private negotiation only—dropped to an extremely low point, and preceding the subsequent scarcity of mackerel, a much stronger market, and substantial price advances, as a result of which they evidently felt the situation had thus corrected itself;

Entered into and put into operation and effect, for a period of one month, an agreement, combination, and conspiracy among themselves and with the Atlantic Fishermen's Union and its members to hinder, restrain, and lessen competition in the production of mackerel and in the sale and distribution of such fish in interstate commerce; and pursuant thereto,

- (a) Agreed to and did limit the catches to 40,000 pounds of mackerel;
- (b) Agreed and abided by agreement that boats carrying their catch to New Bedford (which was the principal port they had in mind in referring to ports on "the westerly side of the Cape Cod Canal" in their formal agreement) would refuse to sell their fish unless the New Bedford dealers would pay a price one-half cent per pound above the prevailing price on the Boston exchange; in order, through said differential, to offset certain freight rate advantages enjoyed by the New Bedford dealers in selling in the New York market, and to offset the effect of apprehended collusion among the New Bedford dealers, which tended to depress the market and afford them an unfair advantage over dealers in Boston, who had to buy at public auction;
- (c) Agreed and abided by agreement that boats going into New Bedford would remain in port for thirty-six hours, as opposed to those going into Boston or Gloucester which were required to remain only twenty-four hours, due to greater nearness of the fishing grounds to New Bedford than to Boston, and their wish to give boats going into Boston opportunity to dispose of their catch and return to the fishing grounds as soon as those going into New Bedford, and thus afford all boats opportunity to make approximately the same number of trips to and from the fishing grounds, encourage boats to go to Boston, and tend to relieve somewhat the glutted condition of the New Bedford market; and
- (d) Agreed to and did discontinue the practice, regarded as unfair, of selling fish via radio phone before the boat reached port, and sometimes even before the fish had been caught;