

accordingly.

It is ordered, That respondent S. Kann Sons Co., a corporation, shall, within sixty (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 the order to cease and desist.

IN THE MATTER OF
AUDIVOX, INC., ET AL.

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

Docket 7345. Complaint, Jan. 5, 1959—Decision, Sept. 3, 1959

Order requiring Boston, Mass., manufacturers to cease advertising falsely that their air conduction hearing aids—which required use of a plastic tube leading to a button-like ear mold—had no buttons, wires, or cords attached, were invisible, hidden behind the ear or concealed within an eye-glass temple and required nothing in the ear; that their advertising booklet "Hearing Aid Digest" was a public service; and that their hearing aid Model 8750 was invented by one of their own executives.

Mr. Kent P. Kratz for the Commission.

Mr. A. Benjamin Cohen, of Boston, Mass., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On January 5, 1959, the Commission issued its complaint in the above-entitled proceeding, charging the respondents named above with the dissemination in commerce of false, misleading and deceptive statements and representations concerning their hearing aids, in violation of the Federal Trade Commission Act. No answer was submitted by the Respondents, but at a hearing held in Boston, Massachusetts, on May 13, 1959, respondents admitted all of the allegations of the complaint, except as to respondents R. C. Alexander

and W. Walters. As to them, counsel stipulated that these two respondents have no financial interest in the respondent corporation, are nominal officers only, and have not in the past and do not now formulate, direct or control the acts and practices of the corporate respondent. Counsel supporting the complaint stated that he would not oppose the dismissal of the complaint as to those two respondents. Counsel supporting the complaint submitted proposed findings as to the facts, whereas counsel for the respondents submitted only an argument concerning one phase of a proposed order to cease and desist. Each proposed finding has been duly considered, adopted and, in substance, incorporated herein.

The hearing examiner, having considered the entire record herein, make the following findings as to the facts:

Identity of Respondents

Respondent Audivox, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 123 Worcester Street, Boston, Massachusetts.

Respondents Rolf Stutz and R. R. Wagner are officers of the corporate respondent, and they formulate, direct and control the acts and practices thereof, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate Respondent.

Although Respondents R. C. Alexander and W. Walters are officers of the corporate Respondent, they are nominal officers only. They have no financial interest in the corporate Respondent herein, and have not in the past and do not now formulate, direct or control the acts and practices of said corporate respondent.

Respondents' Business Organization

Respondents, except as stated above, are now, and for some time last past have been, engaged in the manufacture, sale and distribution of hearing aids, which come within the classification of devices as "device" is defined in the Federal Trade Commission Act. Among said devices are those designated as Model 78 Contour, Model 8750 and Model 75 Spec-tacular Hearing Aid Spectacles.

Respondents cause the said hearing aids, when sold, to be transported from their place of business in the State of Massachusetts to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein, have maintained, a course of trade in said hearing aids in commerce, as "commerce" is defined in the

Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

Advertisements of Respondents' Hearing Aids

In the course and conduct of their business Respondents have disseminated, and caused the dissemination of, certain advertisements concerning their said hearing aids by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers, magazines and other advertising media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said hearing aid instruments; and have disseminated, and caused the dissemination of, advertisements concerning said hearing aids by various means, including but not limited to the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Through the use of said advertisements, and others similar thereto but not specifically set out herein, including depictions of persons wearing said hearing aids, Respondents have represented, and now represent, directly and by implication:

1. That there are no buttons, wires or cords attached to their hearing aids;
2. That their hearing aids are invisible when worn;
3. That their hearing aids are either hidden behind the ear or concealed within an eyeglass temple;
4. That Respondents offer a valuable booklet known as Hearing Aid Digest to the public as a public service;
5. That an executive of Audivox, Inc. invented their hearing aid Model 8750.

Said advertisements were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. Respondents' hearing aids require the use of a plastic tube, which is in the nature of a wire or cord, leading from the device to an ear mold, which is in the nature of a button;
2. Said hearing aids are not invisible when worn;
3. Respondents' hearing aids that are worn behind the ear are not hidden and those that are contained in an eyeglass temple are not entirely concealed as a visible plastic cord leads from the temple to a visible ear mold which fits in the outer ear;

Order

56 F.T.C.

4. The booklet known as Hearing Aid Digest, which is published by the Respondents ostensibly as a public service, is instead a piece of advertising literature for Audivox;

5. An executive of Audivox did not invent the hearing aid designated as Model 8750.

On the basis of the foregoing findings as to the facts and applicable principles of law, the hearing examiner makes the following conclusions:

The dissemination by the Respondents of the false advertisements as hereinabove found constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

The Hearing Examiner, on the basis of the entire record, finds that the Commission has jurisdiction over the Respondents and over their acts and practices as alleged in the complaint; that this proceeding is in the public interest; and that a cease-and-desist order should be issued.

THE ORDER

In view of the admissions made at the hearing and the evidence there presented, the only question in controversy involves the exact language to be used in one paragraph of the proposed order to cease and desist. Counsel supporting the complaint contends that the order to be issued herein should contain a provision forbidding Respondents to represent in their advertising that:

"(a) There are no buttons, wires, or cords attached to their hearing aids, unless in close connection therewith and with equal prominence it is stated that a plastic tube runs from the device *and is attached to an ear mold or nipple fitted in the ear*;"

On the other hand, counsel for the Respondents contends that the words "to the ear" should appear in this provision of the order instead of the underscored phrase. In justification thereof, he cites two recent decisions of the Commission. One is in the matter of *Tonemaster Manufacturing Company, et al.*, Docket No. 7301, wherein the phraseology used in a similar order was:

"(a) That said devices are cordless or do not require the use of a cord unless in close connection therewith and with equal prominence it is stated *that a plastic tube runs from the device to the ear*;" (emphasis supplied).

The other is in the matter of *Otarion, Inc., et al.*, Docket No. 6757, wherein the order, while varying somewhat in phrasing, is semantically to the same effect.

Unlike the orders to cease and desist in both of the aforementioned

cases, however, an order containing the provision proposed by counsel for respondents would not prohibit respondents herein from representing, either directly or by implication, that their devices do not require anything to be inserted in the user's ear.

The complaint herein alleges, in effect, and it has been found, that through use of representations that no buttons, wires or cords are attached to their hearing aids, respondents have impliedly represented, contrary to fact, that nothing in the nature of a cord or wire is attached to their hearing aids and that nothing in the nature of a button is required to be placed in the user's ear. Consequently, a full disclosure of the fact that a plastic tube runs from the device to an ear mold or nipple fitted in the ear is necessary to prevent deception resulting from the use of the aforementioned representations. The provision proposed by counsel supporting the complaint would require a full disclosure of this information, whereas the wording suggested by respondents would not adequately inform the public that respondents' hearing aids require the use of an accessory to be fitted in the user's ear. The provision proposed by counsel supporting the complaint should therefore be adopted.

It is ordered, That respondents Audivox, Inc., a corporation, and its officer, and Rolf Stutz and R. R. Wagner, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hearing aid devices now known as Models 75, 78, 8750 or any other air conduction hearing aid device, whether sold under the same or any other model designation, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, any advertisement, by means of United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said products, which advertisement represents, directly or by implication, that:

(a) There are no buttons, wires, or cords attached to their hearing aids, unless in close connection therewith and with equal prominence it is stated that a plastic tube runs from the device and is attached to an ear mold or nipple fitted in the ear;

(b) Any of their hearing aids are invisible when worn;

(c) Any of their hearing aids are either completely hidden behind the ear or completely concealed within an eyeglass temple;

(d) Their booklet known as Hearing Aid Digest is offered to the public as a public service; or that any other booklet or publication is so offered, unless such is the fact;

(e) That an executive of respondent Audivox, Inc., invented their hearing aid model 8750; or that any other hearing aid was invented by anyone connected with respondents, unless such is the fact;

2. Disseminating any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondents' said products in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondents R. C. Alexander and W. Walters individually, but not as officers of said corporation.

ORDER MODIFYING INITIAL DECISION, ADOPTING INITIAL DECISION AS
MODIFIED AS COMMISSION'S DECISION, AND DIRECTING THAT REPORT OF
COMPLIANCE BE FILED

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision herein; and

The Commission being of the opinion that the hearing examiner's conclusions as to the form of subparagraph (a) of paragraph 1 of the order to cease and desist contained in the initial decision are incorrect and that said order to cease and desist is not appropriate in all respects to dispose of this matter:

It is ordered, That the hearing examiner's initial decision be, and it hereby is, modified by striking therefrom the last paragraph on page 4 thereof, beginning with the words "A comparison of the two proposals," and the first paragraph on page 5 thereof, beginning with the words "We conclude," and substituting therefor the following:

Unlike the orders to cease and desist in both of the aforementioned cases, however, an order containing the provision proposed by counsel for respondents would not prohibit respondents herein from representing, either directly or by implication, that their devices do not require anything to be inserted in the user's ear.

The complaint herein alleges, in effect, and it has been found, that through use of representations that no buttons, wires or cords are attached to their hearing aids, respondents have impliedly represented, contrary to fact, that nothing in the nature of a cord or wire is attached to their hearing aids and that nothing in the nature of a button is required to be placed in the user's ear. Consequently, a full disclosure of the fact that a plastic tube runs from the device to an ear mold or nipple fitted in the ear is necessary to prevent deception resulting from the use of the aforementioned representations. The provision proposed by counsel supporting the complaint

would require a full disclosure of this information, whereas the wording suggested by respondents would not adequately inform the public that respondents' hearing aids require the use of an accessory to be fitted in the user's ear. The provision proposed by counsel supporting the complaint should therefore be adopted.

It is further ordered, That subparagraph (a) of paragraph 1 of the order to cease and desist contained in the initial decision be modified to read as follows:

(a) There are no buttons, wires, or cords attached to their hearing aids, unless in close connection therewith and with equal prominence it is stated that a plastic tube runs from the device and is attached to an ear mold or nipple fitted in the ear.

It is further ordered, That the initial decision, as so modified shall, on the 3rd day of September, 1959, become the decision of the Commission.

It is further ordered, That the respondents 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.