

...bearing and involved a new scientific principle, would be helpful regardless

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of the hearing disability, prevent deafness, transform high tones to lower tones, were invisible when worn, fit entirely within the ear canal, needed no batteries, and that hearing aids for both ears were more beneficial than for one; respondents also misrepresented that their sales personnel had medical or scientific training, and made other false and misleading representations.

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 Mather Hearing Aid Distributors, Inc., a corporation, United Hearing Centers, Inc., a corporation, Washington Hearing Center, Inc., a corporation, and Marion Spreeuw, individually and as an officer of said corporations, hereinafter referred to as respondents, have 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 Mather Hearing Aid Distributors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at North 12 Howard Street, in the city of Spokane, State of Washington.

Respondent United Hearing Centers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Montana, with its principal office and place of business located at 22 Fourth Street North, in the city of Great Falls, State of Montana.

Respondent Washington Hearing Center, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at North 12 Howard Street, in the city of Spokane, State of Washington.

Respondent Marion Spreeuw is an individual and an officer of the corporate respondents. She formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Her address is 4631 NW Boulevard, in the city of Spokane, State of Washington.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribu-

tion of hearing aids which come within the classification of "device" as the term "device" is defined in the Federal Trade Commission Act. Respondents do not manufacture said devices but purchase them from one or more manufacturers.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said devices when sold, to be shipped from their place of business in the State of Washington to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of hearing aids of the same general kind and nature as that sold by respondents.

PAR. 5. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said devices 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 and other advertising media for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices; and have disseminated, and caused the dissemination of, advertisements concerning said devices 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.

Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

UNITED HEARING CENTERS, INC., 22 Fourth Street North, Great Falls, Montana 59401.

HEARING INFORMATION SERVICE, 22 Fourth Street North, Great Falls, Montana 59401.

Hearing Information Service, 318 Rookery Building, Spokane, Washington 99201.

WESTERN HEARING INSTITUTE, North 12 Howard Street, Spokane, Washington 99201.

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FOR YOU . . . A Marvelous New Invention!
A MODERN MIRACLE! THE TRANSISTOR.

It's a brand new hearing aid that nobody—not even your closest friend—realizes you're wearing. It has no cords, no ear buttons, and no blobs. There's nothing at all behind your ear, in your hair, or in your clothing. . . . Defies detection from front, back and sides, on both men and women. . . .

YOU can own an AMAZING HEARING INVENTION THAT DEFIES DETECTION.

Fits Into Your Ear Canal.

* * * And because it is so tiny that you wear it in the ear canal, you won't be conspicuous as with external type hearing aids * * *

How To Hear Better Without A Hearing Aid.

Tell Me How To Hear Without A Hearing Aid.

NO B BATTERIES.

No Batteries to Change.

Just Slip It In Your Ear and Hear Again as Nature Intended. Do you hear but do not understand? Audibel is offering these true life-size replicas, that you can wear in the privacy of your home, absolutely FREE. It is yours to keep.

PLEASE TELL ME HOW TO HEAR AND UNDERSTAND—IN BOTH EARS.

HEAR WITH BOTH EARS * * * Slip a Personal Amplifier into each ear. Allows you to know where sound is coming from.

A FREE OFFER * * * TODAY FOR YOU * * * Complete Information Fully Illustrated. HEAR in Both Ears * * * DETACH AND MAIL POSTAGE-PAID REPLY CARD TODAY for your FREE Fully Illustrated Brochure.

* * * EXPERT SERVICE * * * Factory Technician * * *

* * * Complete Hearing Aid Overhaul * * *

Representative and illustrative, albeit neither verbatim nor all inclusive, of oral statements and representations made to prospective purchasers by respondents and their salesmen, representatives, and agents, are the following:

Our sales personnel are experts or have medical background in the hearing disability field.

This (hearing aid) works similar to a computer—it automatically takes the high tones, which you don't hear, and throws them into lower tones that you do hear and understand.

Our sales personnel will visit you after the sale to observe your progress, and to check and adjust your hearing aid.

The "word test" or "word test chart" is a reliable standard by which to measure hearing disabilities or hearing improvement.

Use of a hearing aid will always prove beneficial.

Use of a hearing aid will restore or improve an individual's natural or nerve hearing, or will prevent an individual from becoming totally deaf.

Use of a hearing aid will help one to distinguish and understand sounds in group situations or when background noise is present.

PAR. 6. By and through the use of said advertisements, and others of similar import and meaning but not expressly set out herein, and by oral statements and representations of their salesmen and representatives, the respondents have represented, and are now representing, directly or by implication, that:

1. They maintain an office or place of business in Great Falls, Montana.
2. Their primary activity is the dissemination of free information or that they are other than a profit-making organization, through the use of the assumed names, Hearing Information Service and Western Hearing Institute.
3. They merchandise a hearing aid which is a new invention or involves a new mechanical or scientific principle.
4. Their hearing aids are invisible or undiscernible when worn.
5. They merchandise a hearing aid which will fit entirely into the ear canal.
6. They render a service or merchandise a device, not a hearing aid, which will improve an individual's hearing.
7. Certain of their hearing aids do not require batteries.
8. They will supply upon request to those who answer their advertisements a free replica or model of their advertised hearing aid, the use of which will improve an individual's hearing.
9. Use of two of their hearing aids, one in each ear, for those suffering from a hearing disability of both ears, will be more beneficial than use of one.
10. They employ individuals who are experts in the repairing or servicing of hearing aids.
11. Their repair facilities will properly clean, repair or service any hearing aid, including types other than those sold by respondents.
12. Their sales personnel have had medical or scientific education or training which enables them to diagnose hearing disabilities or to prescribe the proper hearing aid for an individual with a hearing disability.
13. They merchandise a hearing aid which will automatically transform high tones, which cannot be heard, into lower tones which can be heard and understood.
14. Their sales personnel will visit the home of a purchaser of

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one of respondents' devices to observe the progress of said purchaser in his use of the device, and to adjust and regulate said device, when necessary.

15. The "word test" or "word test chart" is a reliable standard by which to measure hearing disabilities or hearing improvements.

16. Their hearing aids will be beneficial regardless of an individual's type of hearing disability.

17. Use of their hearing aids will restore or improve an individual's natural hearing, or will prevent an individual from becoming totally deaf.

18. Their hearing aids will enable a purchaser to distinguish and understand sounds in group situations or when background noise is present.

PAR. 7. In truth and in fact:

1. Until recently, they did not maintain an office or place of business in any town or city other than Spokane, Washington.

2. Their primary activity is not the dissemination of free information, but is that of a profit-making organization engaged in obtaining the names of potential purchasers, offering for sale, and sale and distribution of hearing aids to the public.

3. The hearing aids they merchandise are not new inventions nor do they involve new mechanical or scientific principles.

4. The hearing aids they merchandise are not invisible or undiscernible when worn.

5. The hearing aids they merchandise will not fit entirely into the ear canal.

6. They do not render a service or merchandise devices other than hearing aids, which will in any way improve an individual's hearing.

7. The hearing aids advertised do require batteries.

8. Use of respondents' hearing aid replicas or models will not improve the hearing of the user.

9. Use of two of their hearing aids, one in each ear, for those suffering from a hearing disability of both ears, will not, in most instances, be more beneficial than the use of one.

11. The individuals they employ are not experts in the repairing or servicing of hearing aids.

11. Seldom do respondents attempt to clean, repair or service hearing aids brought to them for that purpose.

12. Their sales personnel have not had medical or scientific education or training which will enable them to properly diagnose hearing disabilities or to prescribe the proper hearing aid for an individual with a hearing disability.

13. The hearing aids they merchandise do not transform high tones, which cannot be heard, into lower tones which can be heard and understood by the wearer.

14. Seldom, if ever, are purchasers of respondents' devices visited by representatives of respondents, nor are the said devices adjusted or regulated by respondents' personnel in the homes of said purchasers.

15. The "word test" or "word test chart" is not a reliable standard by which to measure hearing disabilities or hearing improvement.

16. Their hearing aids will not prove beneficial to all persons with a hearing disability.

17. Use of respondents' hearing aids will not restore or improve an individual's natural hearing, nor will said devices prevent an individual from becoming totally deaf.

18. Their hearing aids in most instances, will not enable an individual with a hearing disability to distinguish and understand sounds in group situations or when background noise is present.

Therefore, the advertisements referred to in Paragraphs Five and Six 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; and the aforesaid statements and representations referred to in Paragraphs Five and Six were and are false, misleading and deceptive.

PAR. 8. In the course and conduct of their business respondents by use of advertising mailers, including reply cards attached thereto, invite the addressees to return the reply cards with their addresses to respondents in order to receive helpful information relative to improving their hearing. Respondents also insert advertisements and announcements in newspapers of general circulation which inform the public that hearing aids may be brought to a certain address for cleaning, repairing and servicing. Said advertisements and announcements do not restrict or limit the make or type of hearing aid for which such service is offered.

Respondents represent through the use of the aforesaid advertising mailers, and the reply cards attached hereto, that they are making a bona fide offer to furnish free of charge helpful information to those handicapped by deafness; and respondents represent through the aforesaid newspaper advertisements and announcements that they are engaged in a bona fide business of cleaning, repairing and servicing hearing aids.

In truth and in fact the respondents' aforesaid representations

were not and are not bona fide offers to furnish free helpful information as aforesaid, nor are respondents in the bona fide business of cleaning and servicing hearing aids; but to the contrary, said representations were, and are, made by respondents, for the purpose of developing leads to prospective purchasers of respondents' devices.

In numerous instances persons sending in respondents' reply cards for "free" information were visited in their homes by respondents' salesmen for the purpose of selling respondents' devices, and said salesmen have attempted to and often succeeded in selling such persons respondents' hearing aids. Numerous persons who have visited the places designated in respondents' advertising announcements as hearing aid "clinics," have found that respondents' representatives and salesmen disparaged the hearing aids brought in for cleaning, repairing and servicing, and attempted to sell, and often sold, the persons so visiting such "clinics," one or more of respondents' hearing aids.

PAR. 9. The dissemination by respondents of the aforesaid false advertisements and the use of the aforesaid false, misleading and deceptive statements, representations and practices have had, and now have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said advertisements and representations were and are true and into the purchase of substantial quantities of respondents' devices by reason of said erroneous and mistaken beliefs.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of false advertisements as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Mr. Garland S. Ferguson and Mr. William A. Fawcett supporting the complaint.

Erickson & Worthington by Mr. Ross Worthington, Spokane, Wash., for the respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

APRIL 9, 1970

The Federal Trade Commission issued its complaint against the respondents herein on July 16, 1969, charging them with the dissem-

ination of false advertisements and the use of false, misleading, and deceptive statements, representations, and practices that constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. It was charged that such violations occurred in the course of their business of selling and distributing hearing aids which are devices to enable hard-of-hearing people to hear more clearly. The respondents filed their answer which denied most of the allegations of the complaint. Following a prehearing conference, hearings were held at which testimony was adduced and the record was closed on December 5, 1969.

At the close of the case-in-chief, counsel for respondents moved to dismiss the complaint and the hearing examiner reserved his ruling on this motion until his initial decision. Accordingly, the motion to dismiss the complaint is hereby denied for the reasons which appear in the following findings as to the facts and conclusions.

The parties have filed their proposed findings and the proceeding is before the hearing examiner for final consideration. Consideration has been given to the proposed findings of fact and conclusions submitted by all parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected; and the hearing examiner, having considered the entire record herein, makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

1. Respondent Mather Hearing Aid Distributors, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at North 12 Howard Street, in the city of Spokane, State of Washington.

Respondent United Hearing Centers, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its principal office and place of business located at 22 Fourth Street North, in the city of Great Falls, State of Montana. Approximately one year ago, the name of this corporation was changed to United Hearing Aid Center, Inc.

Respondent Washington Hearing Center, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at North 12 Howard Street, in the city of Spo-

kane, State of Washington. Approximately one year ago, the name of this corporation was changed to Washington Hearing Aid Center, Inc.

Respondent Marion Spreeuw is an individual and an officer of the corporate respondents. She formulates, directs, and controls the acts and practices of the corporate respondents. Her address is 4631 Northwest Boulevard, in the city of Spokane, State of Washington.

The aforementioned respondents cooperate and act together in the formulation of policy and acts and practices of the corporate and individual respondents herein.

2. The respondents are now, and for some time last past have been, engaged in advertising, offering for sale, sale, and distribution of hearing aids, which come within the classification of "device" as the term "device" is defined in the Federal Trade Commission Act. Respondents do not manufacture said devices, but purchase them from one or more manufacturers, principal of which at the time of these hearings was The Qualitone Hearing Aid Company, Minneapolis, Minnesota.

The respondents, in the course of their business, sell hearing devices in interstate commerce in the States of Montana, Washington, Idaho, and several counties in Wyoming, immediately south of Billings, Montana. (Tr. 853.)

3. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been and now are, in substantial competition, in commerce, with corporations, firms, and individuals in the sale of hearing aids of the same general kind and nature as that sold by respondents. (Answer; Prehearing Conf., p. 14.)

4. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said devices 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 and other advertising media for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices; and have disseminated, and caused the dissemination of, advertisements concerning said devices 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.

Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

UNITED HEARING CENTERS, INC., 22 Fourth Street North, Great Falls, Montana 59401.

HEARING INFORMATION SERVICE, 22 Fourth Street North, Great Falls, Montana 59401.

Hearing Information Service, 318 Rookery Building, Spokane, Washington 99201.

WESTERN HEARING INSTITUTE, North 12 Howard Street, Spokane, Washington 99201.

FOR YOU. . . . A Marvelous New Invention!

A MODERN MIRACLE! THE TRANSISTOR.

It's a brand new hearing aid that nobody—not even your closest friend—realizes you're wearing. It has no cords, no ear buttons, and no blobs. There's nothing at all behind your ear, in your hair, or in your clothing. . . . Defies detection from front, back and sides, on both men and women. . . .

YOU can own an AMAZING HEARING INVENTION THAT DEFIES DETECTION.

Fits Into Your Ear Canal.

. . . And because it is so tiny that you wear it in the ear canal, you won't be conspicuous as with external type hearing aids. . . .

How To Hear Better Without A Hearing Aid.

Tell Me How To Hear Without A Hearing Aid.

NO B BATTERIES.

No Batteries To Change.

Just Slip It in Your Ear and Hear Again as Nature Intended. Do you hear but do not understand? Audibel is offering these true life-size replicas, that you can wear in the privacy of your home, absolutely FREE. It is yours to keep.

PLEASE TELL ME HOW TO HEAR AND UNDERSTAND—IN BOTH EARS.

HEAR WITH BOTH EARS. . . . Slip a Personal Amplifier into each ear. Allows you to know where sound is coming from.

A FREE OFFER. . . . TODAY FOR YOU. . . . Complete Information Fully Illustrated. HEAR in Both Ears. . . . DETACH AND MAIL POSTAGE-PAID REPLY CARD TODAY for your FREE Fully Illustrated Brochure.

. . . EXPERT SERVICE. . . . Factory Technician. . . .

. . . Complete Hearing Aid Overhaul. . . .

Representative and illustrative, albeit neither verbatim nor all inclusive, of oral and written statements and representations made to prospective purchasers by respondents and their salesmen, representatives, and agents, are the following:

Our sales personnel are experts or have medical background in the hearing disability field.

This (hearing aid) works similar to a computer—it automatically takes the high tones, which you don't hear, and throws them into lower tones that you do hear and understand.

Our sales personnel will visit you after the sale to observe your progress, and to check and adjust your hearing aid.

The "word test" or "word test chart" is a reliable standard by which to measure hearing disabilities or hearing improvement.

Use of a hearing aid will always prove beneficial.

Use of a hearing aid will restore or improve an individual's natural or nerve hearing, or will prevent an individual from becoming totally deaf.

Use of a hearing aid will help one to distinguish and understand sounds in group situations or when background noise is present.

(Answer; Prehearing Conf., pp. 15-16).

5. In this paragraph, the representations are discussed separately under numbered subparagraphs.

(1) Respondents represented that they maintained an office or place of business in Great Falls, Montana. They did maintain an office there except for a period of about one year (Tr. 846). It is not shown that they represented that they had this office during that period of time.

(2) Through the use of the names "Hearing Information Service" and "Western Hearing Institute" respondents imply that they are something other than a commercial enterprise. It is correct, as respondents contend, that their representatives clearly stated that they were selling hearing aids, but the names had the capacity to mislead prospective customers. The respondents do not contest this conclusion.

(3) By representing

FOR YOU . . . A Marvelous New Invention!
A MODERN MIRACLE! THE TRANSISTOR.
and

It's a brand new hearing aid that nobody—not even your closest friend—realizes you're wearing. It has no cords, no ear buttons, and no blobs. There's nothing at all behind your ear, in your hair, or in your clothing. . . . Defies detection from front, back and sides, on both men and women.

Respondents contend that they sell a hearing aid which is a new invention and involves a new and different kind of hearing aid. The evidence shows that the "automatic volume control" which was represented as new was in use in the mid-1940's (Tr. 116) and that the contact amplifier represented as new was sold in the 1950's. (Tr. 119.) For several years respondents have represented all of the devices they sell as being new. It seems clear that to continue representing these products as being new was misleading. No cases were cited by the parties and none have been found that are directly in point, but the Commission's Advisory Opinion Digest of June 1, 1962, to December 31, 1968, which was cited by complaint counsel, in discussing this subject, states:

Assuming that a particular product could truthfully be described as "new" in the first instance, the opinion noted that there is little precedent for determining how long an advertiser may truthfully continue to describe it as "new." The Commission stated it was aware, of course, that the word has been frequently abused and that it is in the interest of all advertisers to have established ground rules for its use. However, the time period during which a particular product may be called "new" will depend upon the circumstances and is not subject to precise limitations; any selection of a fixed period of time or a rigid cut-off date would have to be arbitrary in nature. Further, any such attempt would not only fence in all advertisers without regard to the circumstances, but would fence in the Commission as well, and deprive it of all flexibility in dealing with individual situations.

Instead, the Commission felt it would be preferable, considering the absence of precedents, to establish a tentative outer limit for use of the claim, while leaving itself free to take into consideration unusual situations which may arise. Thus, the Commission's position was that until such a time as later developments may show the need for a different rule, it would be inclined to question use of any claim that a product is "new" for a period of time longer than six months. This general rule would apply unless exceptional circumstances warranting a period either shorter or longer than six months were shown to exist. (Advisory Opinion Digest No. 120, Released April 15, 1967 [71 F.T.C. 1729].)

As the Commission stated, "any selection of a fixed period of time or a rigid cut-off date would have to be arbitrary in nature" and it would seem that circumstances such as the length of time between major changes in the product should be considered. Usually a good many years elapse before any significant changes are made in hearing aids, and it would appear that in this industry the cut-off date should not be less than one year. The order herein limits the use of the representation "new" to one year.

(4) Respondents have represented that their hearing aids are invisible, that they defy detection when worn, and that they fit entirely into the ear canal. All of the witnesses on this subject agreed that the hearing aids could be seen unless covered by hair and that they do not fit entirely into the ear canal. (Tr. 21, 143, 188, 254.) Respondents do not contest this conclusion.

(5) Respondents have represented that they render a service or merchandise devices, other than hearing aids, which will improve an individual's hearing. The services offered were related to hearing aids, and the devices offered were hearing aids. One device was not referred to by the factory as a hearing aid because it was not worn upon the body but was attached to a handle and held to the ear by the occasional user. (Tr. 690.) While this distinction would have been apparent to a prospective purchaser when the device was shown to him, it would not have been apparent when the prospect

replied to the advertisement. All of these devices were, in fact, hearing aids.

(6) Respondents represented that certain of their hearing aids did not require batteries. All of these hearing aids do require batteries and the respondents do not contest this conclusion.

(7) Respondents have represented that they will supply a free replica or model of a hearing aid. The advertisement states:

Just Slip It in Your Ear and Hear Again as Nature Intended. Do you hear but do not understand? Audibel is offering these true-life size replicas, that you can wear in the privacy of your home, absolutely FREE. It is yours to keep.

It may be argued that the advertisement does not clearly state that the replicas will improve hearing, but such a conclusion is easily drawn from the entire ad. Since it is capable of being construed as offering a free model of an actual hearing aid, which it was not, prospects could be misled by the use of this representation.

(8) Respondents have represented that the use of two hearing aids, one in each ear, for those suffering from hearing disabilities in both ears, will be more beneficial than the use of one hearing aid. This representation was made in advertising and in instructions to salesmen to relate this same recommendation to prospective customers. While there is some dispute between counsel regarding the conclusions to be drawn from the evidence, all of the evidence shows that hearing aids in both ears are not recommended for all patients who have hearing difficulties in both ears. (Tr. 27, 52, 53, 140, 159, 190, 697, 736.) The order proposed by complaint counsel would only prohibit a representation that the use of a hearing aid in each ear will be more beneficial than one unless it is disclosed that many persons suffering from a hearing disability in both ears will not receive greater benefits from two hearing aids rather than one. This prohibition is warranted by the medical testimony.

(9) Respondents have represented that they employ individuals who are experts in repairing and servicing hearing aids and that they maintain repair facilities that will properly clean, repair, or service any hearing aids. Respondents advertise and set up temporary offices for a day or two at a time in many communities throughout the territory in which they sell, at which time they service the hearing aids brought to them by cleaning and adjusting them and by replacing the batteries and the plastic tubes. (Tr. 897, 904.) For major repairs the instruments are sent to the manufacturer or to the Shelby Instrument Co. and an instrument is loaned to the user for temporary use (Tr. 904-907, 955-56). In addition, respond-

ents' representatives upon special request make service trips to the homes of users (Tr. 903, 915).

Respondents' representatives have had some training that enables them to perform the kind of services above described, but they are not factory technicians, do not perform a "Complete Hearing Aid Overhaul," and do not make major repairs on hearing aids. (Tr. 835, 837, 871, 1081.)

(10) Respondents have represented that their sales personnel have had medical or scientific education or training which enables them to diagnose hearing disabilities or to prescribe the proper hearing aid for an individual with a hearing disability. In their answer respondents admitted making such representations but none of their sales personnel have had any medical or scientific education or training. They have had some training in testing hearing by use of the audiometer and in giving word tests to prospective customers. (Tr. 835, 837, 871, 1081.)

(11) Complaint counsel contend that the wearing of white coats by salesmen in the service centers or "clinics," the wearing of an appliance used in testing hearing aids that has the appearance of a stethoscope, the use of tongue depressors in mixing certain preparations, and the use of terms, such as "medical science," create an impression of medical or scientific training. To the extent that these practices when used in combination constitute a representation of expertise beyond that which the salesmen actually possess, such practices are deceptive. The instrument that appears similar to a stethoscope has a practical purpose, the tongue depressors have a practical purpose, and the wearing of white coats may have a practical purpose, but all of these things used together do create an impression of professionalism that does not exist. While it does not constitute a defense to the charge, respondents beginning on June 26, 1968, advised their sales representatives:

This directive is sent to state the company's position relative to the demonstrating and sale of hearing aids.

It is not permissible to state:

1. That a representative is a medical technician or is possessed of medical expertise or is a factory trained technician (unless this latter is the case). White coats and jackets cannot be used or any other device or artifice used to create such an impression. The word "clinic" is not to be used in connection with our service and sales centers held in locations throughout our area.

2. That the wearing of a hearing aid will prevent deafness.

3. That the wearing of a hearing aid will improve an individual's natural hearing, or will affect the natural course of an individual's loss of hearing.

4. That the hearing aid will improve or affect any other physical defect. (RX 1421-Y.)

Complaint counsel do not urge an order specifically prohibiting the use of the accouterment mentioned. None appears necessary and may not even be warranted by the evidence.

(12) Respondents have represented that they merchandise a hearing aid which will automatically transform high tones which cannot be heard into lower tones which can be heard and understood. The expert testimony is that no hearing aids presently marketed could make this transformation (Tr. 29, 117) and there was no contravening evidence. It is therefore concluded that the representation is misleading.

(13) Respondents have represented that their salesmen would visit the homes of purchasers to observe the progress made in the use of the hearing aids and to adjust and regulate them. It was not the policy of respondents to require or request their salesmen to make such visits (Tr. 207, 279, 466, 505, 623, 921). There were occasions, however, when such calls were made at the specific request of a customer (Tr. 623, 915).

(14) Respondents have represented that their "word test" or "word test chart" was a reliable standard by which to measure hearing disabilities or hearing improvement. In testing hearing, respondents have used word lists which have been described by expert witnesses as non-standard (Tr. 59, 134, 180). More recently, they have substituted what are generally considered to be more reliable standardized word lists (Tr. 871, 890). The more recently used word lists are more reliable than the earlier ones, but it is not found that the earlier ones were wholly unreliable and without value.

(15) It is alleged that respondents have represented that their hearing aids will be beneficial regardless of an individual's type of hearing disability. There is considerable medical evidence to the effect that respondents' hearing aids will not be beneficial to all persons who have a hearing disability and that they will not be beneficial for every type of hearing loss. (Tr. 29, 118, 140, 184, 229, 255.) Respondents' position is simply that no such representation was ever made, and the individual respondent testified that she did not instruct dealer representatives to sell a hearing aid regardless of the hearing disability. (Tr. 921) Many of the exhibits make general representations that respondents' hearing aids will be beneficial for hearing disabilities (CX 3-9, 14-25), and one advertisement (CX 51A-D), sent to prospective customers by respondents, represents that their hearing aids will be beneficial for nerve deafness and for conduction deafness, which would appear to cover virtually all cases of deafness.

(16) The complaint alleges that respondents represented the use of a hearing aid will prevent an individual from becoming totally deaf. Respondents concede that this representation is false, and indeed, all the medical evidence on this subject shows that it is false. (Tr. 31, 116, 142, 187.) Since it is shown that the use of a hearing aid will not prevent an individual from becoming totally deaf, the only issue is whether respondents made such representation. The exhibits cited by complaint counsel to support a finding that this representation was made do not support it, and a review of the exhibits does not disclose that this specific representation was made. It appears from the evidence, however, that some of the customers were told that a hearing aid would prevent them from becoming totally deaf, but it seems fair to assume that when respondents learned that their representatives were making such a representation, they instructed them not to do so. In Respondents' Exhibit 1421A-Y (see p. 723 *supra*) there is an instruction that they are not permitted to make this representation. Therefore, it cannot be found that respondents were responsible for its having been made. It is considered that respondents' admission regarding this representation was inadvertent.

In any event this is merely an aggravation of the representations discussed in the immediately preceding and next succeeding paragraphs, and a prohibition relating to them would prohibit a representation that respondents' hearing aids would prevent one from becoming deaf. By definition, the term "deafness" includes total deafness.

(17) It is alleged that respondents have represented that a hearing aid will restore or improve an individual's natural or nerve hearing. Respondents do not contest a finding that this representation is false, but they do deny having made such representation. There are statements in some exhibits couched in somewhat different language that make this representation, and in Commission's Exhibit 51C, there are the phrases—

Similarly, the Hearing Nerve may weaken through disuse. It needs stimulation to maintain alertness and efficiency. That's why a hearing problem shouldn't be neglected. . . . The use of a hearing aid exercises and stimulates the hearing nerve. . . . The use of a hearing aid puts the hearing center back to work, and it does not lie dormant. Usually, this improves one's ability to understand clear, distinct messages. These are only a few of the many benefits derived from using hearing aids.

Thus, it is shown that this representation was made.

(18) It is alleged that respondents represent that the use of a hearing aid will enable a purchaser to distinguish and understand

sounds in group situations or when background noise is present. Respondents' answer admits that they made such a representation but denies that they have represented, directly or by implication, that in all instances their hearing aids will enable a purchaser to distinguish and understand sounds in group situations.

The use of one of respondents' hearing aids provides no absolute assurance that the wearer will be able to consistently distinguish and understand sounds in group situations or when background noise is present. Several qualified physicians testified to this effect (Tr. 31, 142, 536), and a number of purchasers also testified that they had difficulty hearing in group situations or when background noise was present (Tr. 420-25, 429-32, 606-14). Complaint counsel do not contend that respondents' hearing aids will not provide assistance for some people in group situations or when background noise is present, and in their proposed order, the representation is not prohibited outright but is only prohibited if there is not in immediate conjunction therewith a disclosure that many individuals will not receive such benefits. The prohibition proposed is warranted by the evidence.

(19) In the course of their business respondents have sent out many advertising mailers, including reply cards, inviting the addressees to return them with their addresses in order to receive helpful information relative to improving their hearing, and respondents have also advertised in newspapers, stating that hearing aids may be brought to specific addresses for cleaning, repairing, and servicing. These advertisements do not restrict the make of hearing aid for which such service is offered. Complaint counsel contend that through the use of these representations respondents make offers which are misleading. It is true that the advertising mailers are sent primarily for the purpose of obtaining leads to people having hearing problems and that such leads are generally followed by visits of salesmen, and it is likewise correct that the advertisements offering to clean, repair, and service hearing aids at particular addresses are also made for the primary purpose of making sales to people who come to those addresses.

People who reply to the mailers do receive information regarding hearing problems, and those who bring hearing aids to the addresses advertised are prospects for new hearing aids; but they do, in fact, receive service on their old hearing aids, and if major repairs are required the hearing aids are forwarded to experts who make such repairs.

The hearing examiner cannot find that these practices are un-

fair as a matter of law, even though many of the salesmen are primarily concerned with selling new hearing aids and their proficiency in fitting the proper hearing aid is not as accurate as that of a qualified physician. It is also true that many people do receive hearing benefits from these hearing aids, and it is believed that many of these probably would not receive benefits from any other source. The fitting of hearing aids is not an exact science (Tr. 741), and while the salesmen do not conduct their tests in a soundproof room, which is the most desirable place for testing, and while they have in the past used non-standard word lists and may not be expert in operating an audiometer; nevertheless, they do attain a degree of expertise.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

The dissemination and use by respondents of the aforesaid false, misleading, and deceptive statements, representations, and practices have had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations were true and into the purchase of substantial quantities of respondents' devices by reason of said erroneous and mistaken belief.

The acts and practices of respondents, found above, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

It is believed that the following order will prohibit the unfair acts and practices found and is sufficiently broad to prohibit similar acts and practices.

ORDER

PART I

It is ordered, That respondents Mather Hearing Aid Distributors, Inc., a corporation, United Hearing Aid Center, Inc., a corporation, Washington Hearing Aid Center, Inc., a corporation, and their officers, and Marion Spreeuw, individually and as an officer of said corporations, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of hearing aids, do forthwith cease and desist from:

1. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents directly or by implication that:

(a) They merchandise a hearing aid which is a new invention or involves a new mechanical or scientific principle when such product or one involving such principle has been marketed in the same area for more than one year.

(b) Their hearing aids are either invisible or indiscernible when worn.

(c) They merchandise a hearing aid which will fit entirely into the ear canal.

(d) They render a service or merchandise a replica, model, or device, not a hearing aid, which will improve an individual's hearing.

(e) A particular model or type of hearing aid does not require batteries, when, in fact, said model or type does require batteries.

(f) Use of two hearing aids, one in each ear, for those suffering from a hearing disability of both ears, will be more beneficial than use of one, unless in immediate conjunction therewith it is clearly and conspicuously disclosed that many individuals suffering from a hearing disability of both ears will not receive greater benefits from use of two hearing aids than from use of one.

(g) They will clean, repair, or service hearing aids, or that they provide service centers where all types of hearing aids may be cleaned, repaired, or serviced, unless in all instances respondents:

(1) Make a bona fide attempt to clean, make minor repairs, or service hearing aids brought to them for that purpose, and

(2) Clearly and conspicuously disclose that they do not themselves perform major repairs, but if such is the fact, they will forward the hearing aids elsewhere for such repairs.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of hearing aids in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1, Part I of this order.

PART II

It is further ordered, That respondents Mather Hearing Aid Distributors, Inc., a corporation, United Hearing Aid Center, Inc., a corporation, Washington Hearing Aid Center, Inc., a corporation, and their officers, and Marion Spreeuw, individually and as an officer of said corporations, 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 aids in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Their sales personnel have had medical or scientific education or training.

(b) They merchandise a hearing aid which will transform high tones into lower tones.

(c) Purchasers of hearing aids, sold by respondents, will, after purchase, be routinely visited in their homes by representatives of respondents for the purpose of observing the progress of such purchasers in the use of the devices, or to adjust or regulate said devices when necessary.

(d) Their hearing aids will be beneficial to individuals with hearing problems unless in immediate conjunction therewith it is clearly and conspicuously disclosed that not all individuals suffering a hearing disability will benefit from the use of a hearing aid.

(e) Use of their hearing aids will restore an individual's "natural" or "normal" hearing, will prevent deterioration of an individual's hearing, will prevent an individual from becoming deaf, or will physiologically improve or correct a sensory neural hearing disability.

(f) Use of their hearing aids will enable an individual with a hearing disability to distinguish and understand sounds in group situations or when background noise is present, unless in immediate conjunction therewith it is clearly and conspicuously disclosed that many individuals with a hearing disability will not receive such benefits from the use of a hearing aid.

(g) Their business is other than selling hearing aids to the public for a profit.

2. Misrepresenting in any manner:

(a) The nature or purpose of their business.

(b) The education or training of their sales personnel.

(c) The efficacy of their hearing aids.

3. Failing to deliver a copy of this order to cease and desist to all operating divisions of the corporate respondents and to all officers, managers, and salesmen, both present and future, and any other person now engaged or who becomes engaged in the sale of hearing aids as respondents' agent, representative, or employee; and failing to secure a signed statement from each of said persons acknowledging receipt of a copy thereof.

4. Failing to notify the Commission at least thirty days prior to any proposed 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, or any other change in the corporations that may affect compliance obligations arising out of the order.

OPINION OF THE COMMISSION

APRIL 29, 1971

By DENNISON, *Commissioner*:

I

This case comes before the Commission on the cross-appeals of the respondents and counsel supporting the complaint from the initial decision of the hearing examiner. The proceeding involves alleged violations by the respondents of Sections 5 and 12 of the Federal Trade Commission Act ("the Act") in that they engaged in unfair methods of competition, unfair and deceptive acts and practices, and false advertising of devices, as that term is defined in Section 15(d) of the Act. The complaint was issued on July 16, 1969, and respondents, on August 23, filed their answer denying the allegations in the complaint.¹ After full evidentiary hearings in Seattle and Spokane, Washington, and at Washington, D.C., the hearing examiner issued his initial decision on April 9, 1970, in which he found the major allegations of the complaint to be true.

II

The facts are adequately set forth in the initial decision and, to the extent such facts are not inconsistent with the findings herein, they are hereby adopted by the Commission.

The respondents, Mather Hearing Aid Distributors, Inc., and Washington Hearing Center, Inc.,² are organized and doing business

¹ One answer was filed on behalf of all respondents.

² The corporate name was changed during the course of these proceedings to Washington Hearing Aid Center, Inc.

under the laws of the State of Washington. The respondent, United Hearing Center, Inc.,³ is organized and doing business under the laws of the State of Montana. The individual respondent, Marion Spreeuw, is a major stockholder and is an officer of the corporate respondents; as such, she formulates, directs, and controls their acts and practices.

Respondents are, and have been for some time, engaged in the business of selling hearing aids which they purchased from one or more manufacturers. In the furtherance of said business, respondents have caused their products to be advertised, offered for sale, sold, and distributed in commerce, as that term is defined in the Act. Hearing aids are "devices," as that term is defined in the Act. See, e.g., *Forrest A. Jones, d/b/a Oregon Hearing Center, et al.*, 52 F.T.C. 1192 (1956); *Audivox, Inc.*, 56 F.T.C. 215 (1959).

Specifically, the complaint alleges that respondents falsely represented or advertised that:

(a) They maintain an office at their place of business in Great Falls, Montana.

(b) Their primary activity was the dissemination of free information and that they were an organization engaged in nonprofit-making activities.

(c) Their hearing aids involve a new invention of novel mechanical or scientific principles.

(d) Their hearing aids are invisible and undiscernible when worn.

(e) Their hearing aids fit entirely within the ear canal.

(f) They render a service or merchandise a device other than the hearing aid which would improve an individual's hearing.

(g) Their hearing aids would transform high tones into lower tones.

(h) Their hearing aids were beneficial regardless of an individual's type of hearing disability.

(i) Their hearing aid would restore or improve an individual's natural hearing or prevent an individual from becoming totally deaf.

(j) Their hearing aids would enable an individual to distinguish and understand sounds in group situations or where background noise was present.

(k) Their hearing aid does not require batteries.

(l) They would supply a replica or model which would improve hearing to individuals responding to their advertisements.

³ The corporate name was changed during the course of these proceedings to the United Hearing Aid Center, Inc.

(m) "Word tests" and "word test charts" used by respondents were reliable standards to measure hearing disabilities or hearing improvement.

(n) They employed personnel who were experts in repairing and servicing hearing aids.

(o) Their sales personnel had medical or scientific education or training to diagnose and prescribe proper hearing aids for the hard-of-hearing.

(p) Their sales personnel would visit the homes of purchasers, observe the latter's progress, and adjust or regulate the hearing aid when necessary.

(q) Their repair facilities would properly clean, repair or service any hearing aid including types other than those sold by respondents.

Respondents, in their answer, denied the substantive allegations contained in the complaint. From the facts placed in evidence before the hearing examiner, the examiner found the respondents misled the public by misrepresenting or falsely advertising much of the material set forth above.

Based upon the testimony and exhibits, the examiner found that the respondents have falsely advertised and misrepresented that:

1. Their primary activity is something other than a commercial enterprise.
2. Their device involved a new mechanical or scientific principle.
3. Their hearing aid would be beneficial regardless of the nature of the hearing disability and would prevent deafness.
4. Their hearing aid would enable the wearer to distinguish and make understandable sounds in group situations or where background noise was present and would transform high tones to lower tones.
5. The hearing aids respondents sold, or some models of such hearing aids, were:
 - a. Invisible when worn.
 - b. Fit entirely within the ear canal.
 - c. Needed no batteries.
6. Binaural hearing aids (one in each ear) were more beneficial than one.
7. Respondents employ sales personnel having medical or scientific education or training to diagnose or treat the hard-of-hearing.
8. Respondents employ sales personnel who are experts at repairing and servicing hearing aids.
9. A model of the hearing aid which would improve hearing would be supplied free to those responding to respondents' advertisements.

Counsel supporting the complaint appealed from the hearing examiner's order; basing error upon the hearing examiner's failure to:

(a) Find respondents falsely represented they conduct a bona fide business for the dissemination of free material and information for the hard-of-hearing and conduct a business of repairing and servicing hearing aids and to require in the order the affirmative disclosure that a salesman will call.

(b) Find respondents misrepresented their "word test" or "word test chart" as a reliable standard for measuring hearing ability.

(c) Find respondents falsely represented their hearing aid would prevent total deafness.

(d) Find respondents falsely represented they maintained an office in Great Falls, Montana.

(e) State affirmative reasons to hold Marion Spreeuw, in her individual capacity, subject to the order.

(f) Rule on respondents' affirmative defense of noncontrol of independent contractors.

(g) Order a more limited period for the use of the term "new" in respondents' advertising and representations.

The respondents, in their cross-appeal, alleged error in the findings and order of the hearing examiner in the following respects:

1. His order respecting advertising of the beneficial effects of binaural hearing aids.

2. His order prohibiting representations that the hearing aids sold by respondents would transform high tones into lower tones and enable an individual to distinguish and understand sounds in group situations or when background noise is present.

3. His order requiring a copy of the order be distributed to salesmen and others.

After reviewing the record, we find it replete with evidence amply justifying the examiner's findings listed above. Complaint counsel called 25 witnesses, including 9 experts in the field of audiology and otolaryngology and 13 customers of the respondents. These witnesses substantiated the allegations of the complaint. In addition, counsel supporting the complaint called two of respondents' salesmen (one of whom is no longer with the company). Their testimony likewise tends to substantiate many of the allegations of the complaint.

Respondents' counsel called 29 witnesses, including 2 expert witnesses and 2 representatives of the manufacturer of the hearing aids respondents sold. Twenty-one customers also testified on the benefit of respondents' products and their service.

Opinion

78 F.T.C.

No one can deny the importance of the hearing aid industry. Through its efforts millions of Americans have compensated for hearing disabilities. However, such importance demands the highest degree of responsibility and fairness, particularly where the market is composed of the infirm, usually elderly, consumers who are often credulous and naive. These people are particularly susceptible to overstated advertising promises and misrepresented product claims.

Notwithstanding this obvious caveat for fairness and responsibility, respondents have consistently abused the requirement for fair dealing. For example, in their "procedure for representative" (CX 42), they instructed their salesmen in the use of the audiometer (a hearing testing device) as follows:

1. Look serious when encountering loss.
2. Look worried.
3. Use this sentence . . . "Are you *sure* you don't hear this?" (Emphasis in original.)

In the instructions on use of the word test:

Cover lips or turn back and continue word test, repeating and saying no or shake head, when word is missed. (This gives and shows genuine effort to help them. Understand with facial and body expression.)

In the instructions for completing the questionnaire:

You are aware, Mr. Jones, that your hearing is getting worse? (Very affirmative.)

Again:

DO use the word "Patient," not customer.

Respondents' former salesman, Donald Kirschner, testified that when respondents advertised a hearing clinic for repair and cleaning of any make of hearing aid, if people "came in with a hearing aid that was not clean, if there was wax in the tube, we were instructed not to take the wax out, in that it would not result in a sale." (Tr. 619.) Respondents in their proposed findings of fact contend that the witness Kirschner's testimony is unreliable since he was discharged from his position.

In reviewing the pleadings, evidence and briefs of counsel, the Commission finds no substantial dispute between the parties with respect to most of the findings and order of the hearing examiner. Reviewing the facts as a whole, the prevalent practices of respondents and the abuses to be corrected, the parties' bases for appeal lie primarily in minor and often technical points found in the hearing examiner's initial decision and order.

With respect to the complaint counsel's objection to the finding

relative to respondents maintaining an office in Great Falls, Montana, this matter is subject to such speculation and is of such minor consequence that the finding of the hearing examiner is adopted.

The record discloses that respondents represented that they conducted a business of dispensing free, helpful information to the hard-of-hearing and conducted a business for servicing and repairing hearing aids.⁴ Evidence further discloses that such representations were not wholly untrue. Respondents do supply information to that segment of the public with hearing difficulties and will do minor repairs and servicing of hearing aids, *albeit* with a view toward selling their product. The order of the hearing examiner is sufficiently protective in this regard and, except for the addition noted hereafter, is adopted without modification.

The hearing examiner declined to find the use of soliciting reply cards for "free" information or material as a method of obtaining leads for salesmen as being unfair. This conclusion is unwarranted. Recipients of the "free" information solicitations are entitled to know what strings are attached; that a salesman may call; that they will be subjected to a sales pitch. Our findings and corrective action will be discussed, *infra*. However, the examiner found that respondents' use of "Hearing Information Service" and "Western Hearing Institute" as trade names implied that respondents were something other than a commercial enterprise, and that this would have the capacity to mislead prospective customers. This finding is supported by the evidence and adopted by the Commission.

With respect to the use of the word "new" in advertising, and hearing examiner determined that respondents could, without misrepresentation or deception, advertise or represent their hearing aid as a new invention or involving a new mechanical or scientific principle, provided that such representation is limited to a period of one year from the date the product is introduced to the marketing area.

His order is based on a liberal construction of our advisory opinion⁵ which limits the advertising of "newness" to a period of six months after introduction of the product unless circumstances dictate a different period. In view of the infrequent developments of the technology and advancements in the use of transistors and miniaturization of electronic components and the related impact on the hearing aid industry, it would appear that the hearing examiner's order as to the time limitation on the use of the term "new" is ap-

⁴ CX 16A, 18A, 18B, 19A, 19B and 31-34.

⁵ Advisory Opinion Digest No. 120, released April 15, 1967 [71 F.T.C. 1729].

appropriate and follows Advisory Opinions Nos. 120 and 146 (April 15 [71 F.T.C. 1729] and October 24, [72 F.T.C. 1049]).

However, under the examiner's order, if a product is "new" in a marketing area but not known in another, a company can presumably advertise the product as "new" in the latter area for a period of one year after its arrival. This construction on the concept of "newness" is strained. In advertising "newness" the implication is that the product is new, *i.e.*, "recently invented, discovered or developed," not that it is new to the marketing area. This latter construction is wholly unfounded and an order reflecting this construction retards full market disclosure of new products, thereby denying some consumers the prompt benefits of innovations. Therefore, the permitting of the use of the term "new" in advertising for one year after introduction in a marketing area is not appropriate and, to that extent, the hearing examiner's order is modified.

Complaint counsel objects to the finding that respondents did not misrepresent their "word test" or "word test chart" as a reliable standard to measure hearing disability. The respondents furnished their sales representatives with word test charts containing words chosen to demonstrate hearing problems. Testimony indicates that there is no finite list nor any "approval" or "standardized" list in the industry. The one used by respondents was not shown to be unreliable for the purpose to which it was used. We therefore, adopt the hearing examiner's findings.

Counsel supporting the complaint also contend that the examiner failed to find the respondents falsely represented their hearing aids would prevent total deafness. It appears that respondents' instruction manual inspired the sales representatives to make this representation and witnesses supporting the complaint testified that such representations were made (CX 43c). Customers testified that they were told by respondents that the hearing aids would restore normal hearing⁶ and that they would be deaf in six months if they didn't have a hearing aid.⁷ Respondents concede these representations were false.⁸ We find that respondents falsely represented that their product would restore normal hearing or prevent deafness. The order, as proposed by the hearing examiner, adequately proscribes this form of representation in the future.

Complaint counsel's argument regarding the role of the individual respondent, Marion Spreeuw, eludes the Commission. Based on the

⁶ Testimony of Joseph F. Mahoney, Tr. 544.

⁷ Testimony of Eldon D. Schwoek, Tr. 521.

⁸ P. 121, Initial Decision.

evidence, it would appear that adequate findings were made concerning her participation and activity and an appropriate order was rendered. *The Vollrath Company*, Docket No. 8698 [73 F.T.C. 728], is applicable to demonstrate the quantity of proof required to support the finding of the hearing examiner. In this case, the complaint counsel proffered sufficient proof to establish the fact that the individual respondent should be subject to the order and the hearing examiner so found.

The hearing examiner in his decision is required to reach findings relative to affirmative defenses as well as those touching on matters alleged in the complaint. In this instance the hearing examiner failed to meet and deal with respondents' affirmative defense of non-accountability for the acts of independent contractors. The evidence is clear that the agents, employees and salesmen of the respondents were within their control in all matters raised by this complaint and to such extent the respondents are responsible for their acts and representations. Notwithstanding the fact respondents never authorized "the offending conduct of the salesmen [or whether such conduct was] . . . condemned or discouraged by their superiors, it still was conduct which subjects the employers to the jurisdiction of the Commission and to its cease and desist order." *Parke, Austin Lipscomb, Inc. v. F.T.C.*, 142 F. 2d 437, *cert. den.*, 323 U.S. 753 (2d Cir. 1944). No one can seriously question the fact that the respondents are responsible and accountable for the acts of their salesmen. *International Art Co. v. F.T.C.* 109 F. 2d 393 (7th Cir. 1940), *cert. den.*, 310 U.S. 632 (1950). The respondents do not challenge the authority.

Complaint counsel's next argument in his appeal relates to the unlimited extent to which the examiner found that the respondents represented themselves as something other than a commercial enterprise engaged in the business of selling hearing aids. The testimony and exhibits establish that respondents represented and advertised themselves as hearing aid service centers and offerors of free hearing information. Because of the medical nature of hearing problems and the fact that many eleemosynary, social and governmental agencies do offer free services and advice in the health field, the respondents' advertising may create an impression that they are something other than a profit-making organization. *Aronberg v. F.T.C.*, 132 F. 2d 165 (7th Cir. 1942). This advertising is calculated to lead people to respondents for reasons other than buying a hearing aid, although some may have the need. This covert design is obvious when viewing the respondents' activities as a whole. *United*

States Retail Credit Association, Inc. v. F.T.C. 300 F. 2d 212 4th Cir. 1962).

Complaint counsel would have the order require the respondents to affirmatively set out in all advertising not only the fact that they are a profit-making organization but that if a prospect returns a "lead" card a salesman will call. As will be discussed, *infra*, the respondents' business practices lead us to conclude that the most effective way to protect the consumer is to require an affirmative disclosure of respondents' profit-oriented designs. Only by this method may the true motive behind respondents' offers of information, advice and service be made known.

Respondents' appeal questions the examiner's findings as to (1) the efficacy of binaural hearing aids [hearing aid in each ear], and (2) respondents' representation that their hearing aid will transform high tones into lower tones and enable an individual to distinguish and understand sounds in group situations or when background noise is present. Respondents' contention as to the use of binaural hearing aids is that the initial order is at variance with the evidence and that the order requires a disclosure that *many* individuals do not have better hearing with two hearing aids. The evidence clearly established that the respondents have blatantly overstated the value of binaural hearing aids. The issue is whether the modifying terminology in the order over-reacts to the misrepresentation. In reviewing the expert testimony it is clear that *many* people are not benefited by binaural hearing aids and the qualifying language of the initial order is appropriate. We therefore concur in the hearing examiner's findings in this regard and adopt his order as it relates to the representations of the respondents, *vis-a-vis* the binaural hearing aids.

As to the examiner's findings that respondents falsely represented their device to transform high tones into lower ones, there is some conflict as to whether the respondents admitted they engaged in this practice. Even if they did not admit this allegation, the record nevertheless establishes that respondents' advertising left this impression in the minds of potential customers.⁹ *Rhodes Pharmacal Co. v. F.T.C.* 208 F. 2d 382 (7th Cir. 1953). The examiner found respondents represented their device would aid wearers to make sound discriminations in group situations.¹⁰ There was ample evidence introduced indicating respondents made this representation. The

⁹ See CX 51.

¹⁰ Initial Decision, finding 18.

examiner also found this representation to be false and that *many* people were not so benefited by respondents' device. Respondents object to the form of the examiner's order requiring them to qualify their representation to show that *many* wearers are unable to make such sound discriminations in group situations.¹¹ It is respondents' contention that, absent a showing of exact figures or percentages,¹² the Commission cannot prohibit or qualify advertising where the record shows only that the representation is false as it relates to *many people*. This conclusion is untenable and results from a misreading and application of the *Williams* case. The evidence disclosed that *many* people were not helped by respondents' device in discrimination situations and, ergo, the order appropriately requires respondents to indicate this fact to the public. We, therefore, adopt the findings of fact and order of the hearing examiner in this regard.

Finally, respondents object to the requirement that the order be served on present and future personnel. Many of the acts of the respondents were perpetrated by its salesmen in the field. To insure against future violations of the order, such personnel must be advised of the prohibitions contained therein. The required service of a copy of the order is the assurance that respondents' subordinates will be informed of the illegal acts and practices. The order must be broadly circulated to inform as many of respondents' representatives as possible of the prohibited acts. *FTC v Colgate Palmolive Company*, 384 U.S. 374 (1968). This requirement also serves as some protection to the respondents, for should the order not be circulated and a subordinate ignorantly violates the prohibitions therein then, of course, the respondents are liable for civil penalties. While respondents are still accountable for the acts of their salesmen, wide circulation of the order will tend to lessen the risk of inadvertent activity by an overly zealous salesman. *Niresk Industries v. FTC*, 287 F. 2d 337, *cert. den.*, 364 U.S. 883 (1960). Regarding the requirement that the order be served on future subordinates, this again protects respondents from an employee's ignorant act. We find the provision in the hearing examiner's order requiring respondents to notify all present and future personnel of the contents of this order to be appropriate. If, at some future point, it appears the order is no longer appropriate, meaningful or desirable, respondents may petition the Commission for its modification or setting aside. Federal Trade Commission Act, Section 5(b), as amended.

¹¹ Part II-1-(F) of Initial Order.

¹² *J. B. Williams Co. v. FTC*, 381 F. 2d 884 (6th Cir. 1967).

III

In formulating our order, the hearing examiner's order has been modified not only to render it fully consistent with our conclusion, but also to frame it in a context which will be more likely to assure correction of the evils found to exist. *FTC v. Colgate Palmolive Company, supra*.

The representations and advertisements of the respondents blatantly violate the Trade Practice Rules¹³ which have been widely published and followed by many in the industry. For example, Rule 10 defines the representation of a profit organization as nonprofit through the use of such trade names as "Hearing Center," "Hearing Institute," or similar names as an unfair trade practice. Also it is an unfair trade practice to represent deceptively the novelty of the device (Rule 9). Individual respondent, Marion Spreeuw, is acutely aware of our responsibility and interest in this industry and of those practices deemed unfair, false and deceptive. She was an employee of the Oregon Hearing Center at the time a prior investigation by this Commission was being conducted.¹⁴

Respondents, through the use of advertising in newspapers and by direct mail, have given promise and hope to many, many people in the far Northwestern States who have hearing difficulties. From the evidence, many of these people, in responding to this advertising, thought they were obtaining free information or help from a public service institution or similar eleemosynary body. Our order will: (1) prohibit respondents from misrepresenting the nature or purpose of their business, and (2) require the respondents to state in all advertising the fact that they are in the business of selling hearing aids and should a person respond to their advertising a salesman may call for that purpose. This affirmative disclosure does not require the respondents to call upon every prospect, but does require that all are put on notice that there may be a solicitation by the respondents. The nature of the respondents' product and the age and susceptibility of their prospective customers make such an affirmative disclosure necessary to assure that future deceptions do not occur. *FTC v. Ruberoid Company*, 343 U.S. 370 (1952). The fact that other hearing aid distributors are not similarly restricted does not detract from the propriety of this order. *P. F. Collier & Sons Corp., et al. v. FTC*, 427 F. 2d 261 (6th Cir. 1970), *cert. den.*, 400 U.S. 926 (1970).

¹³ Trade Practice Rules, Hearing Aid Industry, 16 CFR 214 (September 6, 1953), as amended.

¹⁴ She was this organization's sales manager. The investigation culminated in an order being issued. *Forrest A. Jones d/b/a Oregon Hearing Center*, 52 F.T.C. 1192 (1956).

Our order, like that of the examiner's seeks a balance between the "reasonable relationship" of the remedy to the unlawful acts (*FTC v. Ruberoid Company, supra*) and the appropriate "fencing in" to prevent future violations of the law. *FTC v. National Lead Company*, 352 U.S. 419 (1957).

FINAL ORDER

Respondents and counsel supporting the complaint having filed cross-appeals from the initial decision of the hearing examiner, and the matter having been heard upon briefs and oral argument; and

The Commission having rendered its decision determining that the initial decision issued by the examiner should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision be modified by striking the order to cease and desist issued by the examiner and substituting therefor the following:

ORDER

PART I

It is ordered, That respondents Mather Hearing Aid Distributors, Inc., a corporation, United Hearing Aid Centers, Inc., a corporation, Washington Hearing Aid Center, Inc., a corporation, or any substitute or successor organization, and their officers, and Marion Spreeuw, individually and as an officer of said corporations, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hearing aids, do forthwith cease and desist from:

1. Disseminating, or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that:

(a) They merchandise a hearing aid which is a new invention, or involves a new mechanical or scientific principle when such product or one involving such principle has been on a market in the United States for more than one year.

(b) Their hearing aids are either invisible or undiscernible when worn.

(c) They merchandise a hearing aid which will fit entirely into the ear canal.

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(d) They render a service or merchandise a device, not a hearing aid, which will improve an individual's hearing.

(e) A particular model or type of hearing aid does not require batteries, when, in fact, said model or type does require batteries.

(f) They employ expertly trained individuals to repair or service hearing aids.

(g) They will clean, repair or service hearing aids, or that they provide service centers where all types of hearing aids may be cleaned, repaired or serviced, unless in all instances respondents:

(1) Make a bona fide attempt to clean, repair or service hearing aids brought to them for that purpose, and

(2) Clearly and conspicuously disclose in immediate conjunction therewith that they do not perform major repairs and that they do not perform major service upon hearing aids.

(h) Use of two hearing aids, one in each ear, for those suffering from a hearing disability of both ears, will be more beneficial than use of one, unless in immediate conjunction therewith it is clearly and conspicuously disclosed that many individuals suffering from a hearing disability of both ears will not receive greater benefits from use of two hearing aids than from the use of one.

2. Disseminating, or causing the dissemination of any advertisement by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which fails to clearly and conspicuously disclose that:

(a) The business of respondents is the sale of hearing aids.

(b) Persons replying to respondents' advertisements may be contacted by salesmen, or otherwise, for the purpose of inducing them to purchase a hearing aid sold by respondents.

3. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of hearing aids in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1, Part I of this order, or fails to

comply with the affirmative requirements of Paragraph 2 of Part I thereof.

PART II

It is further ordered, That respondents Mather Hearing Aid Distributors, Inc., a corporation, United Hearing Aid Centers, Inc., a corporation, Washington Hearing Aid Center, Inc., a corporation, or any substitute or successor corporation and their officers, and Marion Spreeuw, individually and as an officer of said corporations, 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 aids in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Their sales personnel have had medical or scientific education or training which enables them to diagnose hearing disabilities or to prescribe the proper hearing aid for an individual with a hearing disability.

(b) They merchandise a hearing aid which will transform high tones into lower tones.

(c) Purchasers of hearing aids, sold by respondents, will after purchase be routinely visited in their homes by representatives of respondents for the purpose of observing the progress of such purchasers in the use of the devices, or to adjust or regulate said devices when necessary.

(d) Their hearing aids will be beneficial to individuals with hearing problems unless in immediate conjunction therewith it is clearly and conspicuously disclosed that not all individuals suffering a hearing disability will benefit from use of a hearing aid.

(e) Use of their hearing aids will restore an individual's "natural" or "normal" hearing, will prevent deterioration of an individual's hearing, will prevent an individual from becoming deaf, will physiologically improve or correct a sensorineural hearing disability.

(f) Use of their hearing aids will enable an individual with a hearing disability to distinguish and understand sounds in group situations or when background noise is present, unless in immediate conjunction therewith it is clearly and conspicuously disclosed that many individuals with a hearing disability will not receive such benefits from use of a hearing aid.

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(g) Their business is other than selling hearing aids to the public for a profit.

2. Misrepresenting in any manner:

- (a) The nature or purpose of their business.
- (b) The education or training of their sales personnel.
- (c) The efficacy of their hearing aids.

3. Failing to deliver a copy of this order to cease and desist to all operating divisions of the corporate respondents and to all officers, managers and salesmen, both present and future, and any other person now engaged or who becomes engaged in the sale of hearing aids as respondents' agent, representative or employee; and failing to secure a signed statement from each of said persons acknowledging receipt of a copy thereof.

4. Failing to notify the Commission at least thirty (30) days prior to any proposed 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 or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the initial decision, as modified by the accompanying opinion, and as above modified, be, and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

KENNECOTT COPPER CORPORATION

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7
OF THE CLAYTON ACT

Docket 8765. Complaint, Aug. 5, 1968—Decision, May 5, 1971

Order requiring the nation's largest copper mining corporation with headquarters in New York City to divest itself within six months of the largest