

ters, Allied shall retain the status of *amicus curiae* as provided by the order of the administrative law judge.

For the foregoing reasons, the order of the administrative law judge is modified to provide for participation by applicant Allied as provided hereinabove.

By the Commission.

Commissioner Jones dissenting.

IN THE MATTER OF
RADIOEAR CORPORATION

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

Docket C-2419. Complaint, June 26, 1973—Decision, June 26, 1973.

Consent order requiring a Canonsburg, Penn., manufacturer, distributor, and repairer of hearing aids, among other things to cease imposing customer and territorial restrictions and exclusive dealing requirements on its dealers; price-fixing activities; requiring its dealers to furnish names and addresses of customers; and failing to include and deliver any express product warranty.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (Title 15, U.S.C. Section 41, *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party identified in the caption hereof, and more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Radioear Corporation (hereinafter sometimes referred to as "Radioear") is a corporation organized under the laws of the State of Delaware, with its principal office and place of business at 375 Valley Brook Road, Canonsburg, Pennsylvania. Radioear Corporation is a subsidiary of the Esterline Corporation, New York, New York.

PAR. 2. Respondent is engaged in the business of manufacturing, distributing, selling and repairing of Radioear brand hearing

aids. It distributes and sells to selected retail dealers located throughout the United States, who then resell to the general public.

PAR. 3. In the course and conduct of its business, respondent ships or causes to be shipped hearing aids from its facilities in the State of Pennsylvania to selected retail dealers throughout the United States. There is now and has been for several years a constant and substantial flow of respondent's hearing aids in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been restrained by reason of the practices hereinafter alleged, respondent's selected retail dealers, in the course and conduct of their business of offering for sale and selling Radioear hearing aids, are in substantial competition in commerce with one another and with dealers engaged in the offering for sale and selling of other brands of hearing aids; and respondent is in substantial competition in commerce with others engaged in the manufacturing, distributing, selling and repairing of hearing aids.

PAR. 5. Trade and commerce in the United States in hearing aids is substantial. In 1970, the total value of shipments amounted to \$50 million at the manufacturers' prices, and is estimated to have exceeded \$175 million at retail prices. In 1970, about fifty domestic manufacturers, domestic subsidiaries of foreign manufacturers and domestic distributors of foreign manufacturers sold approximately 510,000 hearing aids through 5,000 retail dealers who employed over 10,000 salesmen.

PAR. 6. In 1970, the top four companies in the hearing aid industry accounted for approximately 50 percent of the dollar value of shipments; the top eight companies, including respondent Radioear, accounted for approximately 70 percent of such shipments; and the top twenty companies accounted for over 90 percent of the industry's shipments.

PAR. 7. In 1970, respondent Radioear, which has manufactured hearing aids since 1924, had sales in excess of two million dollars, making it the seventh largest hearing aid manufacturer in the United States market.

PAR. 8. Hearing aids are sold by the manufacturers directly to the retail dealers, who resell the hearing aids to members of the general public. Wholesalers are rarely used in the distribution process. The success of the established manufacturers in selling their products has been based primarily on their ability to secure

the services of retail dealers to sell their products to the hearing handicapped. Similarly, to be successful, new entrants into the market must secure distribution through established dealers.

Approximately 60 percent of the retail sales of hearing aids occur as a result of initial, direct contact between the hearing aid dealer and the hearing handicapped, while most of the remaining sales are made after the hearing handicapped are referred to dealers by medical doctors or hearing clinics. It is the practice among medical doctors and hearing clinics, after having determined that an individual may benefit from use of a hearing aid, to recommend a hearing aid to the patient by the brand name and model, rather than by its general performance characteristics. This is done on the basis of actual tests with hearing aids which have been placed with such doctors or clinics by either the manufacturers or dealers. Then, because the doctors and clinics do not sell hearing aids, the patient is referred to the hearing aid dealer in his locale who deals in the brand of hearing aid recommended. While the average price of a hearing aid to a dealer is about \$100, the average retail price to the hearing handicapped is about \$350. More than 50 percent of the persons with hearing impairment who purchase hearing aids are over 65 years of age.

PAR. 9. In the distribution and sale of their hearing aids, a number of the manufacturers of hearing aids for many years have used and pursued parallel courses of business behavior.

Among such courses of business behavior are the following:

(1) distributing and selling their hearing aids directly to selected retail dealers, refusing to deal with all other dealers;

(2) entering into agreements or understandings with their dealers, which agreements:

(a) establish territories within which the dealers may advertise and sell their products;

(b) require exclusive dealing in the manufacturers' products;

(c) assign sale or purchase quotas to be met by their dealers;

(d) encourage or require the use of the manufacturers' brand name in the dealers' trade styles;

(e) restrict the classes of customers with whom their dealers may deal;

(f) require their dealers to submit the names and addresses of their customers to the manufacturers;

(g) permit the manufacturer to terminate such agreements without cause upon thirty days notice; and

(h) in the event of such termination permit the manufacturers

to repurchase the terminated dealers' products purchased from such manufacturers;

(3) refusing to issue the express product warranties to consumers unless and until their dealers have reported the names and addresses of their customers to the manufacturers;

(4) encouraging or requiring their dealers to participate in cooperative advertising programs which preclude mention that the dealers offer competing brands of hearing aids for sale;

(5) engaging in extensive national brand advertising of their hearing aids;

(6) suggesting to their dealers retail prices for hearing aids which are often more than 300 percent above the manufacturers' prices to the dealers, with such dealers generally selling at such suggested retail prices; and

(7) selling repair parts and offering repair service only to their selected dealers, refusing to sell such parts to all others, including independent repairmen or repair centers, and refusing to offer repair service to all other dealers.

The effect of the aforesaid parallel courses of business behavior has been to eliminate intra-brand and to hinder or suppress inter-brand competition in the hearing aid industry, and, further, to aggravate the unfair and anticompetitive effect of the acts and practices of the respondent as alleged in Paragraphs Ten and Eleven.

PAR. 10. In the course and conduct of its business of manufacturing, distributing, selling and repairing Radioear hearing aids in commerce, respondent Radioear pursues the following course of action:

A. It requires its selected dealers to sell Radioear hearing aids within assigned geographic territories;

B. It requires its selected dealers to deal exclusively in Radioear hearing aids;

C. It fixes, establishes, controls and maintains the retail prices at which its dealers sell Radioear hearing aids;

D. It prohibits its dealers from dealing with certain potential customers;

E. It prohibits others, not its dealers, from dealing in, or repairing Radioear hearing aids; and

F. It appropriates and uses for its own purposes the names and addresses of its dealers' customers.

PAR. 11. In furtherance of this course of action, respondent has

been and now is engaged in the following acts and practices, among others:

- (1) Respondent uses agreements or understandings which
 - (a) require a dealer to sell Radioear hearing aids within an assigned territory on penalty of forfeiting his sales profit to another Radioear dealer in whose territory sales would be made;
 - (b) require a dealer to deal exclusively in Radioear hearing aids within that assigned territory upon penalty of appointment of additional dealers in such territory;
 - (c) require a dealer to sell Radioear hearing aids only to customers found within the assigned territory;
 - (d) require a dealer to sell Radioear hearing aids at prices established by respondent;
 - (e) require a dealer to submit to the respondent the names and addresses of each customer who purchases Radioear hearing aids;
 - (f) condition the express product warranty on the submission of the names and addresses of each such customer to the respondent;
 - (g) prohibit a dealer from dealing with the United States Government, State Governments or agencies thereof; and
 - (h) allow for immediate termination of contract upon dealer's violation of any provision thereof;
- (2) Respondent encourages or permits its dealers to use the Radioear brand name, in conjunction with a geographic identification of the dealers' locations, or otherwise, in the dealers' trade styles;
- (3) Respondent issues to its dealers price lists in which the retail prices for Radioear hearing aids are set forth;
- (4) Respondent offers to its dealers a cooperative advertising plan which provides that Radioear will not share the cost of any dealer advertisement which mentions in any way that the dealer also offers for sale other brands of hearing aids;
- (5) Respondent refuses to ship additional merchandise to a dealer unless or until the dealer submits to Radioear the names and addresses of the purchasers of hearing aids previously shipped to the dealer;
- (6) Respondent refuses to sell to all but a few dealers, selected in such a manner that each of such selected dealers enjoys territorial exclusivity so that he is not in competition with any other dealer selling Radioear hearing aids;
- (7) Respondent refuses to sell Radioear repair parts or to pro-

vide schematics to all dealers, or to persons engaged in the business of repairing or servicing hearing aids;

(8) Respondent refuses to supply Radioear promotional and advertising materials, price lists, hearing aid specifications or performance information to all dealers;

(9) Respondent prohibits its selected dealers from selling Radioear hearing aids to other dealers of hearing aids;

(10) Respondent provides in its standard-form contract that Radioear has the right to terminate the contract, at any time, upon thirty days notice to the dealer; and

(11) Respondent provides in said contract that in the event of termination:

(a) a dealer is required to discontinue the use of Radioear brand name in his name, sign or advertising in connection with hearing aid business;

(b) a dealer is prohibited from receiving any mail addressed to him in a manner including the name Radioear in it, and he is to instruct the postmaster to forward such mail either to the respondent or to a person of respondent's choice;

(c) a dealer is prohibited from using Radioear advertising material and must either destroy it or return it to respondent; and

(d) Radioear has the right to reacquire the terminated dealer's inventory of Radioear hearing aids.

PAR. 12. The acts and practices of respondent enumerated hereinabove in Paragraphs Ten and Eleven, taken either individually or collectively, are oppressive, coercive, unfair and anticompetitive, and have the tendency and capacity of hindering, suppressing or eliminating competition, or constitute unfair methods of competition, or unfair acts or practices, with the following effects, among others:

(1) Competition between respondent and other manufactures of hearing aids has been hindered and suppressed;

(2) Competition among dealers dealing in Radioear hearing aids has been eliminated;

(3) Such dealers have been deprived of their freedom to select their customers and otherwise to function as free and independent businessmen;

(4) Such dealers have been deprived of their ownership of, and freedom to maintain, confidential lists of their customers;

(5) Competition among dealers dealing in Radioear hearing aids and dealers dealing in other brands of hearing aids has been hindered and suppressed;

(6) Retail dealers of hearing aids have been deprived of their freedom to act in the best interests of the hearing-impaired public;

(7) Consumers have been deprived of their right to fair and impartial recommendations from dealers in the selection of hearing aids for the alleviation of their hearing impairment;

(8) Consumers have been deprived of the benefits of free competition; and

(9) Those engaged in the repairing or servicing of hearing aids in competition with respondent have been deprived of their right to repair or service Radioear hearing aids.

PAR. 13. The aforesaid acts and practices of respondent have the tendency unduly to restrict and restrain competition and have injured, hindered, suppressed, lessened or eliminated actual or potential competition, are to the prejudice and injury of the public, and constitute unfair methods of competition in commerce and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its com-

plaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Radioear Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 375 Valley Brook Road, city of Canonsburg, State of Pennsylvania. Radioear Corporation is a subsidiary of Esterline Corporation of 280 Park Avenue, New York, New York.

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

ORDER

I

It is ordered, That respondent Radioear Corporation, and its subsidiaries, divisions, affiliates, successors, assigns, officers, directors, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the manufacturing, distribution, advertising, offering for sale, sale or repair of its own brand name or trademark hearing aids, or related products, in commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into, maintaining, preserving, or enforcing, by refusal to sell or repair, setting of sales quota or equivalent thereof, termination or threat thereof, communicated expectation or request, or in any other manner, any arrangement or method of doing business with a dealer of hearing aids and/or accessories which has the purpose or effect of precluding or preventing a dealer from selling the product of one or more other hearing aid manufacturers;

2. Refusing to make available promptly upon request

(a) a hearing aid, accessory or any written materials necessary to fit and sell such hearing aid or accessory, to any dealer engaged in the sale of hearing aids, if respondent makes such products available to any other dealer located within 100 miles of the requesting dealer, or

(b) a repair or replacement part or any written materials necessary to repair or replace such hearing aid, to any person engaged in the repair of hearing aids when requested for such purpose, if respondent makes repair

or replacement parts available to any dealer for such purpose;

Provided, however, That if no other provision of this order is violated thereby:

(1) respondent may require as a condition to the availability directly from it of any of its products that the dealer or person referred to in 2(a) or (b) above has received instruction or met standards necessary for the fitting, servicing and/or repairing of respondent's hearing aids which are required at that time of all then existing dealers of respondent's products or all persons then engaged in the repair of respondent's products, so long as such instruction, if made available to any dealer or person, is made available by respondent on reasonable terms and conditions to all dealers or persons wanting to deal in or repair respondent's product,

(2) respondent may refuse to make available directly from it any of its products to any dealer or person if such requesting dealer or person is able promptly to obtain the product from another dealer or distributor at respondent's price to dealers for a single unit plus a reasonable handling charge, and

(3) respondent may refuse to make available directly from it any of its products to any dealer or person on other grounds related to that dealer's or person's professional competence or ethical conduct, so long as such refusals are uniformly made where such grounds exist;

3. Entering into, maintaining, preserving, or enforcing, by refusal to sell or repair, setting of sales quota or equivalent thereof, termination or threat thereof, communicated expectation or request, report of sale, warranty limitation, use of names or addresses of a dealer's customers, or in any other manner, any arrangement or method of doing business which has the purpose or effect of restricting or limiting

(a) the territory or area in which a dealer of respondent's hearing aids advertises, offers for sale, sells or repairs such products, or

(b) the persons with whom a dealer of respondent's hearing aids deals;

4. Failing to return any hearing aid submitted to respondent for repair directly to the person who submitted such

product for repair, unless otherwise instructed in writing by such person;

5. Fixing, establishing, stabilizing, maintaining or suggesting the prices at which a dealer of respondent's hearing aids may or shall advertise, offer for sale, or sell to the public, or a person repairing respondent's hearing aid may repair, such products; *Provided, however*, That nothing in this order shall prohibit respondent after ten years from the date of entry of this order from exercising any lawful rights it may then have under the Miller-Tydings Act, 50 Stat. 693 (1937) and the McGuire Act, 66 Stat. 632 (1952) with respect to hearing aids;

6. Requiring that a dealer participating in respondent's cooperative advertising program must not state or imply, in such cooperative advertisements, that the dealer also deals in other brands of hearing aids; *Provided, however*, That respondent may continue to prohibit in such cooperative advertisement the stating of other brand names of hearing aids;

7. Requiring that a dealer of the respondent's hearing aids submit to respondent any name or address of any customer of such dealer, or maintaining, using, publishing or disseminating for any purpose any name or address of any customer of a dealer of the respondent's hearing aids obtained from such dealer after the date of this order without securing a prior written consent of such dealer for such purpose;

8. Preventing any dealer from using respondent's product (brand) name in connection with the advertising, offering for sale, sale or repair of any of respondent's products, except that respondent may protect its rights in such name recognized at law;

9. Failing to include and deliver with any of respondent's hearing aids sold by respondent any express product warranty for such product provided by respondent to the user.

II

It is further ordered, That respondent shall:

(a) Forthwith distribute a copy of this order to each of its operating divisions, to its present corporate officers and to its present sales and repair personnel, and shall secure from each such officer, employee or other person, a signed statement acknowledging receipt of said order;

(b) Within thirty (30) days after service upon it of this order, distribute a copy of the letter appended to this order and made a part hereof as Appendix A to each of its existing hearing aid dealers and to every person known to be engaged in the repair of respondent's products;

(c) Within sixty (60) days after service upon it of this order, place a full-page advertisement in a trade journal or publication with circulation among hearing aid dealers, which advertisement shall clearly and conspicuously disclose the provisions of Part I of this order;

(d) Within one hundred and twenty (120) 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, including a list of all dealers and other persons on whom it has served a copy of Appendix A, and a copy of the publication which includes respondent's advertisement required by this order;

(e) For a period of ten (10) years from the date hereof establish and maintain a file of all records referring or relating to respondent's refusal to sell to any hearing aid dealer, or person engaged in the business of repairing hearing aids, which file must contain a record of a communication to such dealers or persons explaining respondent's refusal to sell, and which file will be made available for Commission inspection on reasonable notice and annually, for a period of five (5) years from the date hereof, submit a report to the Commission listing the names of all dealers or persons with whom respondent has refused to deal over the preceding year, a description of the reason for the refusal, and the date of the refusal;

(f) Notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent 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 corporation which may affect compliance obligations arising out of this order.

1880

RADIOEAR CORP.
Decision and Order

1841

APPENDIX A
(LETTER TO HEARING AID DEALERS)

(Official Stationery of
Radioear Corporation)

Dear

Radioear Corporation has entered into a consent order agreement with the Federal Trade Commission which obligates the company not to impose various restrictions upon dealers or to engage in certain other practices. This agreement is for settlement purposes only and does not constitute an admission by the company that it has engaged in any unlawful conduct.

A copy of the pertinent provisions of the consent order is enclosed for your careful examination. If in the future you believe that any of its terms have been violated, the details may be reported in writing to:

Federal Trade Commission,
Bureau of Competition,
Washington, D.C. 20580

The entry of this consent order does not affect Radioear's method of consignment selling, so long as no provision of this order is violated, and we may continue to rely on our group of existing dealers as primarily responsible for the effective distribution and service of Radioear products. We look forward to continuing such an association with you consistent with the letter and spirit of our consent order agreement.

Sincerely yours,

(Name),
President,
Radioear Corporation.

IN THE MATTER OF
COMMERCIAL CREDIT COMPANY
CONSENT ORDER IN REGARD TO THE ALLEGED VIOLATION OF THE
TRUTH IN LENDING AND FEDERAL TRADE COMMISSION ACTS