

Complaint

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IN THE MATTER OF

DAHLBERG ELECTRONICS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8929. Complaint, May 8, 1973—Decision, Aug. 6, 1974*

Consent order requiring a Minneapolis, Minn., manufacturer of hearing aids, among other things to cease imposing customer and territorial restrictions and exclusive dealing requirements on its dealers; maintaining resale prices; restricting dealers in cooperative advertising from stating that dealers deal in other brands of hearing aids. Failing to include warranties with products sold by respondents. Further, respondent is required to place in a trade journal a full-page ad clearly disclosing particulars of the order, and to maintain for a ten-year period a file record of any refusal to sell.

Appearances

For the Commission: *Alan I. Leibowitz, L. Barry Costilo, Dennis R. Carluzzo and James C. Donoghue.*

For the respondent: *Arent, Fox, Kintner, Plotkin & Kahn, Wash., D. C.*

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 Dahlberg Electronics, Inc., (hereinafter sometimes referred to as "Dahlberg") is a corporation organized under the laws of the State of Minnesota, with its principal office and place of business at 7731 Country Club Drive, Minneapolis, Minn. Dahlberg is a wholly-owned subsidiary of Detection Sciences, Inc., a Minnesota Corporation, with its office and principal place of business located at 7731 Country Club Drive, in the city of Minneapolis, State of Minnesota.

Par. 2. Respondent is engaged in the business of manufacturing, distributing, selling and repairing of hearing aids and related articles, sometimes referred to as "Dahlberg products." 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 Minnesota 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 Dahlberg 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 approximately \$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, including respondent Dahlberg, accounted for approximately 50 percent of the dollar value of shipments, the top eight companies 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 Dahlberg was the third largest hearing aid manufacturer with sales in excess of \$4 million, representing an estimated 8 percent of the market. It and its corporate predecessors have manufactured hearing aids since 1949.

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.

Approximately 60 percent of the retail sales of hearing aids occur as a result of an 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 a parallel course 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 manufacturers 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 warranty 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;

(7) selling repair parts and offering repair service only to their selected dealers, refusing to sell such parts of 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 its hearing aids in commerce, Dahlberg pursues the following course of action:

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

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

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

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

E. It prevents others, not its dealers, from dealing in, or repairing Dahlberg products;

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 alone or with its dealers in the following acts and practices, among others:

(1) Respondent uses agreements or understandings which

(a) require a dealer to sell Dahlberg hearing aids only to customers found within an assigned territory;

(b) require a dealer to sell Dahlberg hearing aids in preference to other brands;

(c) require a dealer to submit to respondent the name and address of each customer who purchases a Dahlberg hearing aid;

(d) allow for termination of the contract upon dealer's violation of any provision thereof;

(2) 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 Dahlberg hearing aids;

(3) Respondent represents to its dealers that if a dealer sells other brands of hearing aids, Dahlberg has the right to convert the standard-form dealer contract into a so-called Limited Dealer Agreement under which dealers have no right, on a proportionately equal basis, or otherwise, to such services or facilities as advertising, sales management, operating and technical assistance, provided by respondent to full dealers; and the respondent expressly reserves the right to appoint other dealers in the territory assigned to such a limited dealer;

(4) Respondent offers to its full dealers a cooperative advertising plan which provides that Dahlberg will not share the cost of any dealer advertisements in another dealer's territory, or which mention in any way that the dealer also offers for sale other brands of hearing aids; limited dealers have no right to a cooperative advertising plan, on a proportionately equal basis with full dealers, or otherwise;

(5) Respondent represents to its dealers that it will not assign additional dealers to the territory of an existing dealer who complies with the requirement that he sell and promote the sale of Dahlberg hearing aids in preference to any other brand;

(6) Respondent requires its dealers to accept and fulfill sales quotas for their assigned territories; as fixed from time to time by the respondent;

(7) Respondent refuses to issue its express product warranty unless and until the dealer from whom the hearing aid was purchased forwards the retail purchaser's name and address to respondent;

(8) Respondent requires dealers whose advertising may reach into other dealers' territories to surrender to such other dealers the names of prospective purchasers responding to such advertising if they reside in such other dealers' territories;

(9) Respondent supplies a dealer only with names of prospective customers arising in the dealers' assigned territory;

(10) Respondent issues to its dealers price lists or provides other means by which the retail prices for Dahlberg hearing aids are set forth;

(11) Respondent refuses to sell Dahlberg repair parts or to provide schematics to all dealers, or to persons engaged in the business of repairing or servicing hearing aids;

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

(13) Respondent prohibits its selected dealers from selling Dahlberg hearing aids to other dealers of hearing aids;

(14) Respondent has the right to terminate the standard-form contract without cause upon thirty days notice to the dealer; and the limited contract without cause upon seven days notice; and

(15) Respondent provides in both contracts that in the event of termination, Dahlberg has the right to repurchase the terminated dealer's inventory of Dahlberg products.

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 manufacturers of hearing aids has been hindered and suppressed;

(2) Competition among dealers dealing in Dahlberg 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 Dahlberg 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;

(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 Dahlberg 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 Federal Trade Commission having issued a complaint which charges respondent Dahlberg Electronics, Inc. with violating the Federal Trade Commission Act; 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 aforesaid complaint, 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 thereafter accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and after 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 makes the following jurisdictional findings and enters the following order:

1. Respondent Dahlberg Electronics, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 7731 Country Club Drive, Minneapolis, Minn.

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 Dahlberg Electronics, Inc., 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 dealer, other than a dealer to whom hearing aids are made available pursuant to this paragraph, 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 respondent may impose a \$10. minimum order requirement for such parts;

(c) repair service on a nondiscriminatory basis with respect to a hearing aid manufactured by respondent when requested by any dealer who sold such aid;

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), (b) or (c) 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 such dealer for a single unit (meaning the same price and discount terms available from respondent) plus a reasonable handling charge, and

(3) respondent may refuse to make available directly from it any of its products or services 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 person or 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 or coercing a dealer of respondent's hearing aids to submit to respondent the names or addresses of any customers of such dealer, or, with respect to such customer names or addresses obtained from a dealer after the effective date of this order, maintaining, using, publishing or disseminating them for any purpose, without securing the free and informed written consent of the dealer for each such purpose based upon full disclosure to the dealer of the specific uses and disseminations which would be made of the customer names. No such consent shall be sought for other

than respondent's advertising and promotional programs for at least one hundred and twenty (120) days from the date of respondent's initial inventory shipment of hearing aids to a new dealer or, in the case of an existing dealer, at least sixty (60) days after service on the dealer of this order and letter attached hereto as Appendix A.

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

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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.

APPENDIX A

(LETTER TO HEARING AID DEALERS)

(Official Stationery of Dahlberg Electronics, Inc.)

Date

Dear

The Federal Trade Commission has entered a consent order against Dahlberg Electronics, Inc. which obligates the company not to impose various restrictions upon dealers or to engage in certain other practices. A copy of the pertinent provisions of the 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

We welcome the opportunity to do business with you on terms which are in accordance with the letter and the spirit of the Federal Trade Commission Order.

Very truly yours,

(Name)
President,
Dahlberg Electronics, Inc.

IN THE MATTER OF
PAY'N SAVE CORPORATION

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

Docket C-2526. Complaint, Aug. 6, 1974—Decision, Aug. 6, 1974

Consent order requiring a Seattle, Wash., owner and operator of retail drug, general merchandise, department and hardware stores, among other things to cease failing to have advertised specials readily available for sale at or below the advertised prices. Further, respondent is required to hire an independent testing company to check on its compliance with the order for a period of two years.

Appearances

For the Commission: *David A. Middaugh.*

For the respondent: *Michael Rayton, Ryan, Bush, Swanson and Hendel, Seattle, Wash.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pay'N Save Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated and is now violating Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Pay'N Save Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the state of Washington, with its office, and principal place of business located at 1511 Sixth Ave., Seattle, Wash.

PAR. 2. Respondent owns and operates retail drug and general merchandise stores in the States of Washington, Oregon, Alaska and California and in Canada. Respondent also owns and operates retail department stores and hardware stores.

PAR. 3. In the course and conduct of its business, respondent ships and distributes and causes the shipment and distribution of various articles of merchandise from warehouses and sellers located in various states to its retail stores located in various other states and in Canada, and then from its retail stores to consumers. In the further course and conduct of its business respondent transmits contracts, business correspondence, monies and other documents from its stores, offices, and divisions located in various states to others of its stores, offices and