

Complaint

88 F.T.C.

IN THE MATTER OF
MAICO HEARING INSTRUMENTS, INC.

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

Docket 8927. Amended Complaint, April 30, 1976 — Decision, Aug. 4, 1976

Consent order requiring a Minneapolis, Minn., manufacturer of hearing aids, among other things to cease imposing on its dealers customer and territorial restrictions and exclusive dealing requirements. The order also requires the firm, under certain circumstances, to make its products available to all qualified dealers, 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, James C. Donoghue and Dennis R. Carluzzo.*

For the respondent: *Thomas C. Kayser, Robins, Davis & Lyons, Minneapolis, Minn.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. §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 Maico Hearing Instruments, Inc. (hereinafter sometimes "Maico") is a corporation organized under the laws of the State of Minnesota, with its principal office and place of business at 7375 Bush Lake Road, Minneapolis, Minnesota.

PAR. 2. Maico is engaged in the business of manufacturing, distributing, selling and repairing of Maico 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 Maico 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 Maico 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 Maico, 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, Maico, which has manufactured hearing aids since 1939, was the fourth largest manufacturer of hearing aids in the United States with sales in excess of \$3 million, representing more than 6 percent of the 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.

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 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 style;

(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 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 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 its hearing aids in commerce, Maico pursues the following course of action:

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

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

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

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 Maico hearing aids within an assigned territory;

(b) require a dealer to achieve a sales quota fixed from time to time by Maico;

(c) prohibit a dealer from soliciting, selling, repairing or making delivery of any of Maico hearing aids outside the assigned territory;

(d) require a dealer to submit to Maico the name and address of each customer who purchases Maico hearing aids;

(e) provide that Maico has the right to terminate the contract for failure to make quotas at any time, or for violations of the terms thereof, upon thirty days written notice to the dealer;

(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 Maico hearing aids;

(3) Respondent requires its dealers to surrender to it all inquiries which are received from prospective purchasers residing outside of such dealers' assigned territories;

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

(5) Respondent permits or requires its dealers to use the Maico brand name, in conjunction with a geographic identification of the dealers' locations, or otherwise, in the dealers' trade styles;

(6) Respondent supplies its dealers only with names of prospective customers arising in such dealers' assigned territories;

(7) Respondent offers to its dealers a cooperative advertising plan which provides that Maico will not share the cost of any dealer advertisement outside of his assigned territory, or which mentions in any way that the dealer also offers for sale other brands of hearing aids;

(8) Respondent issues to its dealers price lists or provides other means by which the retail prices for Maico products are set forth;

(9) Respondent requires its dealers to adhere to repair prices recommended by Maico, which prices are also made available to users of hearing aids;

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

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

(12) Respondent prohibits its selected dealers from selling Maico hearing aids to other dealers of hearing aids;

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

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

(a) a dealer is required to return to the respondent the names and addresses of Maico hearing aid users;

(b) Maico has the right to repurchase the terminated dealer's inventory of Maico 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 Maico hearing aids has been eliminated;

(3) Such dealers have sold or repaired Maico hearing aids at prices established by respondent;

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

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

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

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

(8) 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;

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

(10) Those engaged in the repairing or servicing of hearing aids in

competition with respondent have been deprived of their right to repair or service Maico 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 Maico Hearing Instruments, 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, 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 Maico Hearing Instruments, 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 7375 Bush Lake Road, Minneapolis, Minnesota.

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 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 hearing aid accessories, 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, 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) Respondent's hearing aids, respondent's hearing aid accessories which respondent sells or any of respondent's written materials relating to fitting and selling such hearing aids or accessories, to any dealer engaged in the sale of hearing aids; or

- (b) repair or replacement parts for respondent's hearing aids or any of respondent's written materials relating to repairing or replacing such hearing aids, 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 ten dollar (\$10.00) 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:

- (i) Respondent may require as a condition to the availability from it of any of its products, services or materials, that the dealer or person referred to in 2(a), (b) and (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 at the request of respondent 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 products;

- (ii) Respondent may refuse to make available directly from it any of its products or materials to any dealer or person if such requesting dealer or person is able promptly to obtain the product or materials

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 service charge not to exceed the sum of twenty five dollars (\$25.00), said sum to be adjusted annually by any increase or decrease after 1974 in the Consumer Price Index as published by the United States Government;

(iii) Respondent may refuse to make available directly from it any of its products, services or materials 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;

(iv) Respondent may refuse to make available directly from it any of its products or materials to any dealer or person if such requesting dealer or person will not agree to purchase a minimum initial order of five (5) of respondent's hearing aids on a cash with order basis.

3. Entering into, maintaining, preserving or enforcing by refusal to sell or repair, setting of sales quota or equivalent thereof, termination or threat thereof, 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 dealer who submitted such product for repair unless otherwise instructed in writing by such dealer.

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, accessories or parts.

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 twenty (120) days from the date of respondent's initial 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 units, 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 attached 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 it 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

Decision and Order

88 F.T.C.

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.

APPENDIX A

Dear

The Federal Trade Commission has entered a consent order affecting the hearing aid and accessory operations of Maico Hearing Instruments, Inc. which obligates it not to impose various restrictions upon dealers or to engage in certain other practices. The order is for settlement purposes only and does not constitute an admission that the law has been violated as alleged by the Commission. 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.

Yours very truly,

President, Maico Hearing Instruments, Inc.

Complaint

IN THE MATTER OF

ANDREX INDUSTRIES CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS
LABELING ACTS

Docket C-2831. Complaint, Aug. 11, 1976 — Decision, Aug. 11, 1976

Consent order requiring a New York City manufacturer and seller of fabrics, among other things to cease misbranding and mislabeling wool products; misrepresenting the wool and other fiber content of their fabrics and further requires respondents to notify their customers that the fabrics they purchased were misbranded. The order further prohibits respondents from using the term "Angorama" in connection with products not substantially composed of "angora" fibers.

Appearances

For the Commission: *Jerry R. McDonald.*

For the respondents: *Hahn, Hessen, Margolis & Ryan*, New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Andrex Industries Corp., a corporation, and Stephen Gottdiener, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, 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 Andrex Industries Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1430 Broadway, New York, New York.

Respondent Stephen Gottdiener is an officer of Andrex Industries Corp. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.