

Complaint

88 F.T.C.

IN THE MATTER OF
MAICO HEARING INSTRUMENTS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9011. Complaint, Jan. 29, 1975 — Decision, Sept. 8, 1976

Consent order requiring a Minneapolis, Minn., hearing aid manufacturer, among other things to cease misrepresenting the beneficial results of using its products; misrepresenting the performance characteristics, efficacy and uniqueness of its merchandise; furnishing means and/or instrumentalities of misrepresentation or deception; and failing to maintain adequate and accurate records. Further, in the event a final trade regulation rule regarding hearing aids is promulgated, such rule shall supersede this order to the extent that any requirement or prohibition herein is omitted by the rule or differs from the corresponding portion of the rule.

Appearances

For the Commission: *William S. Busker* and *Heidi P. Sanchez*.

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

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 Textron, Inc., hereinafter referred to as respondent, has 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 Textron, Inc. 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 10 Dorrance St., Providence, Rhode Island.

PAR. 2. Respondent is now, and for some time last past has been through its operating division, Maico Hearing Instruments, 7375 Bush Lake Road, Minneapolis, Minnesota, engaged in the 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, to dealers, distributors, licensees, retailers, salespersons, representatives or agents thereof, for resale to the public.

PAR. 3. In the course and conduct of its business as aforesaid, respondent causes, and for some time last past has caused, its devices

when sold to be shipped from its place of business in the State of Minnesota to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has 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 its business and at all times mentioned herein, respondent has been, and is now, in substantial competition in commerce with corporations, firms and individuals likewise engaged in the sale of hearing aids of the same general kind and nature as the devices sold by respondent.

PAR. 5. Respondent in the course and conduct of its business and for the purpose of inducing the purchase of said devices has furnished and supplied to dealers, distributors, licensees, retailers, salespersons, representatives or agents thereof, who sell said devices to the public, various types of advertising materials, including, but not limited to advertisements, sales manuals, brochures, advertising mailers, ad mats and other sales aid materials.

Respondent has assisted, aided, provided payments to and otherwise cooperated with its dealers, distributors, licensees, retailers, salespersons, representatives, or agents thereof, in the advertising of said devices.

PAR. 6. In the course and conduct of its business respondent has disseminated, and does now disseminate, certain advertisements by use of the United States mail and by various means in commerce as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in periodicals of general circulation or broadcast on radio or television, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of its said devices, and has disseminated, and caused the dissemination of, advertisements concerning said devices by various means, including those aforesaid, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said devices in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Typical and illustrative of the representations contained in the advertisements referred to in Paragraphs Five and Six, but not inclusive thereof, are the following:

With the development of exciting new hearing concepts such as directional hearing and electret microphones, MAICO hearing aids are better than ever. (Mailer)

* * *it represents a dramatic new concept in hearing aid design, but more importantly, because of *what it does to overcome the one problem hearing aid wearers find most difficult: HEARING CLEARLY (especially voices) IN NOISY SURROUNDINGS.* (Mailer)

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Now, a new hearing aid has been released after six years of development and testing, which may offer you *better hearing than you have ever known!* An exclusive new microphone used in this aid suppresses bothersome background noises, and *allows you to hear and understand voices clearly*, even in noisy rooms! (Radio)

A remarkable new hearing aid utilizing an exclusive microphone design can offer as much as 100% improvement in speech discrimination over aids with conventional microphones.

* * *The hearing aid is the new MAICO DirectionEar Mark 100, with the exclusive Linear Array Dephaser (LAD) Microphone. Longtime hearing aid wearers find it difficult to believe how much better they can hear with this unique aid.

BENEFITS TO THE WEARER: 1. Discrimination is greatly improved in noisy environments. (Print)

PAR. 8. Through the above representations, and others of similar import and meaning but not expressly set out herein, respondent has represented directly or by implication that:

1. It merchandises a hearing aid which is a new invention or involves new model features or a new mechanical, engineering or scientific concept or principle in hearing aid capability.

2. Certain of its hearing aids or component parts thereof are unique, special or exclusive in that they

(a) are superior to all other hearing aids or component parts thereof used for hearing loss; or

(b) contain or embody certain inventions, features (excluding physical appearance), concepts or principles not contained or embodied in any other hearing aids or component parts thereof used for hearing loss.

3. Respondent's hearing aids will be beneficial to persons with a hearing loss, regardless of the type or extent of loss.

4. Respondent's hearing aids will enable persons with a hearing loss to distinguish and understand speech sounds in noisy or group situations.

5. Respondent's hearing aids will help those persons who hear but do not understand.

PAR. 9. In truth and in fact:

1. The hearing aids referred to in the representations contained in Paragraph Seven, and in other advertisements, are not new inventions nor do they involve model features or mechanical, engineering or scientific concepts or principles in hearing aid capability that are new.

2. The hearing aids or component parts thereof, referred to in the representations contained in Paragraph Seven, and in other advertisements, are not unique, special or exclusive in that they

(a) are not superior to all other hearing aids or component parts thereof used for hearing

(b) do not contain or embody certain inventions, loss; and features (excluding physical appearance), concepts or principles not contained or embodied in any other hearing aids and/or component parts thereof used for hearing loss.

3. Many persons with a hearing loss will not receive any significant benefit from any hearing aid.

4. Many persons with hearing loss will not be able to consistently distinguish and understand speech sounds in noisy or group situations by using any hearing aid.

5. In many instances, persons who hear but do not understand have a discrimination problem that cannot be helped by any hearing aid.

Therefore, the advertisements referred to in Paragraphs Five through Eight 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 through Eight were and are false, misleading and deceptive.

PAR. 10. Through the use of the aforesaid advertisements, respondent has represented, directly or by implication, that at the time that respondent made the claims set forth in Paragraph Eight, respondent had a reasonable basis for such claims.

PAR. 11. In truth and in fact, at the time that respondent made the claims set forth in Paragraph Eight, respondent had no reasonable basis from which to conclude that such claims were true.

Therefore, the statements and representations set forth in Paragraph Eight were, and are, deceptive or unfair acts or practices.

PAR. 12. At the time that respondent made the claims set forth in Paragraph Eight, respondent had no reasonable basis to support such claims.

Therefore, the making of the claims set forth in Paragraph Eight was, and is, a deceptive or unfair act or practice.

PAR. 13. The following statement constitutes a material fact with respect to the making of any claim regarding the hearing capability or hearing quality of any hearing aid:

Many persons with a hearing loss will not receive any significant benefit from any hearing aid.

PAR. 14. The advertisements referred to in Paragraphs Five through Eight contain claims regarding the hearing capability or the hearing quality of respondent's hearing aids and fail to disclose the material fact set forth in Paragraph Thirteen. Therefore, those advertisements

were and are "false advertisements" as that term is defined in the Federal Trade Commission Act, and respondent's failure to disclose said material fact in connection with each such claim for its hearing aids was, and is, an unfair or deceptive act or practice.

PAR. 15. The dissemination by respondent of the aforesaid false advertisements and the use of the aforesaid unfair or deceptive acts or practices has had, and now has, 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 respondent's devices by reason of said erroneous belief.

PAR. 16. The aforesaid acts and practices of respondent, as herein alleged, including the dissemination of false advertisements, and the making of representations without a reasonable basis as aforesaid, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce in violation of Sections 5 and 12 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 the 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 3.25(d) 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 Washington, 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 respondent, and the proceeding is in the public interest.

ORDER

PART I

It is ordered, That Maico Hearing Instruments, Inc., a corporation, its successors and assigns, and its officers, and respondent's 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 or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, which

(a) Represents, directly or by implication, that:

(1) Respondent merchandises a hearing aid which is a new invention or involves a new mechanical, engineering or scientific concept or principle in hearing aid capability unless [1] respondent possesses and relies upon competent and reliable scientific or medical evidence which establishes that respondent merchandises such a hearing aid which is a new invention or involves a new mechanical, engineering or scientific concept or principle in hearing aid capability; [2] the invention, concept or principle represents a significant benefit to users of the hearing aid; [3] respondent clearly and conspicuously describes the new invention, concept, or principle, and the significant benefit to the user of the hearing aid, in the advertisement; and [4] respondent maintains in its records, subject to reasonable inspection by Commission staff members, the competent and reliable scientific or medical evidence upon which it relies to support such claim until three (3) years after the last dissemination of any such claim.

(2) Respondent's hearing aid or its shape, design or any other model feature is new, or that respondent merchandises a hearing aid which is a new invention or involves a new mechanical, engineering or scientific concept or principle when such hearing aid or its shape, design or any other model feature or invention, mechanical, engineering or scientific concept or principle has been marketed in the United States for a period greater than one year. *Provided, however*, that such one-year time period shall not begin to run during the test marketing of such new model or feature where such test marketing program does not cover more than fifteen percent (15%) of the population, does not exceed six (6) months in duration, and is conducted in good faith for test purposes only.

(3) Respondent's hearing aids will be beneficial to persons with a hearing loss regardless of the type or extent of loss.

(4) Use of respondent's hearing aids will enable all persons with a hearing loss to consistently distinguish or understand speech sounds in noisy situations.

(5) Use of respondent's hearing aids will enable all persons with a hearing loss to consistently distinguish or understand speech sounds in group situations.

(6) Respondent's hearing aids or component parts thereof (a) are unique or superior to all other hearing aids used for hearing loss; or (b) embody inventions, features (excluding physical appearance), concepts or principles not contained or embodied in any other hearing aid or component parts thereof used for hearing loss unless [1] respondent possesses and relies upon competent and reliable scientific or medical evidence which establishes that its hearing aids or component parts thereof (a) are unique and superior to all other hearing aids used for hearing loss, and (b) embody inventions, features, concepts or principles not contained or embodied in any other hearing aids or component parts thereof used for hearing loss; [2] the hearing aid or component part, invention, feature, concept or principle represents a significant benefit to users of the hearing aid; [3] respondent clearly and conspicuously describes the nature of the uniqueness or superiority claim made in the advertisement, including the nature of the benefit to the consumer attributed to the invention, feature, concept or principle embodied in any such hearing aid; and [4] respondent maintains in its records, subject to reasonable inspection by Commission staff members, the competent and reliable scientific or medical evidence upon which it relies to support such claim until three (3) years after the last dissemination of any such claim.

(7) Respondent's hearing aids will help all or most persons to discriminate speech sounds where they hear but do not understand.

(b) In the event the Federal Trade Commission promulgates a final trade regulation rule which omits a requirement or prohibition or whose requirements or prohibitions differ in any manner with respect to the representations dealt with in any sub-paragraph of Paragraph 1 of Part I, of this order, such omissions, requirements or prohibitions with respect to such representations imposed by the rule shall, on the effective date of the rule, supersede and replace or cause to be automatically deleted the corresponding and differing sub-paragraphs of Paragraph 1, Part I, of this order.

2. Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to any feature (excluding physical appearance), or performance characteristic of, or

the uniqueness, superiority or efficacy of any of respondent's hearing aids or any component part thereof, unless prior to the time of such statement or representation respondent had a reasonable basis for same, which shall consist of competent and reliable scientific or medical evidence.

3. Failing to maintain accurate and adequate records which may be inspected by Commission staff members upon reasonable notice:

(a) which contain documentation in support of any claim included in any advertising or sales promotional material disseminated by respondent, or any of its divisions' or subsidiaries' officers or employees, which claim concerns any feature (excluding physical appearance), or performance characteristic of or the uniqueness, superiority or efficacy of, any of respondent's hearing aids or any component part thereof; and

(b) which provided the basis upon which respondent relied at the time any such claim was made.

Such records shall be maintained by respondent for so long as any such material is disseminated by respondent or any of its divisions' or subsidiaries' officers or employees, or by its dealers, distributors, licensees, retailers, representatives or agents thereof, in cooperation with respondent, and for a further period of three (3) years after the last dissemination of any such material.

4. 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 or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in paragraph 1 of Part I of this order.

PART II

It is further ordered, That Maico Hearing Instruments, Inc., a corporation, its successors and assigns, and respondent's agents, representatives, officers and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of hearing aids in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act shall not:

1. Misrepresent, directly or indirectly, any feature or performance characteristic of any of respondent's hearing aids or any component part thereof.

2. Supply any dealer, distributor, licensee, retailer, salesperson, representative or agent thereof, with advertisements, sales manuals, brochures, advertising mats, or any other advertising or sales aid

materials for the purpose of inducing or which are likely to induce, directly or indirectly, the purchase of respondent's devices, and which contain any of the false, misleading or deceptive representations prohibited in this order.

PART III

It is further ordered, That Maico Hearing Instruments, Inc., a corporation and its successors and assigns, shall:

1. Within thirty (30) days after the effective date of this order, or within thirty (30) days after any dealer, distributor, licensee or retailer attains such status, distribute a copy of this order, by certified or registered mail, return receipt required, to each of respondent's known dealers, distributors, licensees, or retailers, who are now or in the future become engaged in the advertising, offering for sale, sale or distribution of respondent's hearing aids to the consuming public, except with respect to respondent's hearing aids advertised, offered for sale, sold or distributed under a private label by a party other than respondent, this requirement shall be limited to sending a copy of the order to the person responsible for the advertising of respondent's hearing aids under the private label at the principal office of the private label purchaser of respondent's hearing aid.

2. Supply, upon request, proof of distribution to, and make available to the Federal Trade Commission for inspection and review, the names and addresses of those parties to whom respondent distributed a copy of this order as required by paragraph 1 of Part III of this order.

3. Inform each appropriate party described in paragraph 1 above that respondent shall not participate in any way in any advertisement which fails to comply with Part I of this order.

4. Not pay for, compensate for, print, mail or in any other way, directly or indirectly, through discounts, services, or any other benefit in lieu of direct payment, or otherwise participate in any manner in the preparation of, payment for, or dissemination of any of the advertisements of any party described in paragraph 1 above at any time if any such advertisement fails to comply with Part I of this order.

5. Within thirty (30) days after the effective date of this order, institute a program for reviewing any advertisement submitted by respondent's dealers, distributors, licensees, retailers, representatives or agents thereof, pursuant to respondent's cooperative advertising or similar program for advertising credit or other consideration.

PART IV

It is further ordered, That respondent submit to the Federal Trade

Commission, within sixty (60) days from the effective date of this order, a detailed report describing the actions that respondent has taken in order to comply with said order.

In addition, respondent shall, for a period of three (3) years at one-year intervals from the effective date of this order, submit to the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

It is further ordered, That respondent 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 any subsidiary or any other change in the corporate structure which may affect any compliance obligation arising out of this order.

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its operating divisions.

Commissioner Dole did not participate by reason of absence.

Complaint

88 F.T.C.

IN THE MATTER OF
RADIOEAR CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9012. Complaint, Jan. 29, 1975 — Decision, Sept. 8, 1976

Consent order requiring a McMurray, Penn., hearing aid manufacturer, among other things to cease making false, deceptive and unsubstantiated claims or representations regarding the benefits, characteristics, efficacy and/or uniqueness of its products; furnishing means and/or instrumentalities of misrepresentation or deception; and failing to maintain adequate and accurate records. Further, in the event a final trade regulation rule is promulgated regarding hearing aids, such rule shall supersede this order to the extent that any requirement or prohibition herein is omitted by the rule or differs from the corresponding portion of the rule.

Appearances

For the Commission: *Wallace S. Snyder* and *Judith A. Neibrief*.

For the respondent: *Charles C. Keller, Peacock, Keller, Yoke & Day*,
Washington, Pennsylvania.

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 Radioear Corporation, hereinafter referred to as respondent, has 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 Radioear Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal place of business located at 375 Valley Brook Road, Canonsburg, Pennsylvania. Radioear Corporation is a subsidiary of the Esterline Corporation, New York, New York.

PAR. 2. Respondent is now, and for some time last past has been engaged in the 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, to dealers, distributors, licensees, retailers, salespersons, representatives or agents thereof, for resale to the public.

PAR. 3. In the course and conduct of its business as aforesaid, respondent causes, and for some time last past has caused, its devices when sold to be shipped from its place of business in the Commonwealth