

Decision and Order

103 F.T.C.

IN THE MATTER OF

BIG THREE INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket 9138. Complaint, June 17, 1980—Decision, Jan. 16, 1984*

This consent order prohibits respondent from having on its board of directors any person who is a board member of a competing company, whose revenues derived from the relevant product or service exceeds 5 million dollars. Respondent must, among other things, institute an annual monitoring program designed to detect unlawful interlocks; permit only those persons who have submitted the information required by Paragraph III(a) of the order to serve as board members; and provide present and future directors and prospective directors, including those of its subsidiaries, with a copy of the order.

Appearances

For the Commission: *Steven E. Weart, Kristin Malmberg and Edward C. Johnson.*

For the respondent: *Willis Witt, Liddell, Sapp, Zivley, Brown & LaBoon, Houston, Tex.*

DECISION AND ORDER

The Commission having heretofore issued its complaint charging respondent Big Three Industries, Inc. ("Big Three") with violation of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, 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, 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The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

* Complaint previously published at 103 F.T.C. 17 (1984).

The Commission having considered the matter and having thereupon 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(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Big Three Industries, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 3535 West Twelfth Street, in the city of Houston, State of Texas.

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 the following definitions shall apply herein:

(a) *Parent* means any corporation which owns or controls, directly or indirectly, 50 percent or more of the issued and outstanding voting securities of another corporation.

(b) *Subsidiary* means any corporation of which 50 percent or more of the issued and outstanding voting securities is owned or controlled, directly or indirectly, by another corporation.

(c) *Director* does not include any foreign national who sits on the board of directors of a Big Three Subsidiary incorporated pursuant to the laws of a foreign sovereign, *provided*, that no more than 10 percent of the annual gross revenue of such Subsidiary (including the revenues of its Subsidiaries) is represented by exports to the United States of America and *provided*, that such foreign national does not also sit on the Board of Directors of Big Three or of a Big Three Subsidiary incorporated pursuant to the laws of any state of the United States of America.

(d) *Partially-Owned Foreign Corporation* shall mean any corporation which (1) is incorporated pursuant to the laws of a foreign sovereign, (2) is not owned, directly or indirectly, by Big Three or its Subsidiaries (other than a Partially-Owned Foreign Corporation) to the extent of 70 percent or more of the issued and outstanding voting securities and (3) either (i) generates no more than 10 percent of its annual gross revenue (determined in accordance with generally accepted accounting principles) by exports to the United States of

America or (ii) because required by the law of the jurisdiction where the corporation is organized, at least 50 percent of the directors of the corporation are citizens or permanent residents of that jurisdiction.

(e) *Relevant Amount* shall mean the product of \$5,000,000.00 (U.S.) multiplied by a fraction, the denominator of which is 258.71 and the numerator of which is the Consumer Price Index—All Items for Wage-Earners and Clerical Employees in the United States as published by the United States Department of Labor for the month of December of the year immediately preceding the year for which the calculation is being made for purposes hereof.

(f) *Qualifying Subsidiary* shall mean any Subsidiary which had revenue (determined in accordance with generally accepted accounting principles) for its immediately preceding fiscal year of an amount at least equal to the Relevant Amount.

II.

It is further ordered, That:

(a) Big Three, its successors and assigns, shall not permit on its board of directors or on the boards of directors of its Subsidiaries (other than a Partially-Owned Foreign Corporation) any Director who also serves as a Director of any other corporation (other than Big Three or any of its Subsidiaries or a Partially-Owned Foreign Corporation) if Big Three and such other corporation are, by virtue of business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws of the United States of America (hereinafter referred to in this Order as an "Interlock"), *provided*, that no such interlock shall be prohibited hereunder unless:

(1) The annual gross revenues (determined in accordance with generally accepted accounting principles) of Big Three and its Subsidiaries (other than a Partially-Owned Foreign Corporation) derived from a product or service sold or rented by Big Three or its Subsidiaries as to which Big Three competes with such other corporation exceeds the Relevant Amount, and

(2) The annual gross revenues (determined in accordance with generally accepted accounting principles) of such other corporation (including the revenues of its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries) derived from sales or rentals of a product or service as to which it competes with such product or service sold or rented by Big Three or its Subsidiaries exceeds the Relevant Amount.

(b) For the purpose of this Order, when an interlock occurs with any other corporation, competition between Big Three or any of its Subsidiaries (other than a Partially-Owned Foreign Corporation) and such other corporation or any of its Qualifying Subsidiaries or its Parents or its Parents' Qualifying Subsidiaries will be considered to be competition between Big Three and such other corporation. In addition, a product or service sold or rented by Big Three or its Subsidiaries shall only be considered competitive with a product or service sold or rented by another corporation if such products or services are sold or rented (a) in the same geographic market and (b) at the same level of the distribution process.

III.

It is further ordered, That:

(a) Within sixty (60) days after the date of service of this Order, and annually thereafter no later than April 1 of each calendar year, Big Three shall obtain, review and retain from each of its Directors and each person who has been nominated to be its Director and from each Director and each person who has been nominated to be a Director of each Big Three Subsidiary (other than a Partially-Owned Foreign Corporation), except Directors whose terms expire prior to June 1 of such calendar year and who are not standing for reelection, the following information concerning each corporation, its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries (other than Big Three or any of its Subsidiaries or a Partially-Owned Foreign Corporation) of which such person serves as a Director:

(1) Name and address; and

(2) A descriptive list of each product or service for which the annual gross revenue of such corporation for its most recent fiscal year (including the revenues of its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries) exceeds the Relevant Amount.

(b) Big Three shall not permit any person to serve as a Director who fails to submit to Big Three the information required by this Paragraph.

(c) Big Three shall provide the information received pursuant to this paragraph to the Commission's staff upon twenty (20) days' written request.

(d) If competition (as defined in Paragraph II above) arises as to any subject product or service between Big Three (or any of its Subsidiaries, other than a Partially-Owned Foreign Corporation) and any other corporation with which there is an interlock by virtue of action taken by such other corporation subsequent to the submission to Big Three

under Paragraph III(a) above of information concerning such corporation, then Big Three shall have no obligations under Paragraph II above until May 1 of the year following the year such information was submitted.

(e) Big Three shall have a period of thirty (30) days after the date of the closing of an acquisition or the date upon which Big Three or any of its Subsidiaries commences the marketing of any such product or service, as the case may be, which creates an interlock that would otherwise be in violation of the terms of Paragraph II of this Order to remedy such interlock.

IV.

It is further ordered, That within (10) days from the date of service of this Order, Big Three shall distribute a copy of this Order to each of the current Directors of its Subsidiaries (other than a Partially-Owned Foreign Corporation). Thereafter, Big Three shall distribute a copy of this Order to each prospective Director of Big Three and to each prospective Director of each of its Subsidiaries (other than a Partially-Owned Foreign Corporation)

V.

It is further ordered, That Big Three shall:

(a) Within ninety (90) days after the date of service of this Order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this Order; and

(b) File with the Commission such other reports of compliance with this Order as may be requested by the Commission.

VI.

It is further ordered, That the obligations imposed upon Big Three under the terms of this Order shall become effective upon and continue for a period of ten (10) years following the date of service of this Order.

VII.

It is further ordered, That Big Three shall notify the Commission not more than thirty (30) days after any change in the corporation such as a 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 the compliance obligations arising out of this Order.

Set Aside Order

103 F.T.C.

IN THE MATTER OF
DICTOGRAPH PRODUCTS, INC.

ORDER TO SET ASIDE IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 5655. Order, Sept. 24, 1953—Order To Set Aside, Jan. 17, 1984

The Federal Trade Commission has set aside the Sept. 24, 1953 order issued against Dictograph Products, Inc. (50 F.T.C. 281), in light of its actions in *Beltone Electronics Corp.*, Dkt. 8928 [100 F.T.C. 68 (1982)] and *Dahlberg Electronics Corp.*, Dkt. 8229 [101 F.T.C. 703 (1983)], which set aside prohibitions on the companies' use of exclusive dealing arrangements.

ORDER TO SET ASIDE ORDER TO CEASE AND DESIST

On September 24, 1953, the Federal Trade Commission issued an order against Dictograph Products, Inc. in Docket No. 5655 prohibiting Dictograph, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements upon its dealers. [50 F.T.C. 281]

Two of Dictograph's larger competitors are now permitted by recent Commission actions to engage in the same exclusive dealing practices contained in the order against Dictograph. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.*, Docket No. 8928 [100 F.T.C. 68], challenging, among other things, the same practices prohibited by the order against Dictograph. On April 11, 1983, the Commission, in *Dahlberg Electronics, Inc.*, Docket No. 8929 [101 F.T.C. 703], set aside prohibitions on Dahlberg's use of exclusive dealing arrangements, which were similar to those contained in the order against Dictograph.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued an order to show cause why the proceeding herein should not be reopened to set aside the final cease and desist order in Docket No. 5655, prohibiting Respondent's use of exclusive dealing arrangements. Respondent was provided an opportunity to object to the proposed set aside of the order against it, and having failed to do so, is now deemed to have consented to such action. In view of the Commission's actions in *Beltone* and *Dahlberg*, the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened