

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
) Civil No. 671378
v.)
) Judge Charles W. Joiner
NU-PHONICS, INC.;)
LUCAS, INC.;)
FERNDALE HEARING AID CENTER, INC.;)
EASTSIDE HEARING AID CENTER, INC.;)
DOWNRIVER HEARING AID CENTER;)
DANIEL F. BIFANO, d/b/a CADILLAC)
HEARING AID & OPTICAL CO.;)
MURRAY DAVIS PEPPARD, d/b/a DEARBORN)
HEARING AID CENTER;)
ALLAN M. KAZEL, d/b/a METRO HEARING)
AID CENTER; and)
WILLIAM T. LAFLER, d/b/a OAKLAND)
COUNTY HEARING AID SERVICE,)
)
Defendants.)

DEC 19 1978

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)-(h), the United States files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I

NATURE AND PURPOSE OF THE PROCEEDING

On June 30, 1976, the United States filed a civil antitrust Complaint alleging that four corporations, one partnership, and four individuals, doing business as hearing aid dealers, conspired to fix prices in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

The Complaint alleges that beginning at least as early as November 1974 and continuing thereafter at least until February 5, 1975, the defendants engaged in a combination and conspiracy to fix, raise, and maintain the prices at which hearing aids were sold in the Detroit area (Wayne, Macomb, and Oakland Counties).

The Complaint seeks a judgment by the Court declaring that defendants had engaged in an unlawful combination and conspiracy in unreasonable restraint of trade in violation of the Sherman Act. It also seeks an Order by the Court to enjoin and restrain the defendants from such activities in the future.

The corporate defendants named in the Complaint are: Nu-Phonics, Inc.; Lucas, Inc.; Ferndale Hearing Aid Center, Inc.; and Eastside Hearing Aid Center, Inc. The partnership named in the Complaint is Downriver Hearing Aid Center. The individual defendants named in the Complaint are Daniel F. Bifano, d/b/a Cadillac Hearing Aid & Optical Co.; Murray Davis Peppard, d/b/a Dearborn Hearing Aid Center; Allan M. Kazel, d/b/a Metro Hearing Aid Center; and William T. Lafler, d/b/a Oakland County Hearing Aid Service.

Defendants' activities which gave rise to this civil action were also the subject of a criminal felony Indictment returned by a grand jury on June 30, 1976. The trial of the criminal case commenced on June 6, 1977. Before the United States completely presented its evidence, the trial was discontinued because the case was resolved in other ways. As to three of the defendants, the United States voluntarily dismissed the criminal charge because of the health of the principals. The remaining defendants pleaded nolo contendere to misdemeanor Informations which were filed by the United States. The felony Indictment was dismissed and the Court sentenced these remaining defendants. This civil action had been held in abeyance until the criminal charge was resolved.

II

DESCRIPTION OF THE PRACTICES GIVING RISE TO THE ALLEGED VIOLATIONS OF THE ANTITRUST LAWS

Hearing aids are electrical devices worn by persons with hearing problems to assist them to hear better. Hearing aid dealers sell hearing aids and usually provide associated products and services. Hearing aid dealers are paid either by the patient or, if the patient is covered by a form of public assistance, by a State or local public agency.

During the period specified in the Complaint, the defendants were hearing aid dealers in the Detroit area. During 1974, defendants had revenues of approximately \$800,000 from the sale of hearing aids in the Detroit area.

The Complaint alleges that the defendants engaged in a combination and conspiracy beginning as early as November 1974 and continuing at least until February 5, 1975, the substantial terms of which were:

- (a) to refrain from giving price quotations for hearing aids over the telephone;
- (b) to refrain from advertising prices for hearing aids; and
- (c) to charge \$180 over cost for all State business (hearing aids sold to the public and paid for, in whole or in part, by a governmental entity or agency, including the State of Michigan and local public agencies).

The Complaint further alleges that the combination and conspiracy had the following effects, among others:

- (a) prices for hearing aids in the Detroit area have been fixed, raised and maintained at artificial and noncompetitive levels;

- (b) price competition between the defendants and co-conspirators in the sale of hearing aids in the Detroit area has been restrained and eliminated; and
- (c) purchasers of hearing aids in the Detroit area have been deprived of the benefits of purchasing hearing aids in an open and competitive market.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the Antitrust Procedures and Penalties Act. The proposed Judgment states that it constitutes no admission by any party with respect to any issue of fact or law. Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, entry of the proposed Judgment is conditioned upon a determination by the Court that the proposed Judgment is in the public interest (Section X of the Final Judgment).

The proposed Final Judgment enjoins any direct or indirect renewal of the type of conspiracy alleged in the Complaint. Specifically, Section IV provides that the defendants are enjoined and restrained from entering into, adhering to, maintaining, furthering, or renewing, directly or indirectly, any contract, agreement, understanding, plan, program, or concert of action with any other hearing aid dealer in the Detroit area, to:

- (a) refrain from giving price quotations for hearing aids over the telephone;

- (b) refrain from advertising prices for hearing aids;
- (c) fix, determine, establish, maintain, stabilize, increase or adhere to prices, markups, discounts or other terms or conditions, for the sale or service of hearing aids.

Section V further enjoins each defendant from, directly or indirectly:

- (A) communicating to any other hearing aid dealer in the Detroit area information concerning:
 - (1) future prices, markups, or discounts at which, or terms or conditions upon which, any hearing aid or any service will be sold or offered for sale by said defendant;
 - (2) the fact that such defendant is considering making changes or revisions in the prices, markups or discounts at which, or the terms or conditions upon which, such defendant sells or offers to sell any hearing aid or any service;
- (B) requesting from another hearing aid dealer in the Detroit area any information which said defendant could not communicate without violating subparagraph (A) of Section V.

Section VII of the proposed Judgment orders and directs each defendant to:

- (A) furnish a copy of the Judgment to each of its employees who has pricing responsibility in connection with the sale of hearing aids within thirty (30) days after the date of entry of the Judgment;

- (B) furnish a copy of the Judgment to each new employee who has pricing responsibility in connection with the sale of hearing aids, within thirty (30) days after the new employee is employed; and
- (C) attach to each copy of the Judgment furnished pursuant to subsections (A) and (B) of Section VII a statement advising each person of his obligations and of the defendants' obligations under the Judgment, and of the penalties which may be imposed upon him and/or upon the defendant for violation of the Judgment.

There is one limited exception to the prohibition against the exchange of information set forth in Section V of the proposed Judgment. This exception, contained in Section VI of the proposed Judgment, provides that nothing in Section V of the Judgment shall prohibit the communication of applicable information, including prices and quotations, by a defendant to another hearing aid dealer in the course of, and solely related to, negotiating for, entering into, or carrying out a bona fide purchase or sales transaction between such defendant and such other hearing aid dealer.

The proposed Judgment is applicable to each of the defendants and to the officers, directors, partners, agents, employees, and subsidiaries of each defendant, and to all other persons in active concert or participation with any of them who shall have received actual notice of the Judgment by personal service or otherwise (Section III).

Standard provisions similar to those found in other antitrust consent judgments are contained in Section I, concerning jurisdiction of the Court, Section VIII, concerning investigation and reporting requirements, and Section IX, concerning retention of jurisdiction by the Court over the parties to this Final Judgment.

IV

REMEDIES AVAILABLE TO
POTENTIAL PRIVATE PLAINTIFFS

After entry of the proposed Final Judgment, any potential private plaintiffs who might have been damaged by the alleged violations will retain the same right to sue for monetary damages and any other legal and equitable remedies which they may have had if the Judgment had not been entered. The Judgment may not be used, however, as prima facie evidence in private litigation pursuant to Section V(a) of the Clayton Act, as amended, 15 U.S.C. § 16(a).

V

PROCEDURES AVAILABLE FOR MODIFICATION OF
THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Judgment should be modified may submit written comments to John A. Weedon, Chief, Cleveland Field Office, Antitrust Division, United States Department of Justice, 995 Celebrezze Federal Building, Cleveland, Ohio 44199 (telephone: 216-522-4070), within the 60-day period provided by the Act. These comments and the Department's responses to them will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which

remains free to withdraw its consent to the proposed Judgment at any time prior to its entry if it should determine that some modification of it is necessary. Section IX of the proposed Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for such order as may be necessary or appropriate for its modification, interpretation or enforcement.

VI

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Judgment considered by the Antitrust Division was a full trial of the issues on the merits and on relief. The Division considers the substantive language of the proposed Judgment to be of sufficient scope and effectiveness to make litigation on the issues unnecessary, as the proposed Judgment provides appropriate relief against the violations charged in the Complaint.

VII

DETERMINATIVE MATERIALS AND DOCUMENTS

No other material or document of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16) was considered in formulating this proposed Judgment. Consequently, none is submitted pursuant to that Section.

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Dated: DEC 19 1978