

Effective July 5, 1999

MINNESOTA DEPARTMENT OF HEALTH

In the Matter of George Simmons,
Hearing Instrument Dispenser

ADMONITION AGREEMENT

HDC-96906

THIS AGREEMENT is by and between the Minnesota Department of Health ("Department") and George Simmons ("Practitioner") who hereby stipulate and agree:

1. The purpose of this Admonition Agreement ("Admonition") is to resolve a disputed matter between Practitioner and the Department regarding the conclusion described in paragraph 5 of this Admonition. In entering into this Admonition, Practitioner does not admit that the conduct set forth in paragraph 4 of this Admonition violates the requirements of Minn. Stat. § 153A.15 (1998). However, Practitioner agrees to undertake the actions set forth in paragraph 6 of this Admonition and consents to judgment for a court order compelling him to comply with those actions should he fail to timely complete them.

2. The Department is authorized pursuant to Minn. Stat. § 153A.14 (1998) to certify and regulate hearing instrument dispensers and to take disciplinary action as appropriate.

3. Practitioner is a resident of the State of Minnesota. Practitioner has at all times relevant to this Admonition been certified by the Department as a hearing instrument dispenser pursuant to Minn. Stat. § 153A.14 (1998). Practitioner is subject to the jurisdiction of the Department with respect to the matters referred to in this Admonition.

4. Practitioner admits the following facts:

a. Practitioner has been involved with retail hearing instrument dispensing in the State of Minnesota since 1990. Prior to entering the dispensing business, Practitioner worked as senior audiology technician for six and one half years at Brooke Army Medical Center in San Antonio, Texas;

b. In 1990, Practitioner received his initial training and retail experience as a hearing instrument dispenser through Miracle Ear Centers of America. Practitioner worked as an office manager for Dahlberg, Inc. at its St. Cloud Miracle Ear Center, located at 3333 Division Street, Suite 115, St. Cloud, Minnesota 56301-3783 ("ME");

c. In late October 1990, Practitioner purchased the ME franchise from Ken Dahlberg and Roger Taylor and entered into a franchise agreement with Dahlberg, Inc.;

d. On May 23, 1990, the Department approved Practitioner as a hearing instrument permittee. Practitioner received a copy of the relevant laws pertaining to hearing

instrument dispensing when he initially applied for permittee status. The Department renewed his permit in 1991, 1992 and 1993;

e. On October 13, 1993, the Department certified Practitioner as a hearing instrument dispenser. Practitioner received a copy of the relevant laws pertaining to hearing instrument dispensing when he initially applied for certification. Between October 1993 and February 1996, Practitioner received three certification renewal notices from the Department in which he had been advised of the following: "As a dispenser of hearing instruments you have legal responsibilities and obligations. You are responsible for conducting your business and activities consistent with the current laws provided to you.";

f. By 1995, Practitioner had expanded his dispensing business to include an office in Buffalo, as well as service centers in Elk River, Princeton, Paynesville, Melrose, and Sauk Centre;

g. During the fall of 1995, Practitioner hired Jeffrey Dockman as a receptionist and data entry clerk. Mr. Dockman had no experience dispensing hearing aids or otherwise working in the hearing instrument industry before Practitioner hired him. Mr. Dockman's prior work experience included telemarketing, sales, and managing a small printing business. According to Practitioner, Mr. Dockman possessed good customer relations and telephone skills, but was unable to follow basic office procedures pertaining to electronic data entry and data base management;

h. By October 1995, Practitioner began spending most of his time at the Buffalo office. Practitioner's franchise was operating with little or no cash flow and he had significant personal and business debt. Practitioner was in arrears on his franchise payments to Dahlberg, Inc. and became delinquent on his home mortgage loan through Norwest. Mr. Dockman assisted Practitioner with Practitioner's financial difficulties. Practitioner discussed with Mr. Dockman, Practitioner's vision of transforming his one-vendor franchise operation into a multi-line independent dispensing practice as well as other means for reducing business expenses;

i. Before the end of fall 1995, Mr. Dockman had assumed the position of office manager and negotiated payment plans with ME business creditors. Practitioner retained responsibility for negotiating terms of payment with Dahlberg, Inc. because Practitioner did not want Dahlberg to become aware of his impending plans to terminate his franchise agreement;

j. By February 1996, Practitioner realized that he was unable to meet his ME business obligations. Practitioner owed Dahlberg, Inc. \$81,939.05. Practitioner had failed to pay \$30,979.73 to the Internal Revenue Service for either WT-FICA, FUTA or income taxes due for his ME business for the tax periods of 12/31/91, 12/31/93, 3/31/94, 6/30/94, 9/30/94, 12/31/94, 12/31/95 and 3/31/96. Practitioner failed to pay withholding tax or provider tax in the amount of \$13,175 to the State of Minnesota Department of Revenue during 1993, 1994 and 1995. Practitioner defaulted on his 1995 equipment lease with Execulease. Practitioner failed to pay The Paynesville Press and St. Cloud Press for ME advertisements. Practitioner fell behind on his

office lease payments to Plaza Professional Building for his Buffalo office. Practitioner was also behind on his rent payments to St. Michael's Hospital for his Sauk Centre service center. Practitioner acknowledges these are only some of the debts he owed at the time;

k. Throughout early 1996, Practitioner met with Mr. Dockman and Jean Wirz, a dispenser in Practitioner's employ, to discuss closing his ME franchise and forming an independent dispensing business. Practitioner did not want to establish a sole proprietorship in his name due to the significant unpaid debt he carried from his ME business and personal activities;

l. On February 15, 1996, despite the lack of a written agreement between the parties, Practitioner, Ms. Wirz and Mr. Dockman began actual start up activities for the new dispensing business, Minnesota Hearing Center ("MHC"). Mr. Dockman established an MHC bank account. Mr. Wirz and Practitioner set up MHC business accounts and inventory. Practitioner provided the office space, dispensing equipment, and ME customer records for MHC;

m. During February 1996, Practitioner drafted, signed and distributed an announcement to his ME customers confirming that he and his dispensing staff would be providing the same services under a new business name;

n. During the month of February 1996, Ms. Wirz wrote MHC account payable checks to various ME creditors and identified them in the MHC ledger as loans to Practitioner. Practitioner was not aware these were classified as loans at the time;

i) Check #2001 in the amount of \$250.00 to the Federal Department of Revenue;

ii) Checks #2002, 2003, 2055 for a total of \$285.23 to the Minnesota Department of Revenue;

iii) Check #2004 in the amount of \$500.00 to Hearing Services Int.;

iv) Check #2005 in the amount of \$500.00 to U.S. West;

v) Check #2006, 2050 for a total of \$400.00 to Beneficial;

o. Mr. Dockman and Ms. Wirz state that Practitioner directed them to use MHC funds to pay the following and other ME related debts, which were not characterized as personal loans to Practitioner. Practitioner denies having done so;

i) \$1,416.63 to Medica on 3/22/96 for employee premiums which included January and February ME premiums;

ii) \$2,500 to Dorsey and Whitney on 3/22/96 for legal advice concerning the disposition of his Dahlberg franchise in light of both his personal and business financial difficulties;

iii) consumer refunds concerning ME transactions which included a partial refund of \$500 on 3/25/96 to M.K. and a refund of \$592.90 on 3/14/96 to D.D.;

p. On February 29, 1996, Practitioner closed his franchise operation and "discharged" all of his ME staff. On March 6, 1996, Dahlberg, Inc., terminated Practitioner's franchise agreement after Practitioner informed Dahlberg, Inc., that he was no longer financially able to continue business as Miracle Ear Center;

q. MHC operated with little or no start up capital and conducted business with its manufacturer vendors, Micro-Tech, Lori Medical Laboratories and Hearing Services International, primarily on a cash with order basis. MHC relied entirely upon the ME customer and prospective client base to generate business. All MHC business was conducted at the Buffalo and St. Cloud offices and the Paynesville and Sauk Center service centers established by ME. Other than Practitioner's February business change announcement, MHC did not engage in advertising;

r. With the exception of Practitioner, MHC employees were paid the same salary rate that they were paid by ME. Practitioner's salary was established at a rate by which he could satisfy his current and ongoing debt obligations. Mr. Dockman provided Practitioner with a list of Practitioner's personal debts and expenses, from which a gross monthly salary of \$2,500.00 for Practitioner was established;

s. From March 1, 1996 to April 18, 1996, Practitioner dispensed hearing instruments as a certified dispenser through MHC. Practitioner informed customers at the time of the sale that the hearing instruments would be delivered within two to three weeks. Practitioner sold approximately \$13,500.00 worth of hearing instruments through MHC, or 15-16 units at an average price of \$900.00 per unit. However, between March 14, 1996 and April 12, 1996, Practitioner conducted hearing instrument transactions with eight consumers totaling \$11,001.50 in which neither the hearing instruments nor refunds of purchase payments were issued to the consumers;

i) On March 15, 1996, Practitioner sold hearing instruments to B.K. in the amount of \$2,588.96. B.K. paid in full by check number 9821 at the time of sale;

ii) On March 19, 1996, Practitioner sold hearing instruments to W.S. in the amount of \$1,294.48. W.S. paid in full by check number 8637 at the time of purchase;

iii) On March 21, 1996, Practitioner sold a hearing instrument to E.B. in the amount of \$794.68. E.B. paid in full by check number 1187 at the time of sale;

iv) On March 21, 1996, Practitioner sold hearing instruments to N.T. in the amount of \$1,589.36. N.T. paid in full by check number 643 at the time of purchase;

v) On March 25, 1996, Practitioner sold a hearing instrument to G.K. in the amount of \$810.90. G.K. paid in full by her check number 63249 dated March 26, 1996;

vi) On April 4, 1996, Practitioner and Ms. Wirz sold a hearing instrument to J.L. in the amount of \$912.90. J.L. paid in full by check number 5294 at the time of purchase;

vii) On April 6, 1996, Practitioner sold hearing instruments to W.B. in the amount of \$1,689.32. W.B. paid in full by check number 7002 at the time of purchase'

viii) On April 11, 1996, Practitioner sold hearing instruments to D.T. in the amount of \$1,320.90. D.T. made a partial payment of \$660.00 by check number 62106 at the time of purchase;

t. Shortly after April 1, 1996, the landlord owning Practitioner's Buffalo office padlocked the property due to rent arrears. Practitioner was aware of the payment deadline his lessor had established and removed most of the office furniture and equipment before being locked out of the office;

u. By early April, customers began calling MHC to inquire about delivery of their hearing instruments. On April 18, 1996, Practitioner evicted MHC from space Practitioner had leased after Practitioner learned of Mr. Dockman's removal of funds from the MHC bank account. Practitioner retained all of the office equipment, supplies and accounting software as it had already been installed on Practitioner's computer. The only MHC financial records that Practitioner was able to retain were records and customer file folders that Mr. Dockman left behind. Practitioner continued to do business with previous MHC customers, the majority of whom were customers of ME;

v. In a letter dated April 18, 1996, Practitioner notified the Department that he was terminating his supervisor-trainee relationship with Mr. Dockman, which Practitioner had initiated in December 1995;

w. On or around May 1, 1996, Practitioner became the sole proprietor of a new hearing instrument dispensing business, Select Hearing Aid Center. Practitioner hired a temporary telemarketer to follow-up on the same customer lists utilized under both ME and MHC, Practitioner sent out a newsletter, dated May 1, 1996, to these clients and prospects explaining the business name change from MHC to Select Hearing;

x. Practitioner filed a Chapter 13 bankruptcy petition on May 5, 1996 to forestall foreclosure on his home and to continue business operations. Practitioner notified the Department of his bankruptcy petition in a letter dated June 19, 1996. Six unpaid ME customer

refunds, in the amount of \$8,687.80, were included on Practitioner's petition and listed as unsecured priority debts;

5. The Department concludes that Practitioner solicited and accepted payment from the customers identified in paragraph 4.s. after he reasonably should have known that the goods and services for which they paid would not be provided. The Practitioner asserts that he did not become aware of the fact that customer orders would likely not be filled until April 16, 1996.

6. Upon this Admonition and without any further notice of proceedings, Practitioner agrees to complete the following:

a. Practitioner shall make restitution to seven of the eight clients identified in paragraphs 4.s.i. to 4.s.viii. above who, as of the date this Admonition was executed, had not received the products or services for which they had paid. The identity of these clients and the products they purchased appears as Attachment "A" to this Admonition. Practitioner shall supply a product or service the same or substantially the equivalent to that for which each customer originally paid.

b. Practitioner shall complete the restitution described in paragraph 7a no later than six months after this Admonition Agreement is executed. Practitioner shall submit to the Department a report showing:

- i. The identity of each person receiving restitution;
- ii. The type of product or service originally paid for;
- iii. The amount originally paid;
- vi. The product or service Practitioner supplied in restitution and its retail value; and
- v. The date restitution was completed.

c. Practitioner may engage in the full scope of hearing instrument dispensing as provided in Minn. Stat. ch. 153A, however his right to supervise trainees under section 153A.14 is limited as follows: No hearing instrument dispenser trainee working under Practitioner's supervision shall be involved in the financial aspects of the hearing instrument dispensing business at which said trainee is employed, including but not by limitation involvement in placing orders with hearing instrument manufacturers or paying creditors of Practitioner or Practitioner's business. Trainees under Practitioner's supervision may, however, prepare orders to be placed with hearing instrument manufacturers, which must be reviewed and approved by Practitioner prior to submission, accept customer payments and make change for on-site sales of batteries and similar products.

7. Practitioner shall cooperate with the Department in its efforts to monitor compliance with the terms of this Admonition and shall respond to the Department's correspondence by the due dates specified in the correspondence. Practitioner shall cooperate with the Department's investigation in any allegations of prohibited conduct which may come to the Department's attention. Upon request by the Department, Practitioner shall provide authorization for release of information and documentation, to verify compliance of this Admonition.

8. Practitioner has been advised by counsel concerning this Admonition and these proceedings generally. Practitioner hereby acknowledges that Practitioner has read, understood, and agreed to this Admonition and has freely and voluntarily signed it.

9. In connection with this matter, Practitioner waives all further hearings, reviews, procedures and proceedings before the Commissioner to which Practitioner may be entitled under the Minnesota or United States Constitutions, statutes, or rules, waives the right to any judicial review or appeal under the Administrative Procedures Act, by writ of certiorari under Minn. Stat. § 480A.06 (1998).

10. Practitioner waives any claims against the Commissioner, the Department, the Minnesota Attorney General, the State of Minnesota and their agents, employees, and representatives related to the investigation of the conduct described herein, or the negotiation or execution of this Admonition, which may otherwise be available to Practitioner.

11. The Commissioner, the Department, and the Minnesota Attorney General waive any and all additional sanctions that they may impose against Practitioner as a result of the conduct described herein. Nevertheless, this Admonition shall not in any way or manner limit or affect the authority of the Commissioner to proceed against Practitioner by initiating a contested case hearing or by other appropriate means on the basis of any act, conduct, or omission of Practitioner justifying disciplinary action which occurred before August 1, 1995 or after May 1, 1996, and which is not directly related to the specific facts and circumstances described in paragraph 4 of this Admonition Agreement.

12. Except as otherwise specified herein, this Admonition, investigative reports, and related documents shall constitute the entire record of the proceedings herein upon which this Admonition is based and shall be filed with the Department. Any report or other material related to this action and received after the date this Admonition is executed shall become part of the record and may be considered by the Department in future aspects of this proceeding. The items in the record shall maintain the data classification to which they are entitled under the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13. They shall not be considered a part of this Admonition and shall not, to the extent they are not already public documents, become public merely because they are referenced herein. -This Admonition is public data pursuant to the Minnesota Government Data Practices Act, Minnesota Statutes, chapter 13.

13. Practitioner's violation of this Admonition will be considered a violation of Minn. Stat. § 153A.15, subd. 1(22) (1998) and will constitute grounds for disciplinary action.

14. Within seven (7) days after service of this Admonition on Practitioner pursuant to paragraph 21, Practitioner shall provide the Department with the addresses and telephone numbers of Practitioner's residence and work sites. Within seven (7) days of any change, Practitioner shall provide the Department with new address and telephone number information.

15. In the event that Practitioner should leave Minnesota to reside or practice outside the state, Practitioner shall promptly notify the Department in writing of the new addresses and telephone numbers as well as the dates of departure and return.

16. Any notices required or permitted under this Admonition shall be given by certified mail at the following address, or at such other address as either party may from time to time identify by written notice to the other party:

To the Department:

Susan Winkelmann
Investigations and Enforcement Supervisor
Health Occupations Program
Minnesota Department of Health
Metro Square Building
121 East Seventh Place
P.O. Box 64975
St. Paul, MN 55164-0975

To the Practitioner:

William J. Cashman
Rajkowski Hansmeier, Ltd.
11 Seventh Avenue North
P.O. Box 1433
St. Cloud, Minnesota 56301-1433

18. This Admonition contains the entire agreement between the parties, there being no other agreement of any kind, verbal or otherwise, which varies the terms of this Admonition.

19. All rights inure to, and obligations bind, successors, heirs and assigns of all the parties. Practitioner will neither assign nor transfer any rights or obligations under this agreement without the prior written consent of the Department.

20. This Admonition may not be modified or amended except in writing executed by the parties.

21. A copy of this Admonition and related Consent Judgment when issued by the Department shall be served by first class mail on Practitioner as provided in paragraph 16 of this


Admonition. Service via first class mail shall be considered due and sufficient service upon Practitioner, at which time this Admonition shall become effective.

22. Practitioner has executed a Consent Judgment in the form attached as Attachment "B."


CONSENT:

Practitioner hereby acknowledges that he has read, understood, and agreed to this Admonition Agreement and has freely and voluntarily signed it.

Dated: June 24, 1999.


George Simmons, Practitioner

Dated: July 1, 1999.


Susan Winkelmann
Investigations and Enforcement Supervisor
Health Occupations Program

AG:211369