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Speech-Language Pathology & Audiology
& Hearing Aid Dispensers Board
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BEFORE THE
SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY
AND HEARING AID DISPENSERS BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **JON A. AMYX** **CHA The Hearing Store** **750 The City Drive #130** **Orange, California 92868** **Hearing Aid Dispenser License No. HA 3433** Respondent.	Case No. 1C-2011-2 **A C C U S A T I O N**

Complainant alleges:

PARTIES

1. Annemarie Del Mugnaio (Complainant) brings this Accusation solely in her official capacity as the Executive Officer of the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board (Board), Department of Consumer Affairs.

2. On or about July 15, 1994, the Board issued Hearing Aid Dispenser License Number HA 3433 to Jon A. Amyx (Respondent). This license was in full force and effect at all times relevant to the charges brought herein and will expire on July 31, 2012, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board under the authority of the following laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

4. Section 2538.11 of the Code provides:

"(a) "Practice of fitting or selling hearing aids," as used in this article, means those practices used for the purpose of selection and adaptation of hearing aids, including direct observation of the ear, testing of hearing in connection with the fitting and selling of hearing aids, taking of ear mold impressions, fitting or sale of hearing aids, and any necessary post fitting counseling.

"The practice of fitting or selling hearing aids does not include the act of concluding the transaction by a retail clerk.

"When any audiometer or other equipment is used in the practice of fitting or selling hearing aids, it shall be kept properly calibrated and in good working condition, and the calibration of the audiometer or other equipment shall be checked at least annually.

"(b) A hearing aid dispenser shall not conduct diagnostic hearing tests when conducting tests in connection with the practice of fitting or selling hearing aids.

"(c) Hearing tests conducted pursuant to this chapter shall include those that are in compliance with the Food and Drug Administration Guidelines for Hearing Aid Devices and those that are specifically covered in the licensing examination prepared and administered by the board.

5. Section 2538.35 of the Code provides:

"A licensee shall, upon the consummation of a sale of a hearing aid, deliver to the purchaser a written receipt, signed by or on behalf of the licensee, containing all of the following:

"(a) The date of consummation of the sale.

"(b) Specifications as to the make, serial number, and model number of the hearing aid or aids sold.

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"(c) The address of the principal place of business of the licensee, and the address and office hours at which the licensee shall be available for fitting or post fitting adjustments and servicing of the hearing aid or aids sold.

"(d) A statement to the effect that the aid or aids delivered to the purchaser are used or reconditioned, as the case may be, if that is the fact.

"(e) The number of the licensee's license and the name and license number of any other hearing aid dispenser or temporary licensee who provided any recommendation or consultation regarding the purchase of the hearing aid.

"(f) The terms of any guarantee or written warranty, required by Section 1793.02 of the Civil Code, made to the purchaser with respect to the hearing aid or hearing aids."

6. Section 2538.36 of the Code provides:

"(a) Whenever any of the following conditions are found to exist either from observations by the licensee or on the basis of information furnished by the prospective hearing aid user, a licensee shall, prior to fitting or selling a hearing aid to any individual, suggest to that individual in writing that his or her best interests would be served if he or she would consult a licensed physician specializing in diseases of the ear or if no such licensed physician is available in the community then to a duly licensed physician:

"(1) Visible congenital or traumatic deformity of the ear.

"(2) History of, or active drainage from the ear within the previous 90 days.

"(3) History of sudden or rapidly progressive hearing loss within the previous 90 days.

"(4) Acute or chronic dizziness.

"(5) Unilateral hearing loss of sudden or recent onset within the previous 90 days.

"(6) Significant air-bone gap (when generally acceptable standards have been established).

"(7) Visible evidence of significant cerumen accumulation or a foreign body in the ear canal.

"(8) Pain or discomfort in the ear.

"(b) No referral for medical opinion need be made by any licensee in the instance of replacement only of a hearing aid that has been lost or damaged beyond repair within one year of

the date of purchase. A copy of the written recommendation shall be retained by the licensee for the period provided for in Section 2538.38. A person receiving the written recommendation who elects to purchase a hearing aid shall sign a receipt for the same, and the receipt shall be kept with the other papers retained by the licensee for the period provided for in Section 3366. Nothing in this section required to be performed by a licensee shall mean that the licensee is engaged in the diagnosis of illness or the practice of medicine or any other activity prohibited by the provisions of this code."

7. Section 2533 of the Code provides that the board may refuse to issue, or issue subject to terms and conditions, a license on the grounds specified in section 480, or may suspend, revoke, or impose terms and conditions upon the license of any licensee for any of the following:

". . .

"(f) Incompetence, gross negligence, or repeated negligent acts."

"..."

"(k) Violation of section 1689.6 or 1793.02 of the Civil Code."

8. Section 2538.49 of the Code provides that it is unlawful for a licensed hearing aid dispenser to fit or sell a hearing aid unless he or she first does all of the following:

"(a) Complies with all provisions of state laws and regulations relating to the fitting or selling of hearing aids.

"(b) Conducts a direct observation of the purchaser's ear canals.

"(c) Informs the purchaser of the address and office hours at which the licensee shall be available for fitting or post fitting adjustments and servicing of the hearing aid or aids sold."

9. California Code of Regulations, title 16, section 1399.126 states:

"(a) For the purposes of Section 2538.36, subdivision (6), of the code, a significant air-bone gap is defined as a difference of 15 decibels or more between the higher air conduction and the lower bone conduction pure tone thresholds at 2 or more succeeding octave frequencies of 500 Hertz through and including 4000 Hertz.

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"(b) Tests for significant air-bone gap shall be performed in a suitable environment using appropriate equipment to establish threshold values and with appropriate masking procedures employed."

10. Section 1793.02 of the Civil Code, also known as the Song-Beverly Consumer Warranty Act, provides:

"(a) All new and used assistive devices sold at retail in this state shall be accompanied by the retail seller's written warranty which shall contain the following language: "This assistive device is warranted to be specifically fit for the particular needs of you, the buyer. If the device is not specifically fit for your particular needs, it may be returned to the seller within 30 days of the date of actual receipt by you or completion of fitting by the seller, whichever occurs later. If you return the device, the seller will either adjust or replace the device or promptly refund the total amount paid. This warranty does not affect the protections and remedies you have under other laws." In lieu of the words "30 days" the retail seller may specify any longer period.

"(b) The language prescribed in subdivision (a) shall appear on the first page of the warranty in at least 10-point bold type. The warranty shall be delivered to the buyer at the time of the sale of the device.

"(c) If the buyer returns the device within the period specified in the written warranty, the seller shall, without charge and within a reasonable time, adjust the device or, if appropriate, replace it with a device that is specifically fit for the particular needs of the buyer. If the seller does not adjust or replace the device so that it is specifically fit for the particular needs of the buyer, the seller shall promptly refund to the buyer the total amount paid, the transaction shall be deemed rescinded, and the seller shall promptly return to the buyer all payments and any assistive device or other consideration exchanged as part of the transaction and shall promptly cancel or cause to be canceled all contracts, instruments, and security agreements executed by the buyer in connection with the sale. When a sale is rescinded under this section, no charge, penalty, or other fee may be imposed in connection with the purchase, fitting, financing, or return of the device.

". . . ."

11. Section 125.3 of the Code states, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

FIRST CAUSE FOR DISCIPLINE

(Gross Incompetency)

12. Respondent is subject to disciplinary action under Code section 2533, subdivision (f), in that he was grossly incompetent in the fitting and selling of hearing aids. The circumstances are as follows:

13. On or about November 19, 2009, C.M., an eighty-four-year-old female, saw Respondent at Advanced Hearing Aid Professionals in Santa Ana, California for hearing testing. Respondent performed air conduction testing, most comfortable loudness testing, and speech discrimination testing. Respondent did not perform necessary bone conduction testing as required to determine the need for medical referral and clearance.

14. On or about November 25, 2009, Respondent fitted C.M. with a pair of Starkey Destiny 1200 behind-the-ear hearing instrument hearing aids. Respondent did not verify that the fitting of the hearing aids for C.M. was appropriate. Respondent did not select and fit C.M. with hearing aids which provided adequate gain for her hearing loss.

15. On or about November 25, 2009, C.M. signed a purchase agreement and delivery receipt for the purchase of the hearing aids in the amount of $4,450.00. The Song-Beverly Consumer Warranty Act (Act) (Civ.Code,1793.02.) language is not presented in 10-point bold type on the purchase agreement. There is a hand-written notation on the purchase agreement that states that C.M. had a "1 week trial" which is in conflict with the 30-day warranty period required by the Song-Beverly Consumer Warranty Act. The purchase agreement did not include the office hours Respondent was available for fitting or postfitting and servicing of the hearing aids sold.

16. Respondent did not perform any post-fitting verification, such as real ear measures or sound field testing, to verify that the hearing aid fitting was appropriate.

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17. In October and November 2010, C.M. went to Shohet Ear Associates where an audiology evaluation revealed she had a moderately-severe to severe sensorineural hearing loss in the right ear, and a severe to profound essentially mixed hearing loss, which indicated a conductive component, in the left ear. Real ear measures were performed using the Starkey hearing aids. The hearing aid responses were significantly below target before re-programming. After reprogramming, the hearing aid responses showed fair results.

18. Respondent was grossly incompetent as follows:

(a) He failed to perform necessary bone conduction testing as required to determine the need for medical referral and clearance.

(b) He failed to perform thorough and proper audiometric testing.

(c) He failed to select and fit the appropriate hearing aids for C.M. The hearing aid gain was not adequate for C.M.'s hearing loss.

(d) He failed to perform post-fitting verification, such as real ear measures or sound field testing, to verify that the hearing aid fitting was appropriate.

SECOND CAUSE FOR DISCIPLINE

(Gross Negligence)

19. Respondent is subject to disciplinary action under Code section 2533, subdivision (f), in that he was grossly negligent in the fitting and selling of hearing aids. The facts and circumstances alleged in Paragraphs 12 through 17 are incorporated as if fully set forth.

20. Respondent was grossly negligent as follows:

(a) He failed to perform necessary bone conduction testing as required to determine the need for medical referral and clearance.

(b) He failed to perform thorough and proper audiometric testing.

(c) He failed to present in 10-point bold type the Song-Beverly Consumer Warranty Act language on the purchase agreement.

(d) He handwrote on the purchase agreement that C.M. had a "1 week trial" which conflicts with the 30 day warranty as required by the Song-Beverly Consumer Warranty Act.

(e) He failed to include on the purchase agreement the office hours he was available for fitting or postfitting adjustments and servicing of the hearing aids.

THIRD CAUSE FOR DISCIPLINE

(Repeated Negligent Acts)

21. Respondent is subject to disciplinary action under Code section 2533, subdivision (f), in that he engaged in repeated negligent acts in the fitting and selling of hearing aids. The facts and circumstances alleged in the Second Cause for Discipline are incorporated as if fully set forth.

22. Respondent was repeatedly negligent as follows:

(a) He failed to perform necessary bone conduction testing as required to determine the need for medical referral and clearance.

(b) He failed to perform thorough and proper audiometric testing.

(c) He failed to present in 10-point bold type the Song-Beverly Consumer Warranty Act language on the purchase agreement.

(d) He handwrote on the purchase agreement that the purchaser had a "1 week trial" which conflicts with the 30 day warranty as required by the Song-Beverly Consumer Warranty Act.

(e) He failed to select and fit the appropriate hearing aid for C.M. The hearing aid gain was not adequate for C.M.'s hearing loss.

(f) He failed to perform post-fitting verification, such as real ear measures or sound field testing, to verify that the hearing aid fitting was appropriate.

FOURTH CAUSE FOR DISCIPLINE

(Violation of the Song-Beverly Consumer Warranty Act)

23. Respondent is subject to disciplinary action under Code section 2533, subdivision (k), in that he violated the provisions of the Song-Beverly Consumer Warranty Act. The language of the Song-Beverly Consumer Warranty Act is not presented in 10-point bold type on C.M.'s purchase agreement. Respondent handwrote on the purchase agreement that C.M. had a "1 week

trial" which conflicts with the 30 day warranty as required by the Song-Beverly Consumer Warranty Act.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board issue a decision:

1. Revoking or suspending Hearing Aid Dispenser License Number HA 3433 issued to Jon A. Amyx;

2. Ordering Jon A. Amyx to pay the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board the reasonable costs of the investigation and enforcement of this case pursuant to Business and Professions Code section 125.3;

3. Taking such other and further action as deemed necessary and proper.

DATED: April 13, 2012

Annemarie Del Mugnaio

ANNEMARIE DEL MUGNAIO
Executive Officer
Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board
Department of Consumer Affairs
State of California
Complainant

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