

IN THE MATTER OF
BELTONE HEARING AID COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3
OF THE CLAYTON ACT

Docket 5825. Complaint, Nov. 2, 1950—Decision, Feb. 16, 1956

Order requiring one of the largest manufacturers of hearing aid instruments in the United States—in 1953 having written exclusive-dealing franchise agreements with 167 of its 187 independent distributors and exclusive-dealing understandings with the remainder—to cease selling its hearing aids to dealer distributors on condition that they not handle similar products of its competitors.

Mr. Andrew C. Goodhope for the Commission.
Crowell & Leibman, of Chicago, Ill., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned Hearing Examiner for final consideration upon the complaint, amended and supplemental answer thereto, testimony and other evidence, proposed findings as to the facts and conclusion presented by counsel and oral argument thereon.

The complaint in this proceeding was issued November 2, 1950, charging respondent Beltone Hearing Aid Company, a corporation, with having violated the provisions of Section 3 of the Clayton Act by reason of respondent's practice of selling its hearing aids to certain of its customers on condition, agreement or understanding that such customers shall not use or deal in hearing aids sold and distributed by competitors of respondent.

The respondent filed its answer to the complaint on November 30, 1950, but later on January 11, 1951, the respondent withdrew said answer by filing an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts. Subsequent thereto Webster Ballinger, a duly designated Hearing Examiner of the Commission, issued his initial decision in this proceeding. Thereafter, on motion of the respondent, the Commission on February 18, 1954, issued its order setting aside the initial decision of the Hearing Examiner, granting leave to respondent to file an amended and supplemental answer, and remanding this proceeding to the Hearing

Examiner for further proceeding in due course. On March 3, 1954, prior to the taking of any testimony in this proceeding, the Commission issued its order appointing the undersigned, Earl J. Kolb, as Hearing Examiner in the place and stead of Hearing Examiner Webster Ballinger. Thereafter, testimony and other evidence in support of, and in opposition to, the allegations of the complaint were introduced before the undersigned Hearing Examiner and said testimony and other evidence were duly recorded and filed in the office of the Commission.

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. Respondent Beltone Hearing Aid Company is a corporation organized under the laws of the State of Illinois with its principal office and place of business located at 2900 West 36th Street, Chicago, Illinois.

PAR. 2. Since 1941, the respondent has been engaged in the manufacture and in the sale and distribution of hearing aid instruments, under the trade name "Beltone," and parts and accessories therefor, in interstate commerce in competition with other concerns who were also engaged in the sale and distribution of similar products in interstate commerce.

PAR. 3. In 1944, respondent introduced an innovation into the hearing aid industry in the form of a hearing aid which combined the batteries and transmitter into one unit, reducing the bulk and weight of the unit. This hearing aid was sold under the descriptive name of "Beltone Monopac" and was primarily responsible for respondent becoming one of the leading manufacturers of hearing aids in the United States.

PAR. 4. The method of distribution used by respondent is to sell its hearing aids and parts and accessories therefor to independently owned and operated distributors located throughout the United States who are not agents, servants or employees of respondent, but independent contractors in the purchase of respondent's products. This method of distribution is generally followed by manufacturers and distributors of hearing aids and parts and accessories therefor, except for a few who sell to dealers for over-the-counter sales and one substantial manufacturer who sells through dealers acting as agents of the company.

PAR. 5. In the course and conduct of its business, respondent has consistently followed a policy of making sales and contracts of sale

of its hearing aid instruments on the condition, agreement or understanding that the purchaser thereof shall not use or deal in hearing aid instruments sold and distributed by competitors of respondent.

PAR. 6. In January 1948, respondent put into use its first formal franchise agreement in contracting to sell hearing aids to its distributors, which provided among other things as follows:

Article 3. DISTRIBUTOR agrees to represent and sell only those hearing aids manufactured and sold by BELTONE, and not to sell any other new hearing aids. (CX 1)

In March 1952, this form of contract was revised for use thereafter in contracting with distributors. The new form of contract provides, among other things, as follows:

Article 4. DISTRIBUTOR agrees to represent and sell only those new hearing aids manufactured and sold by BELTONE, and not to sell any other new hearing aids. (CX 2)

These contracts further provide that each Beltone instrument sold shall be registered by the distributor with Beltone on registration forms supplied by Beltone, giving name and address of purchaser, date of purchase, and serial number of instrument. It was also provided that said contract may be cancelled at any time by either party upon thirty days written notice by registered mail.

PAR. 7. In 1953, the respondent sold its Beltone hearing aids and accessories to 187 independent distributors located in the United States, who in turn maintained approximately 50 subdealer outlets. Of this number, 167 had executed formal written franchise agreements, as hereinabove described. The remaining 20 distributors were not operating under a formal franchise agreement, but had exclusive dealing understandings with respondent, in fact, 8 of these distributors had typed contracts with respondent, one of which, dated April 25, 1947, provided, among other things, as follows:

Article 4. Elbaum [Distributor] agrees to terminate his franchise or distribution rights with any and all other hearing aid companies within thirty days of this agreement, and thereafter will purchase only service supplies and accessories from said firm or firms, but thereafter will not purchase transmitters for resale.

Article 5. Elbaum agrees thereafter to represent and sell only those hearing aids manufactured and sold by BELTONE and not to sell any other hearing aids.

PAR. 8. In the general course and conduct of respondent's business relationships with its distributors, respondent has required strict

compliance with, and its distributors have strictly adhered to, the exclusive dealing requirements of its contracts. While there is some vague testimony by competitors of respondent that they were able to sell some of respondent's dealers, closer inspection of this testimony shows that for the most part sales were made to former Beltone dealers or dealers who were in the process of giving up Beltone. While various manufacturers solicited all dealers, including those having exclusive dealing contracts with Beltone, they were not successful in inducing such dealers to handle their hearing aids in conjunction with Beltone. Not one Beltone dealer called as a witness admitted to selling any competitive hearing aid, and, in fact, the record shows that in those instances where a competitive aid had been handled by a dealer it was for the purpose of having the customer switch to Beltone. For example, in a letter dated April 1, 1948, to Mrs. Elsie S. Floren of Northwest Hearing Aid Company, David H. Barnow, General Manager of Sales Department of respondent stated:

You stated that somebody was in your office who covered the entire country and states that many Beltone distributors are carrying more than one line. If this is so, they have certainly been successful in keeping it under cover because not only have we been assured by practically every one in the company that they are handling Beltone exclusively (there are only about 5% who are not), but Pete gets around the country and certainly could smell out any situation that wasn't 100% Beltone. There are a few cases, of course, who were formerly Western or Acousticon or Telex, etc., who are not selling those products but are still servicing the users in order to continue the traffic with a view towards ultimately selling them a Beltone. (CX 11-F)

PAR. 9. The provisions of the contract permitting cancellation on thirty day notice and the requirement that names and addresses of all purchasers be forwarded to respondent further enhanced respondent's ability to enforce the exclusive dealing features of its contract. A distributor knew full well that if the cancellation clause were exercised he would be immediately out of business, and that respondent would immediately notify all his customers of his discontinuance and advise such customers that they should contact the new dealer for service and genuine parts. That the respondent did, in fact, require strict compliance with the exclusive dealing features of its contracts is shown by the following:

1. On January 7, 1947, David H. Barnow, Vice President, of respondent wrote A. G. Hoffman, Houston, Texas, in part as follows:

You will recall on my visit to Houston early last year, we made quite a point of the fact that we were interested in *exclusive* representation. At that

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time it was our understanding that you were going to devote your full time to BELTONE distribution. I find, however, that in the December, 1946 Houston telephone directory that you are still listing Western Electric, DeForest, and almost any other hearing aid the prospect may desire.

We are now laying our plans for 1947 and would like to have an expression from you as to your intentions regarding BELTONE distribution. (CX 24)

2. On March 7, 1947, David H. Barnow wrote Roy Carpenter, Beaumont, Texas, in part as follows:

I think we've reached the point, Roy, where you should be able to give us a clear cut decision on whether or not you want to continue with BELTONE on the following terms:

1. Handle BELTONE exclusively to the exclusion of all other hearing aids. (CX 28-A-B)

3. On November 2, 1948, David H. Barnow wrote Mrs. Ida M. Penn, Chattanooga, Tennessee, in part as follows:

Ida, I've always been personally fond of you. You know I've always gone out of my way to do little extras for my "Mammy". More than that I've always been proud of our association, and of having you in our organization. During that association I've never waivered in my loyalty to you. I can, however, remember one period when you came close to waivering when you were flirting with the idea of adding Western Electric to the Beltone line. I resisted it then. I think you're now in a mental frame of mind to waiver again. I think that would be a serious mistake for you. Not only would it pain me personally, but I would consider it an expression that you're no longer interested in your Beltone franchise. (CX 12-A)

4. On February 9, 1949, David H. Barnow again wrote Mrs. Ida M. Penn of Chattanooga, Tennessee, in part as follows:

You ask for a two month trial with Microtone. I'm sorry but we just cannot grant any exception to our basic policy of exclusive representation. We think we've earned it and we know that it can't work out satisfactorily for the distributor or the company any other way. If at the end of this week, you call me and tell me that you have decided to take on Microtone, we'll have no alternative but to assume that you have in effect decided to cancel Beltone and we shall forthwith issue our cancellation of your existing franchise. (CX 19-A-D)

5. On September 30, 1948, David H. Barnow wrote Mrs. Elsie Floren of Minneapolis, Minnesota, in part as follows:

* * * We are committed to a program of exclusive representation wherever we can get it. We're not kidding ourselves into thinking that we have 100% exclusive representation everywhere, but we have reached about the 95% mark now. We intend to continue until we get it 100% if at all possible. Wherever we don't have exclusive representation we'll keep seeking until we find the individual or firm who is willing to give it to us. (CX 8-F)

PAR. 10. The best market for the manufacturers of hearing aids is the independently established retail distributor whose business is devoted entirely to the fitting and sale of hearing aids to the hard-of-hearing public. Such distributors also serve as the best markets for

parts and accessories for hearing aid instruments since the purchaser thereof generally returns to the distributor from whom he purchased the hearing aid for any other parts or batteries or for any repairs or replacement parts in the hearing aid instrument. The hard-of-hearing person generally tries to hide his deafness and does not want to buy a hearing aid; consequently, the dealer, in order to make a sale, has to overcome this reluctance and by continued effort create a personal relationship between himself and the prospect. The value of the independent hearing aid dealer, as compared with the drug store type of outlet, is shown by the testimony of Robert Lubin that at the time that he had 15 dealers and 500 drug store and similar outlets that the sales of the 15 dealers accounted for 50 percent of the gross sales of Cleartone hearing aids.

PAR. 11. The total volume of business done by respondent with its distributors has been substantial. During the years 1948 through 1953, inclusive, sales of hearing aids and parts and accessories therefor by respondent to its distributors were as follows:

Fiscal period	Gross sales to franchise dealers	Total sales new hearing aids to dealers
11/1/47 to 10/31/48	3,010,262.54	1,982,715.00
11/1/48 to 10/31/49	3,850,145.78	2,403,897.00
11/1/49 to 10/31/50	3,621,236.90	2,090,983.00
11/1/50 to 10/31/51	3,635,046.67	2,178,822.00
11/1/51 to 10/31/52	3,491,502.07	2,177,250.00
11/1/52 to 10/31/53	3,433,252.80	2,164,581.00

The total industry figures are shown by the report of the Bureau of Census for sales of hearing aid instruments are as follows:

1947	\$16,868,000
1950	23,073,000
1951	22,316,000
1952	22,103,000

PAR. 12. There are approximately a total of 35 manufacturers of wearable hearing aids in the United States. Respondent is one of the largest of such manufacturers, its total volume of sales of hearing aids ranking fourth in total dollar volume of hearing aids sold in 1951, with its total sales remaining substantially the same in subsequent years. The five largest of these manufacturers are Sonotone, Zenith, Dictograph, Beltone, and Maico. Sonotone sells through employees direct to the user and does not sell to independent distributors. Zenith sells to drug stores, optical stores and similar outlets as distinguished from the independent distributor. Dictograph, Maico, and respondent employ exclusive dealing arrangements with their distributors and together control approximately 600 independent dealers. The total

