

Interlocutory Order

100 F.T.C.

IN THE MATTER OF

BELTONE ELECTRONICS CORPORATION, ET AL.

*Docket 8928. Interlocutory Order, July 6, 1982*ORDER EXTENDING INTERIM *IN CAMERA* TREATMENT AND ORDERING
MOVANTS TO SHOW CAUSE

By order of October 19, 1979, the Administrative Law Judge granted *in camera* treatment to certain exhibits in this record which is to expire on the date of the Commission's Final Order in this matter unless extended by the Commission. The respondent and a number of non-party corporations have now filed requests for extension of that *in camera* coverage.¹ Some of them requested permanent extensions, others requested ten years, and still others specified no period of time.

The information held *in camera* consists mainly of sales and profit data for the years 1970-1978 as well as certain other equally old information about selling methods and product plans. In addition, respondent's income statements, accountants' reports, warranty card analysis and advertising expenses for that period of time were placed in the *in camera* record.

While the ALJ made public some *in camera* information in his Order Certifying the Record on Remand, June 27, 1980, we have found it unnecessary to use any additional *in camera* data in our Opinion. The only question before us, therefore, is whether the protected information should remain *in camera* and, if so, for how long.

Based upon our analysis of this market and the nature and especially the age of the information in question, we do not believe that the material is so secret and material to the business submitting it that "clearly defined, serious injury" is likely to result from its disclosure at this point. *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); *General Foods Corporation*, 95 F.T.C. 352 (1980). Nonetheless, we find it appropriate to extend the *in camera* treatment for the present and permit the movants to show cause why the exhibits in question should not be placed on the public record. Therefore,

It is ordered, That the exhibits and information presently in the *in*

¹ "Respondents' Motion for Continued In Camera Treatment," October 15, 1980; Dahlberg Electronics Corp., "Request for Continuation of Confidential Status of Documents Produced Pursuant to Subpoena in Beltone Electronics Corp., Dkt. No. 8928," July 28, 1980; Maico Hearing Instruments, Inc., "Motion for an Order Granting In Camera Treatment for Certain Exhibits," September 10, 1980; Audiotone (Lear Siegler, Inc.), untitled letter of August 14, 1980; Siemens Hearing Instruments Inc., "Motion for Continued Special In Camera Treatment for Documents Containing Non-Party Sales and Profit Data," September 22, 1980; Fidelity Electronics, Ltd., untitled letter of August 20, 1980.

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camera record of this proceeding shall remain *in camera* for an indefinite interim period, and

It is further ordered, That the movants should file arguments within ten (10) days of the issuance of this order showing good cause why the *in camera* information should not be placed on the public record. If complaint counsel choose to do so, they may also file a statement on the *in camera* status of the exhibits in question within the same period of time.

Complaint

100 F.T.C.

IN THE MATTER OF

BELTONE ELECTRONICS CORPORATION, ET AL.

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 8928. Complaint, May 8, 1973—Dismissal Order, July 6, 1982*

This order dismisses the complaint charging a leading hearing aid manufacturer and three company officials with imposing territorial and customer restrictions, and exclusive dealing requirements upon its dealers. The Commission reversed the 1980 decision of the Administrative Law Judge, finding that Beltone's distributional practices do not adversely affect competition between manufacturers or between dealers.

Appearances

For the Commission: *Joseph S. Brownman, L. Barry Costilo, James C. Donoghue, Dennis R. Carluzzo, Paul M. Rose, Alan K. Palmer and Owen M. Johnson.*

For the respondents: *Elroy H. Wolff and Linda S. Peterson, Sidley & Austin, Washington, D.C., Donald A. MacKay, Sidley & Austin, Chicago, Ill., John J. Zel, in-house counsel, Chicago, Ill. and Julian R. Wilhelm, Chicago, Ill.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties identified in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its charges as follows:

PARAGRAPH 1. Respondent Beltone Electronics Corporation (hereinafter sometimes referred to as "Beltone") is a corporation organized under the laws of the State of Illinois, with its principal office and place of business at 4201 West Victoria St., Chicago, Illinois.

Respondent Sam Posen is an individual, an officer and a director of the corporate respondent. He, with his wife, Faye Posen, is the founder and major stockholder of the corporate respondent, control-

ling, approving and authorizing acts and practices of the corporate respondent and the remaining individual respondents, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent. [2]

Respondent David H. Barnow is an individual, an officer and a stockholder of the corporate respondent. Respondent Chester K. Barnow is an individual, a director and a stockholder of the corporate respondent. They formulate, direct and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

The individual respondents and Faye Posen own almost all of the corporate stock of the corporate respondent, which is a closely held, family corporation.

PAR. 2. Respondents are now and for some time last past have been engaged in the business of manufacturing, distributing, selling and repairing of Beltone brand hearing aids, batteries, hearing test equipment, and related articles, sometimes referred to as "Beltone products." They distribute and sell to selected retail dealers located throughout the United States, who then resell to the general public.

PAR. 3. In the course and conduct of their business, respondents ship or cause to be shipped their products from their facilities in the State of Illinois to selected retail dealers throughout the United States. There is now and has been for several years a constant and substantial flow of respondents' products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been restrained by reason of the practices hereinafter alleged, respondents' selected retail dealers, in the course and conduct of their business of offering for sale and selling Beltone products, are in substantial competition in commerce with one another and with dealers engaged in the offering for sale and selling of other brands of hearing aids and related products; and respondents are in substantial competition in commerce with others engaged in the manufacturing, distributing, selling and repairing of hearing aids and related products. [3]

PAR. 5. Trade and commerce in the United States in hearing aids is substantial. In 1970, the total value of shipments amounted to approximately \$50 million at the manufacturers' prices, and is estimated to have exceeded \$175 million at retail prices. In 1970, about fifty domestic manufacturers, domestic subsidiaries of foreign manufacturers and domestic distributors of foreign manufacturers sold approximately 510,000 hearing aids through 5,000 retail dealers who employed over 10,000 salesmen.

PAR. 6. In 1970, the top four companies in the hearing aid industry, including respondent Beltone, accounted for approximately 50% of the dollar value of shipments; the top eight companies accounted for approximately 70% of such shipments; and the top twenty companies accounted for over 90% of the industry's shipments.

PAR. 7. In 1970, respondent Beltone, which has manufactured hearing aids since 1941, had sales in excess of ten million dollars, more than any other seller of hearing aids in the United States.

PAR. 8. Hearing aids are sold by the manufacturers directly to the retail dealers, who resell the hearing aids to members of the general public. Wholesalers are rarely used in the distribution process.

Approximately 60% of the retail sales of hearing aids occur as a result of an initial, direct contact between the hearing aid dealer and the hearing handicapped, while most of the remaining sales are made after the hearing handicapped are referred to dealers by medical doctors or hearing clinics. It is the practice among medical doctors and hearing clinics, after having determined that an individual may benefit from use of a hearing aid, to recommend a hearing aid to the patient by the brand name and model, rather than by its general performance characteristics. This is done on the basis of actual tests with hearing aids which have been placed with such doctors or clinics by either the manufacturers or dealers. Then, because the doctors and clinics do not sell hearing [4]aids, the patient is referred to the hearing aid dealer in his locale who deals in the brand of hearing aid recommended. While the average price of a hearing aid to a dealer is about \$100, the average retail price to the hearing handicapped is about \$350. More than 50% of the persons with hearing impairment who purchase hearing aids are over 65 years of age.

PAR. 9. In the distribution and sale of their hearing aids, a number of the manufacturers of hearing aids for many years have used and pursued parallel courses of business behavior.

Among such courses of business behavior are the following:

- (1) distributing and selling their hearing aids directly to selected retail dealers, refusing to deal with all other dealers;
- (2) entering into agreements or understandings with their dealers, which agreements:
 - (a) establish territories within which the dealers may advertise and sell their products,
 - (b) require exclusive dealing in the manufacturers' products,

- (c) assign sale or purchase quotas to be met by their dealers,
 - (d) encourage or require the use of the manufacturers' brand name in the dealers' trade styles,
 - (e) restrict the classes of customers with whom their dealers may deal,
 - (f) require their dealers to submit the names and addresses of their customers to the manufacturers,
 - (g) permit the manufacturers to terminate such agreements without cause upon thirty days notice, and [5]
 - (h) in the event of such termination permit the manufacturers to repurchase the terminated dealers' products purchased from such manufacturers;
- (3) refusing to issue the express product warranty to consumers unless and until their dealers have reported the names and addresses of their customers to the manufacturers;
- (4) encouraging or requiring their dealers to participate in cooperative advertising programs which preclude mention that the dealers offer competing brands of hearing aids for sale;
- (5) engaging in extensive national brand advertising of their hearing aids;
- (6) suggesting to their dealers retail prices for hearing aids which are often more than 300% above the manufacturers' prices to the dealers, with such dealers generally selling at such suggested retail prices;
- (7) selling repair parts and offering repair service only to their selected dealers, refusing to sell such parts to all others, including independent repairmen or repair centers, and refusing to offer repair service to all other dealers.

The effect of the aforesaid parallel courses of business behavior has been to eliminate intra-brand and to hinder or suppress inter-brand competition in the hearing aid industry, and, further, to aggravate the unfair and anticompetitive effect of the acts and practices of the respondents as alleged in Paragraphs Ten and Eleven.

PAR. 10. In the course and conduct of their business of manufacturing, distributing, selling and repairing their products in commerce, respondents pursue the following course of action:

- A. They require their selected dealers to sell Beltone products within assigned geographic territories;
- B. They require their selected dealers to deal exclusively in Beltone hearing aids; [6]

C. They prohibit their dealers from dealing with certain potential customers;

D. They prevent others, not their dealers, from dealing in, or repairing Beltone products;

E. They appropriate and use for their own purposes the names and addresses of their dealers' customers.

PAR. 11. In furtherance of this course of action, respondents have been and now are engaged alone or with their dealers in the following acts and practices, among others:

(1) Respondents use agreements or understandings which

(a) require a dealer to sell Beltone products within an assigned territory;

(b) require a dealer to achieve a sales quota by selling Beltone products within that assigned territory;

(c) require a dealer to sell Beltone products only to customers found within the assigned territory;

(d) require a dealer to submit to the respondents the name and address of each customer who purchases Beltone products;

(e) condition the express product warranty on the submission of the name and address of each such customer to the respondents;

(f) require a dealer to participate in Beltone cooperative advertising and other sales promotion programs;

(g) allow for immediate termination of the contract upon dealer's violation of any provision thereof; [7]

(2) Respondents engage in extensive national advertising, such as offers of free models of a "non-operative hearing aid", whereupon they send to their selected dealers, as the so-called "leads", the names of those persons responding to such advertising who reside in such dealers' territories, prohibiting the use of such names for any purpose other than to sell Beltone products;

(3) Respondents have for many years expressed, advocated, communicated or emphasized to their selected dealers Beltone's "one-brand merchandising philosophy", meaning Beltone's business policy of advocating, persuading or pressuring its selected dealers to sell only Beltone brand of products to the exclusion of competitive brands, and have referred to such action by its dealers as "dealer loyalty", continually encouraging, praising or rewarding it;

(4) Respondents have for many years expressed, communicated, or emphasized to their selected dealers Beltone's business policy of dissuading, discouraging, or prohibiting sales of competitive brands by such dealers by means of, among others, persuasion, pressure,

harassment, coercion, or intimidation of such dealers to sell only Beltone products and not to sell other brands;

(5) Respondents refuse to sell to all but a few dealers, selected in such a manner that each of such selected dealers enjoys territorial exclusivity so that he is not in competition with any other dealer selling Beltone products;

(6) Respondents refuse to sell Beltone repair parts or to provide schematics to all dealers, or to persons engaged in the business of repairing or servicing hearing aids;

(7) Respondents refuse to supply Beltone promotional and advertising materials, price lists, hearing aid specifications or performance information to all dealers;

(8) Respondents prohibit their selected dealers from selling Beltone products to other dealers of hearing aids;

(9) Respondents require their selected dealers to use the Beltone brand name, in conjunction with a geographic identification of the dealers' locations, or otherwise, in the dealers' trade styles; [8]

(10) Respondents provide in their standard-form contract that a dealer is prohibited from doing any act, making any representation, or advertising in any manner which may adversely affect Beltone products or any other Beltone dealer;

(11) Respondents provide in their standard-form contract that Beltone has the right to terminate the contract, at any time, upon thirty days notice to the dealer;

(12) Respondents provide in said contract that in the event of termination:

(a) a dealer is required to return to the respondents the names and addresses of Beltone product users;

(b) a dealer is prohibited from using his business telephone number, and the respondents can order a transfer of telephone service under such number to a person of their choice, or order that such service be cancelled immediately;

(c) a dealer is prohibited from advertising Beltone products, new or used, or Beltone repair service;

(d) Beltone has the right to repurchase the terminated dealer's inventory of Beltone products, and

(e) Beltone is not obligated to repair any out-of-warranty Beltone products sent to it by such a dealer.

PAR. 12. The acts and practices of respondents enumerated hereinabove in Paragraphs Ten and Eleven, taken either individually or collectively, are oppressive, coercive, unfair and anticompetitive, and have the tendency and capacity of hindering, suppressing

or eliminating competition, or constitute unfair methods of competition, or unfair acts or practices, with the following effects, among others:

- (1) Competition between respondents and other manufacturers of hearing aids has been hindered and suppressed; [9]
- (2) Competition among dealers dealing in Beltone products has been eliminated;
- (3) Such dealers have been deprived of their freedom to select their customers and otherwise to function as free and independent businessmen;
- (4) Such dealers have been deprived of their ownership of, and freedom to maintain, confidential lists of their customers;
- (5) Competition among dealers dealing in Beltone products and dealers dealing in other brands of hearing aids has been hindered and suppressed;
- (6) Retail dealers of hearing aids have been deprived of their freedom to act in the best interests of the hearing-impaired public;
- (7) Consumers have been deprived of their right to fair and impartial recommendations from dealers in the selection of hearing aids for the alleviation of their hearing impairment;
- (8) Consumers have been deprived of the benefits of free competition;
- (9) Those engaged in the repairing or servicing of hearing aids in competition with respondents have been deprived of their right to repair or service Beltone hearing aids.

PAR. 13. The aforesaid acts and practices of respondents have the tendency unduly to restrict and restrain competition and have injured, hindered, suppressed, lessened or eliminated actual or potential competition, are to the prejudice and injury of the public, and constitute unfair methods of competition in commerce and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION

BY MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

SEPTEMBER 2, 1976

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this matter on May 8, 1973, charging respondents with unfair methods of competition in commerce and unfair acts and practices in commerce,

in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). [2]

By answers duly filed, respondents denied that they had violated the Federal Trade Commission Act as alleged in the complaint. The three individual respondents, although admitting that they were officers, directors, or employees of the corporate respondent and that they participated in the direction and management of the corporation in accordance with applicable Illinois law and the articles of incorporation and the bylaws of the corporate respondent, denied that they were engaged in the business of manufacturing, selling, distributing or repairing of Beltone brand products.

After extensive pretrial discovery, adjudicative hearings commenced on July 15, 1974, and were concluded on November 24, 1975, after 115 days of actual trial. The Commission's case-in-chief consumed 29 trial days and respondents' answering case, which commenced on December 3, 1974, consumed the remaining 86 trial days. Hearings were held in Washington, D. C. (47 days), Chicago, Illinois (49 days), San Francisco, California (10 days) and New Orleans, Louisiana (9 days).

On January 13, 1976, the Administrative Law Judge issued an order receiving substitute documents into evidence and closing the record for receipt of evidence. On March 15, 1976, the Commission granted the Administrative Law Judge's request for an extension of time until September 3, 1976, in which to file the Initial Decision. The parties filed proposed findings on June 15 and respondents filed a reply brief on June 30.

Although many factors contributed to the inordinate time lag between Complaint and Initial Decision, the pace at which this case was to be run was set when counsel supporting the complaint were forced to move for postponement of the second phase of hearings scheduled to commence in September 1974, on the grounds that the Bureau of Competition did not have funds to bring witnesses to Washington in this matter after President Nixon vetoed the Federal Trade Commission's appropriation bill (see Order Setting Additional Dates for Adjudicative Hearings dated August 7, 1974; Motion for Continuance and Resetting of Hearings dated August 30, 1974).

Any motions appearing on the record not heretofore or hereby specifically ruled upon either directly or by the necessary effect of the conclusions in this Initial Decision are hereby denied. [3]

The proposed findings and conclusions submitted by counsel have been given careful consideration and to the extent not adopted by this decision, in the form proposed or in substance, are rejected as not supported by the evidence or as immaterial.

Attached to this decision as "Appendix A" is a 15-page tabulation entitled "Conduct of Respondents' Dealer Witnesses Re: Other Brand and Out-of-Territory Sales", a reproduction of "Appendix A" to complaint counsel's proposed findings. On review of the record citations contained therein, the Administrative Law Judge is satisfied that the information in "Appendix A" is accurate, and it is adopted as support for certain findings and conclusions contained in this Initial Decision.

Some of the abbreviations used in this decision are as follows:

- CX - Commission's Exhibits
- RX - Respondent's Exhibits
- Compl. - Commission's complaint
- Ans. - Answer of Corporate Respondent
- Ans. (name) - Individual Respondent's Answer
- CSCPF - Counsel supporting the complaint's proposed findings of fact, conclusions of law and order
- RPF - Respondents' proposed findings
- Resp. Ans. Br. - Respondents' answering brief.

Page references to the transcript of record do not have an identifying prefix (such as Tr. or R.) but are followed by the names of the witnesses if such identities are not obvious from the text of the decision.

This case focuses on the business relationship that has existed and exists between Beltone Electronics Corporation ("Beltone"), including the individual respondents, and the so-called "authorized" or "selected" dealers. In this respect the complaint alleges that respondents are engaged in the business of manufacturing, distributing, selling, and repairing hearing aids and related products in interstate commerce and that in the course and conduct of said business they pursue a course of action whereby (Compl. par. 10):

- (a) They require their selected retail dealers to sell Beltone products within assigned geographic territories; [4]
- (b) They require their selected dealers to deal exclusively in Beltone hearing aids;
- (c) They prohibit their dealers from dealing with certain potential customers;
- (d) They prevent others, not their dealers, from dealing in or repairing Beltone products; and
- (e) They appropriate and use for their own purposes the names and addresses of their dealers' customers.

The principal evidence of this business relationship is contained in

the various formal written agreements between Beltone and its dealers.¹ In addition, contacts, personal or by way of written correspondence, between Beltone's employees and the dealers are important, and the testimony of both types of witness constitute the major part of the 19,000-plus paged transcript of testimony. Beltone's overall business policies are also disclosed in the testimony of its officers as well as in various documents, some being internal memoranda and some being formal manuals that are supplied to its authorized dealers. As to these evidentiary matters, the complaint alleged that in furtherance of the course of action alleged to be pursued in paragraph 10 thereof, respondents "have been and now are engaged alone or with their dealers in the following acts and practices, among others" (Compl. par. 11):

- (1) Respondents use agreements or understandings which
 - (a) require a dealer to sell Beltone products within an assigned territory;
 - (b) require a dealer to achieve a sales quota by selling Beltone products within that assigned territory;
 - (c) require a dealer to sell Beltone products only to customers found within the assigned territory; [5]
 - (d) require a dealer to submit to the respondents the name and address of each customer who purchases Beltone products;
 - (e) condition the express product warranty on the submission of the name and address of each such customer to the respondents;
 - (f) require a dealer to participate in Beltone cooperative advertising and other sales promotion programs;
 - (g) allow for immediate termination of the contract upon dealer's violation of any provision thereof;
- (2) Respondents engage in extensive national advertising, such as offers of free models of a "non-operative hearing aid", whereupon they send to their selected dealers, as the so-called "leads", the names of those persons responding to such advertising who reside in such dealers' territories, prohibiting the use of such names for any purpose other than to sell Beltone products;
- (3) Respondents have for many years expressed, advocated, communicated or emphasized to their selected dealers Beltone's "one-brand merchandising philosophy", meaning Beltone's business policy of advocating, persuading or pressuring its selected dealers to

¹ Attached to this opinion as "Appendix B" is a typed reproduction of the contents of CX 401, a "Franchise Agreement" between Beltone Electronics Corporation and Hearing Aids Services, Inc., d/b/a Beltone Hearing Aid Service, Winchester, Virginia. This form of agreement was used between approximately August 1969 and June 22, 1971, and is considered to be representative of most of the agreements in effect during the period of time relevant to the issues raised in the complaint.

sell only Beltone brand of products to the exclusion of competitive brands, and have referred to such action by its dealers as "dealer loyalty", continually encouraging, praising or rewarding it;

(4) Respondents have for many years expressed, communicated, or emphasized to their selected dealers Beltone's business policy of dissuading, discouraging, or prohibiting sales of competitive brands by such dealers by means of, among others, persuasion, pressure, harassment, coercion, or intimidation of such dealers to sell only Beltone products and not to sell other brands;

(5) Respondents refuse to sell to all but a few dealers, selected in such a manner that each of such selected dealers enjoys territorial exclusivity so that he is not in competition with any other dealer selling Beltone products;

(6) Respondents refuse to sell Beltone repair parts or to provide schematics to all dealers, or to persons engaged in the business of repairing or servicing hearing aids; [6]

(7) Respondents refuse to supply Beltone promotional and advertising materials, price lists, hearing aid specifications of performance information to all dealers;

(8) Respondents prohibit their selected dealers from selling Beltone products to other dealers of hearing aids;

(9) Respondents require their selected dealers to use the Beltone brand name, in conjunction with a geographic identification of the dealers' locations, or otherwise, in the dealers' trade styles;

(10) Respondents provide in their standard-form contract that a dealer is prohibited from doing any act, making any representation, or advertising in any manner which may adversely affect Beltone products or any other Beltone dealer;

(11) Respondents provide in their standard-form contract that Beltone has the right to terminate the contract, at any time, upon thirty days notice to the dealer;

(12) Respondents provide in said contract that in the event of termination:

(a) a dealer is required to return to the respondents the names and addresses of Beltone product users;

(b) a dealer is prohibited from using his business telephone number and the respondents can order a transfer of telephone service under such number to a person of their choice, or order that such service be cancelled immediately;

(c) a dealer is prohibited from advertising Beltone products, new or used, or Beltone repair service;

(d) Beltone has the right to repurchase the terminated dealer's inventory of Beltone products; and

(e) Beltone is not obligated to repair any out-of-warranty Beltone products sent to it by such a dealer. [7]

The general make-up of the hearing aid industry, including some information about the major manufacturers, is contained in the testimony of the so-called industry witnesses and a Commission employee-accountant witness. Certain technical aspects of the hearing aid business were presented by audiologists, and each side presented the testimony of an expert witness who rendered an opinion about the effects on competition alleged in the complaint. Those alleged effects, or the tendency and capacity to result therein, were, among others (Compl. par. 12):

(1) Competition between respondents and other manufacturers of hearing aids has been hindered and suppressed;

(2) Competition among dealers dealing in Beltone products has been eliminated;

(3) Such dealers have been deprived of their freedom to select their customers and otherwise to function as free and independent businessmen;

(4) Such dealers have been deprived of their ownership of, and freedom to maintain, confidential lists of their customers;

(5) Competition among dealers dealing in Beltone products and dealers dealing in other brands of hearing aids has been hindered and suppressed;

(6) Retail dealers of hearing aids have been deprived of their freedom to act in the best interests of the hearing-impaired public;

(7) Consumers have been deprived of their right to fair and impartial recommendations from dealers in the selection of hearing aids for the alleviation of their hearing impairment;

(8) Consumers have been deprived of the benefits of free competition;

(9) Those engaged in the repairing [or] servicing of hearing aids in competition with respondents have been deprived of their right to repair or service Beltone hearing aids. [8]

Attached to this decision as "Appendix C" is a short glossary relating to the hearing aid industry and to Beltone's business as reflected in this record and decision.

Having reviewed the entire record in this proceeding, and having considered the demeanor of the witnesses as they testified, together with the pleadings, the proposed findings, conclusions, and arguments submitted by counsel supporting the complaint and counsel for respondents, I make the following findings of fact based on the record considered as a whole:

FINDINGS AS TO THE FACTS

About the Respondents

1. Respondent Beltone is an Illinois corporation with its principal office and place of business at 4201 West Victoria Street, Chicago, Illinois (Compl. par. 1; admitted Beltone Ans. par. 1).

2. Respondent Sam Posen ("S. Posen") is an individual, was president and is a director of Beltone (5151 C. Barnow). He is one of the founders of Beltone Hearing Aid Company, a partnership and predecessor of Beltone, and is one of the major stockholders of Beltone (Compl. par. 1; admitted Posen Ans. pars. 2, 3; 5143 C. Barnow). He is chairman of the board of directors of Beltone (6343 D. Smith). He also was one of five members of the executive committee (5042 D. Barnow).

Faye Posen ("F. Posen"), not a respondent in this proceeding, is a director, officer and major stockholder of Beltone. She holds the elected office of Secretary-Treasurer of the corporation (5152, 5154-58 C. Barnow). She is a member of Beltone's executive committee (5165 C. Barnow). She is the wife of S. Posen and the sister of respondents David H. Barnow and Chester K. Barnow (4675-76 D. Barnow).

3. Respondent David H. Barnow ("D. Barnow"), an individual, was, until his retirement on October 31, 1973 (4681 D. Barnow), a stockholder and Executive Vice President of Beltone (Compl. par. 1; admitted D. Barnow Ans. par. 5; 4673, 4683-84). Although he was never actually elected to the office of Vice President, D. Barnow held himself out to the employees of Beltone, its customers and the public as its Vice President (4833-34 D. Barnow; 5154 C. Barnow; 11956 Cato; CX 28D; CX 30A; RX 20 I). D. Barnow was a minority stockholder of Beltone, [9]having bought 1000 shares, representing about 1/16th of the outstanding shares, at about the time of incorporation. Pursuant to his stock purchase agreement, upon retirement he sold all of his shares of stock (which as a result of stock dividends totaled 3285 shares) to the corporation (4834 D. Barnow; 5155-58 C. Barnow). D. Barnow was a member of Beltone's executive committee (5042 D. Barnow). He was Beltone's chief marketing officer for over 30 years (see 4833-34 D. Barnow; CX 29 B).

Pursuant to a deferred compensation arrangement with Beltone, D. Barnow receives a very substantial sum of money from Beltone annually (4842 D. Barnow).

4. Respondent Chester K. Barnow ("C. Barnow") is an individual and an attorney and is a director, stockholder, and Vice President, General Manager and General Counsel of Beltone (Compl. par. 1; C.

Barnow Ans. par. 4; 5143 C. Barnow). Although he was never elected to the office of Vice President, C. Barnow held himself out to the employees of Beltone, its customers and the public as its Vice President (5154 C. Barnow; CX 28 G; CX 30 A; RX 20 I). C. Barnow is a minority stockholder, having bought 250 shares at about the time of incorporation (5155-58 C. Barnow). This represented approximately 1-½ percent of the outstanding shares and although the number of shares he owns today is approximately 800, the percentage of ownership has remained the same (5155-58 C. Barnow). He is a member of Beltone's executive committee (5042 D. Barnow). He is the younger brother of D. Barnow (4676 D. Barnow).

5. Respondents S. Posen, D. Barnow and C. Barnow, along with F. Posen, during the period of time relevant to these proceedings, owned, in the aggregate, but in differing amounts, almost 99 percent of the issued and outstanding shares of stock of respondent Beltone (Compl. par. 1; Beltone Ans. par. 9; 4683-84, 4834-37 D. Barnow; 5149, 5155-58 C. Barnow). Beltone is what is commonly described as a close corporation, with its issued and outstanding stock held, to the largest extent by the Posen family (Compl. par. 1; Beltone Ans. par. 9; 4683-84 D. Barnow; 5149, 5155, 5443 C. Barnow). The individual respondents, S. Posen, D. Barnow and C. Barnow, have, during [10] most of the period relevant to the allegations of the complaint, along with others,² participated in the direction and management of Beltone (Compl. par. 1; Beltone Ans. par. 7).

Beltone's "Board of Directors really were the supreme power and that basically was Sam and Faye Posen" (5044 D. Barnow). D. Barnow, as chief marketing officer, made policy with respect to sales and marketing and he was "in charge of and fully conversant with various Beltone activities and operations including its marketing activities and its franchising of dealers for retail selling of Beltone hearing aids and accessories" (4832-33 D. Barnow). D. Barnow was the final authority on appointing and on terminating dealers (see 4819-20, 4916, 4982 D. Barnow). C. Barnow is responsible for the personnel, fiscal, administrative and legal aspects of Beltone's operations and his decisions are usually final (5164-65 C. Barnow). D. Barnow, up to the time of his retirement, and C. Barnow attend all of Beltone's annual conventions of dealers and participated in every regional dealer meeting since 1960 (5251-55 C. Barnow; 4708,

² Larry Posen ("L. Posen"), not a respondent in this proceeding, is a minority stockholder and is the son of S. Posen and F. Posen. He is a member of Beltone's executive committee and is in charge of Beltone's manufacturing division (5167 C. Barnow). L. Posen is President of Beltone (6343 D. Smith; 11031 Mattingly; 12120 Galloway). Albert Barnow ("A. Barnow"), not a respondent in this proceeding, is Assistant Secretary-Treasurer of Beltone, having been elected to that office by its board of directors (5154 C. Barnow). He is the brother of David and Chester Barnow (5051 D. Barnow).

4882 D. Barnow). They were also responsible for the instructions to Beltone's employees as to their conduct in their contacts with Beltone dealers (4886-99 D. Barnow; 5308 C. Barnow). It is found that the individual respondents formulated, directed and controlled the acts and practices of Beltone, including the acts and practices relating to the matters alleged in the complaint.

About Commerce and Competition

6. Beltone is engaged in the manufacture and sale, at wholesale, of Beltone hearing aids, hearing aid accessories, hearing aid batteries, and hearing testing equipment, such as audiometers and Selectometers, and provides repair service of Beltone hearing aids and hearing testing equipment. Beltone sells its products, at wholesale, to retail hearing aid dealers who pursuant to agreements are authorized to sell, at retail, Beltone products to the consuming public (Compl. par. 2; Beltone Ans. pars. 10, 11). In the course and conduct of its business, Beltone ships or causes to be shipped its products [11]from Chicago, Illinois, to retail hearing aid dealers authorized to sell Beltone products, said authorized dealers located at various and sundry places in the United States outside of Illinois (Compl. par. 3; Beltone Ans. par. 12).

Beltone engages in substantial national advertising (*see* CX6 Z 56, *in camera*; CX 22 F *in camera*) and mails guarantee cards and promotional material directly to Beltone hearing aid users (4771, 4789, 4928 D. Barnow; *see* CX 28Z91-Z93, 28Z 111). Beltone employees visit Beltone dealers at the dealers' offices to give them assistance (9400 Selznick; 15803-04 Wofford, Sr.). Beltone employees and officials, including the individual respondents, regularly visit the various states to preside over and participate in frequent regional meetings, conventions and training sessions (4708, 4930 D. Barnow; 8386-88 Sauls; *see* RX 19Z13; RX 20Z4-6). Respondents are engaged "in commerce," as "commerce" is defined in the Federal Trade Commission Act, and the business practices relating to the matters alleged in the complaint, are "in commerce" within the meaning of "commerce" as set forth in the Federal Trade Commission Act.

7. Beltone is in substantial competition in commerce with others engaged in the manufacturing, distributing, selling and repairing of hearing aids and related products (Compl. par. 4; admitted Beltone Ans. par. 14).

8. The authorized Beltone dealers, in the course and conduct of offering for sale and selling Beltone products, are in substantial competition in commerce with dealers engaged in the offering for

sale and selling of other brands of hearing aids and related products (11392-93 Gorlin; 16021 Kojis; 11702-03 Lucas; *see* RPF 13).

About Beltone's Early History

9. Beltone evolved from an effort by S. Posen, a "self-taught" electronics engineer, to develop a hearing aid for Saul Decker, a salesman by trade, who was a friend of the husband of S. Posen's sister. S. Posen and Decker formed a partnership in 1939 to market hearing aids, but when it was discovered that the hearing aid developed by S. Posen would not help Decker's hearing problem, the latter sold his interest in the partnership to S. Posen, who thereafter formed a partnership with his wife F. Posen. During 1941 and 1942 she engaged in the retail sale of the hearing aid instrument that had emerged from the experiment to help Decker (4676-79 D. Barnow; 5161 C. Barnow; *see* RX 19Z19). [12]

During this period three hearing aid dealers located in Los Angeles, Detroit and Minneapolis, respectively, requested that the Posens, who were trading as Beltone Hearing Aid Company, sell to them hearing aid instruments. From this experience with hearing aid dealers, and with the assistance of D. Barnow and C. Barnow, they wrote letters to dealers, soliciting business. This solicitation resulted in about 30 additional dealers' purchasing Beltone hearing aids for resale. In July of 1943, D. Barnow was employed by the partnership as General Sales Manager. He was paid on a percentage-of-profit basis (4674-79, 4687-90 D. Barnow).

The partnership continued to solicit dealers and in a short time began national advertising in which it offered literature on the subject of hearing, and through which it obtained the names of persons showing interest in that subject. It began transmitting to the dealers, who were purchasing Beltone hearing aids, the names of those interested persons who resided in the dealer's area (4691 D. Barnow).

On October 31, 1946, the business was incorporated as Beltone Hearing Aid Company (CX 21B, *in camera*).

In 1944, S. Posen, who devoted most of his time to production and new product engineering, developed the "monopac" or "one unit hearing aid" that, in effect, reduced the size and weight of a body aid by half, an innovation that "rocked the industry." By 1946, when Beltone's competitors were "beginning to catch up", Beltone "hit them again", when it introduced its Harmony model, which, utilizing a small mercury battery that had been developed during the war, resulted in a further significant miniaturization of the body aid. Then, in about 1948, when its competitors were again catching up technologically, Beltone introduced its Symphonette model, the first

hearing aid incorporating the printed electronic circuit (*see* 4690-92 D. Barnow; CX 28 M, 28 N, 28 O).

In 1945, C. Barnow joined Beltone as its General Manager. He started on a salaried basis and upon incorporation, began receiving in addition a contingent percentage-of-profits remuneration (4682 D. Barnow; 5144-58 C. Barnow).

During this early period in its history, Beltone also acquired the services of a Ph. D. audiologist to help in the [13]training of Beltone hearing aid dealers and in the preparation of Beltone's technical manuals or any technical material sent to professionals or to consumers. It also hired a training director to make available to Beltone dealers knowledge and skills in fitting hearing aids. It also hired personnel to provide assistance to dealers in how to manage their businesses (*see* 4693-94 D. Barnow).

In 1947, Beltone developed the Selectometer, or master hearing aid, from which a dealer could ascertain the particular Beltone hearing aid that could be used to fit a person with a hearing loss, thus permitting the dealer to order only the needed instrument and eliminating the necessity for the dealer to maintain a sizeable inventory (*see* 4715, 4729-32, 5012 D. Barnow).

In about 1944, Beltone's dealer in Kansas City requested a written dealer agreement, ostensibly to document the fact that he was the authorized dealer in that community, in order to capitalize on the "Beltone" name, which, as the result of national advertising, "meant something" (4696 D. Barnow). Beltone supplied this dealer with an individually typed agreement drafted by an attorney and followed this individualized approach with dealers until the requests became too numerous whereupon it drafted a uniform agreement and had it printed (5169 C. Barnow).³

As a result of imaginative product innovation, its methods of sales promotion through a national advertising and lead program, and distribution through dealers, Beltone, by the 1950s, had emerged as one of the leaders in the hearing aid industry.

About the Prior FTC Proceeding Against Beltone

10. In 1956, the Federal Trade Commission, adjudicated a complaint that had been issued November 2, 1950, alleging violations of Section 3 of the Clayton Act, and concluded, on [14]the basis of the terms of the dealer agreements and other facts of record, that the acts and practices of Beltone in selling and making contracts for

³ The record contains eight different forms of so-called "dealer agreement" used by Beltone from 1949 to the time of the hearings. The 1949-50 agreement, which granted the dealer an "exclusive franchise," (*see* CX 576; RX 58D, 59) was slightly modified by the middle of 1953 (CX 577, 436C, 552, 440, 558; RX 58, 578, 76, 66). Citations are arranged by date, i.e. CX 577 executed February 20, 1953, RX 66 executed June 19, 1956.

the sale of hearing aids on the condition, agreement or understanding that the purchasers thereof shall not sell or deal in similar products of a competitor or competitors, constituted a violation of Section 3 of the Clayton Act. The Commission issued an order requiring Beltone, its officers, agents, representatives and employees, to cease and desist from:

1. Selling or making any contract or agreement for the sale of any [hearing aids or other similar or related products] on the condition, agreement or understanding that the purchaser thereof shall not use, deal in, or sell hearing aids or other similar or related products supplied by any competitor or competitors of respondent.
2. Enforcing or continuing in operation or effect any condition, agreement or understanding in, or in connection with, any existing contract for sale, which condition, agreement or understanding is to the effect that the purchaser of said products shall not use or deal in hearing aids or other similar or related products supplied by any competitor or competitors of respondent [52 F.T.C. 830 (1956)].

After negotiations with the Division of Compliance, Federal Trade Commission (*see* RX 22, 23, 24, 25, 26, 27, 28, 29, 30), Beltone sent a letter to each of its dealers enclosing an amended form of agreement as appropriate in the circumstances.⁴ The covering letter, after referring to the Federal Trade Commission proceeding requiring the cancellation of exclusive-dealing franchises, contained [15]the following language (RX 34 Rice and B. C. Kent):

Accordingly, your present Franchise must be changed. To replace it I'm enclosing two copies of a new Franchise Agreement which has already been submitted to the FTC in compliance with their order.

I would like to take a moment or two . . . to explain the meaning of this non-exclusive arrangement. According to our attorney it means you no longer are *required* to deal exclusively with us. I've underlined the word "required" because that's the essence of the change in the new arrangement. You aren't required to deal exclusively with us but if you feel it's in the long-range best interest to you and your customers then you will *want* to continue to handle only the Beltone line. And even though we're not required to deal exclusively with you in your territory, we *prefer* to continue to deal with you exclusively as our distributor in your territory.

Why? Because it has always been, and still is our philosophy that single line merchandising in the hearing aid business is in the best interest of the public, the dealer, and the manufacturer. We are confident that you and all other Beltone distributors will voluntarily desire to handle only the Beltone line.

* * * * *

We sincerely believe that this new Franchise Agreement will in no way disturb the

⁴ Three forms, substantively the same, were used. Form "A" went to all new distributors and old distributors who had never signed an agreement (Listed chronologically: CX 536 (February 1, 1960) RX 96, 81, CX 400, RX 75, CX 410, 420, RX 77B, CX 411, 405, 429, 408, 402 (March 17, 1965)). Form "B" went to all distributors who had agreements which did not include the "Appendix A" assignments. (Listed chronologically: CX 431 (February 11, 1957), 432, 440D; RX 61; CX 421, 523 (March 12, 1957)). Form "C" went to all distributors who had previously signed an "Appendix A" assignment form. (Listed chronologically: RX 72 (February 11, 1957), 68; CX 551; RX 76F, 58F; CX 436; RX 32; CX 559; RX 73 (September 29, 1959); *see also* RX 29).

long-standing, mutually successful business relationship between us We pledge to continue and intensify, and we have in fact intensified our national advertising dominance to produce the greatest number of leads, our unexcelled engineering, design, production, and quality, local advertising and sales helps, aid in recruiting and training consultants, and the many, many other Beltone services you're familiar with. [16]These basic policies have been responsible not only for Beltone's growth to its position of leadership in the industry but also for the welfare and prosperity of Beltone distributors.

Working together in the future as we have in the past we can look forward to an even greater era of prosperity and happiness for all of us in the Beltone family. [Emphasis Beltone's.]

On April 1, 1957, the Commission sent a letter to Beltone (RX 30):

The Commission is in receipt of your latest letter dated March 7, 1957, enclosing the final drafts of your new Franchise Agreement and covering letter, which have been filed by you and your counsel as a report showing the manner of compliance with the Commission's order of February 16, 1956.

On the basis of the information furnished by you and your counsel, it appears that you are presently in compliance with the order and your report, accordingly, has been received and filed.

11. By June 1965, Beltone had a different form agreement that was being used in place of the three 1957 forms (A, B, and C). The 1965 form was used until late 1969,⁵ when it was again modified. Finally in about June 1971, the agreement was further modified and that 1971 form appears to be the agreement presently used.⁶

Except for the 1957 change, Beltone did not enter into a new agreement with each of its authorized dealers [17]everytime it changed the form itself. The then-current form was used when a new agreement was executed whether occurring at the outset of a dealership, or due to a change of business status such as an individual proprietorship's becoming a corporation, or to a significant change of the described "territory" or "area of primary marketing responsibility" of a dealer. Accordingly, at the time of hearing there were in effect agreements representing each form issued since 1957.

In any subsequent discussion of the terms and provisions of the agreements and Beltone's relationship with its authorized dealers generally, the so-called 1969 form will be used as the model and its language quoted.⁷ When deemed appropriate references will be made to the other forms of dealer agreement.

⁵ Listed chronologically: CX 427, (June 7, 1965), 428, 586, 426, 425; RX 65; CX 615, 616, 439, 513, 599, 595, 585, 434E; RX 11, 1; CX 587, 423, 557, 563, 560, 406, 404, 570 (February 4, 1969).

⁶ Specimen CX 398. Listed chronologically: RX 64, 71; CX 581; RX 81I, 78; CX 598.

⁷ Listed chronologically: CX 401 (August 18, 1969), CX 525, 407; RX81D; CX 521, 566, 434, 553, 580, 449, 526, 571, 538, 544, 565 (June 22, 1971).

About the Hearing Aid Industry

12. The hearing aid industry consists generally of domestic manufacturers, domestic subsidiaries of foreign manufacturers and domestic distributors of foreign manufacturers, totalling approximately 50 in number (3915 Harrison; 16004 Kojis; 4086-88 Skadegard). About eighteen of these are members of Hearing Aid Industry Conference, Inc. ("HAIC"). Other members of HAIC include suppliers of hearing aid components and such accessories as batteries (15998-16004 Kojis).

One of the purposes of HAIC is to compile and publish certain industry statistics. A member's dues depend, in part, upon the number of hearing aids it sells (3972 *et seq.* Stutz). In order to insure the confidentiality of an individual member's sales figures, the reporting of such information is made to Price Waterhouse Company and only total figures are made available (4125 Skadegard).

In the November 1972 issue of the Hearing Aid Journal the following information was published (CX 1B):

Volume Sales in the United States

Units Produced in U.S. & Units Imported into U.S. from July 1, 1971 to July 1, 1972 - 595,318. This represents an increase of 8.47% over the same period of the previous year. [18]

Initial Decision

100 F.T.C.

Units for the Years

1970 - 510,747
 1971 - 576,301

A comparison of the yearly totals show that units sold in 1971 increased 12.8% over 1970; whereas the increase in 1970 over 1969 was only 8.4%.

| | | |
|---|---|-----------|
| Hearing Aid Wearers | - | 2,328,571 |
| Hard of Hearing Persons (not using Hearing Aids) | - | 7,760,000 |

Where does the average hearing aid dealer get his sales:

| | |
|---|-------|
| Referred by Otolologists (M.D.'s) | 11.3% |
| Referred by Hearing Centers (Clinics) | 14.5% |
| Customers who have not previously consulted either an otologist or clinic | 68.9% |
| From Some Government Agency | 5.3% |

Sales of Types of Models

| | |
|--|-------|
| Behind-the-Ear Models (of which 1.85% were CROS ^a or Bi CROS) | 63.4% |
| Eye Glass Aids (of which 15.5% were CROS or Bi CROS) | 22.9% |
| Conventional (Body) Aids | 9.4% |
| All-in-the-Ear Aids | 4.3% |

Number of Years Average hearing aid wearer trades for newer model 3.4 years.

In response to certain questionnaires requiring reports pursuant to Section 6(b) of the Federal Trade Commission Act, eleven domestic manufacturers of hearing aids submitted to the Commission totals of their unit and dollar sales of hearing aids for the year 1970. In preparation for this case, counsel supporting the complaint requested permission of each of these manufacturers to make such information, which had been obtained on a promise of confidentiality, available to [19]respondents' counsel as underlying material for computations relating to the degree of concentration in the hearing aid industry. Three manufacturers refused such permission (see RX 13, 14, 15, 16, 17, 18 (*in camera*)).

Computations were made on the basis of sales information relating to the seven nonobjecting manufacturers and Beltone. To compute the "total industry in dollars" an average price per unit (\$103.97) was computed from the eight manufacturers' data and multiplied by the total industry (HAIC) units (510,747), resulting in a total

^a Contralateral-routing-of-offside-signals (see CX 21C (*in camera*)).

industry in dollars \$53,107,473. (CX 18, *in camera*; 3578-3582 Peck, *in camera*).⁹

The tabulation also shows that the first four companies considered for CX 18 accounted for 45.1% of the shipments expressed in units and 47.4% of the shipments expressed in dollars. Similarly, the tabulation shows that the eight companies accounted for 64.4% of shipments expressed in units and 64.4% of shipments expressed in dollars. Beltone, the largest manufacturer in terms of shipments in units (95,887) and dollars (\$10,976,852) had computed market shares of 18.8% expressed in units and 20.7% expressed in dollars.

Commission counsel also presented a similar tabulation based on "total industry in units" (460,037) and on "total industry in dollars" (\$45,016,497) as reported in Annual Survey of Manufacturers in 1971 (CX 19, *in camera*). The resulting statistics show an average price per unit of \$97.85, market shares for the first four companies of 50% expressed in units and 55.9% expressed in dollars, and market shares for the eight reporting companies of 71.4% expressed in units and 75.9% expressed in dollars. Beltone's share of the market was 18.8% (units) and 20.7% (dollars) (CX 19, *in camera*).⁹

These tabulations show that, in 1970, the total value of shipments of hearing aids amounted to approximately \$50 million. Four of the top companies in the hearing aid industry, including Beltone, accounted for approximately 50% of the dollar value of shipments; and eight of the top companies, including Beltone, accounted for approximately 70% of such shipments. Trade and commerce in the United States in hearing aids is substantial. [20]

13. Hearing aids are sold by the manufacturers directly to retail dealers, who in turn resell hearing aids to members of the general public (Compl. par. 8; Beltone Ans. par. 19; 4764-65 D. Barnow; 3717-20 Saad; 15990 *et seq.* Kojis; 3910-45 Skadegard; 4236 Sturtz). There are more than 5000 hearing aid dealers in the United States, and these dealers employ approximately 10,000 salesmen or "consultants" (4257 Sturtz; 4761 D. Barnow).¹⁰

There are approximately 500 natural shopping areas in the United States, and the goal of the manufacturer is to have at least one dealer selling its products in each of these markets (*see* 14445 Winslow).

Most of the states have licensing laws converging the qualifications of dealers and regulating, to some extent, the dispensing of hearing

⁹ On the date of this Initial Decision the *in camera* status of CX 18 and 19 is removed (*see* 3614 ALJ).

⁹ On the date of this Initial Decision the *in camera* status of CX 18 and 19 is removed (*see* 3614 ALJ).

¹⁰ But *see* RX 85, wherein it is reported by the Hearing Aid Journal that there are only a total of 5700 dealers and consultants (*see also* 4064 Skadegard).

aids. Notable exceptions (as of 1974-75) were Illinois (18137 Osnowitz), New York (12093 Galloway) and Pennsylvania (12093 Galloway).

Most dealers carry one major line of hearing aids and, to different degrees, supplement the line with one or two other brands (see 4114-15 Skadegard). Among the "major brands" in the United States are Beltone, Dahlberg, Zenith, Maico, Radioear, Qualitone, Sonotone and Audivox whereas such brands as Acousticon, Otarion, Telex, Audiotone, Vanco and Electone may generally be considered secondary lines (see 3972 Harrison; 15992-93 Kojis). Significantly, some aids of foreign manufacturers are also considered to be secondary brands, foremost of which are Oticon, Norelco, Siemens and Danavox (see CX 6Z112-133, *in camera*).¹¹ However, some dealers, including most Beltone dealers, are single-line dealers, carrying the line of only one manufacturer (16835 Carver; 16653 Harris; 3781 Saad).

14. There are several distinct ways in which manufacturers attempt to stimulate the retail sale of their hearing aids. Foremost is a program of national advertising designed to procure "leads", *i.e.*, the names and addresses of prospects who might be helped by hearing aids. A "lead" is transmitted [21] to the hearing aid dealer who attempts to sell a hearing aid to the "lead". In many cases contact is made in the home of the prospect. Beltone emphasizes this approach, and has since the 1940's (see 4739 D. Barnow).

Some manufacturers do direct mail advertising to hearing aid users and prospects, in effect explaining the features and merits of their products (see CX 6Z16, *in camera*).

In addition, many dealers themselves engage in extensive advertising or promotional activities designed to identify "leads". Many contacts arise from satisfied customers' referring prospects to the dealer, and many sales are repeat sales to users who desire to upgrade the quality of their hearing aids (CX 1B; 11564 Ugoretz).

More than 60 percent of the retail sales of hearing aids occur as a result of an initial, direct contact between the hearing aid dealer (or his consultants) and the hearing handicapped (see CX 1B).

Most of the remaining sales are made after the hearing handicapped are referred to dealers by medical doctors or hearing clinics. It is the practice among many audiologists and hearing clinics, after having determined through audiological testing that a person may benefit from use of a hearing aid, to actually select an aid or aids from their sample stock on hand (which has been supplied to them by manufacturers or dealers) and determine by putting the aids on the patient which aid performs best on the particular individual.

¹¹ It is estimated that Siemens, Norelco and Oticon are the three largest manufacturers of hearing aids in the world (see CX 6Z112, *in camera*).

They then recommend the aid to the patient by the brand name and model and, because the doctors or clinics do not sell hearing aids, the patient is referred to the hearing aid dealer in the patient's locale who deals in the brand of hearing aid recommended (16787, 16800 Carver; 3800, 3821 Harrison). Some clinics prescribe a fitting by general performance characteristics and refer the patient to the dealers (usually designating two or three dealers) who will choose the appropriate aid from the line or lines that they carry (16030-31 Kojis).

Some manufacturers concentrate their marketing activities in contacting the audiologists and attempting to persuade them to carry their aids in stock and to use them in trial fittings, hoping that the audiologists will prescribe their aids (*see* CX6Z10-Z27, *in camera*).

15. In 1970 the average wholesale price of a hearing instrument to the hearing aid dealer was about \$100. It is [22]estimated that the average retail price to the hearing handicapped was \$350 at that time (3937 Skadegard). Since then, there have been significant improvements in hearing aids, and the wholesale cost and retail price have increased to approximately \$150 and \$475, respectively (*see* 16085 Kojis). Significantly, the retail price is generally three times the wholesale cost, a mark-up which reflects, in general, the dealer's cost of doing business (*see* 3940 Skadegard; 14469 Winslow). One of the most important features of a hearing aid, competitively speaking, is its cosmetic appeal, and the principle element of the "cosmetics" of a hearing aid is miniaturization (*see* 16417, 16432 Metcalfe).

The most important factor in the retailing of hearing aids is in the ongoing service supplied by the dealer to his customer/user after the initial fitting (*see* 28Z197). A hearing aid is a sensitive electronic instrument that is fit pretty much according to the subjective response of the user himself (16625, 16700 Harris; 13893, 13904-05 Burak). In addition, ear molds and tubing may need modification, replacement or servicing, and replacement batteries must be available. That this post-fitting service is important is made more clear when it is considered that the vast majority of persons with hearing impairment are over 60 years of age, and the next largest single age group appears to be the very young (3830 Harrison; 16827 Carver; 16028 Kojis).

About Beltone HOFEs and Beltone Dealers

16. Beltone sells hearing aids and accessories at wholesale to its authorized dealers located in the United States and Canada. Such sales constitute 99 percent of its sales of hearing aids. Its authorized

dealers are those dealers who have signed either Beltone's "dealer agreement" or its "franchise agreement". In addition, Beltone now has about 22 authorized audiometer dealers located in the United States and Canada, and these dealers sell audiometers at retail (6038, 6091 D. Smith). Other sales of hearing aids, consisting of not more than 1 percent of the total, are to Beltone's international dealers pursuant to an "international" agreement (CX 441-448). At one time Beltone sold to the United States Government for distribution through the auspices of the Veterans Administration.¹² Beltone makes no retail sales and does not sell to anyone who is not an authorized dealer (5087 D. Barnow; 6330 D. Smith; CX 184, 162). [23]

At all times relevant to the issues raised in the complaint there have been, at any one time, approximately 370 authorized dealers located in the United States with approximately 30 additional authorized dealers located in Canada (6327 D. Smith, *see also* CX 141).

Approximately 15 to 20 dealerships are terminated every year; 12-15 of these terminations are initiated by Beltone (6328 D. Smith).

The record in this proceeding consists in large part of the testimony of approximately 90 persons who had been or were, authorized Beltone dealers. Complaint counsel called 22 ex-Beltone dealer witnesses, most of whom were engaged in retail hearing aid businesses. Respondents presented the testimony of 70 witnesses who were presently or had been Beltone authorized dealers. Several of these dealer witnesses had also been employees of Beltone, Ben Wofford, Sr., having been Beltone's National Field Sales Manager from 1958 through 1965 (15735 Wofford, Sr.).

17. The Beltone employees who call upon the Beltone authorized dealers at the dealers' places of business are called Home Office Field Executives ("HOFEs"). These HOFEs are either District Managers, Regional Managers or Division Managers. District Managers are actually employees in training to become Regional Managers.

Each Regional Manager has responsibility for about 30 to 35 authorized dealers who are located in a geographic region. The HOFEs have no offices in the field, and all correspondence originating with them is typed and mailed by the home office (6436 N. Smith; *see* RX 19Z; 20U (back)).

At the present time there are approximately 13 regions covering the United States and Canada. In 1970 there were ten regions covering the same area (*see* CX 141).

¹² At the time of hearings, Beltone was not selling hearing aids to the Veterans Administration (3265 Causey).

The Regional Managers and District Managers are under the supervision of Division Managers. There are presently two Division Managers (7071 Westmoreland). The Division Managers have offices in Chicago. All of the HOFEs are under the supervision of a National Field Sales Manager who in turn is under the supervision of the Director of Marketing (7071 Westmoreland; *see* RX 19Z30-Z34). [24]

Beltone has carefully delineated the duties of its HOFEs (*see* RX 19Z36; 5070 D. Barnow). For example, these HOFEs are prohibited from taking orders for Beltone products and are prohibited from receiving payment for products purchased from Beltone by authorized dealers (4706 D. Barnow; RX 19Z65).

The HOFEs' principal duties relate to the assistance that Beltone gives its authorized dealers mainly in the area of training dealers and consultants in technical matters and sales techniques (*see* RX 19Z36). In addition the HOFEs are responsible for assisting dealers in the promotion of Beltone products and implementation of programs relating to the hiring of salesmen (8671 Sivek; 10072-73 Wofford, Jr.). HOFEs are also responsible for inducting the dealer at the beginning of his dealership.

Almost all of Beltone's HOFEs either were recruited from the ranks of dealers' consultants or were Beltone dealers themselves before joining the employ of Beltone (5096 D. Barnow).

Regional Managers are also responsible for making initial recommendations on applications for dealerships and for termination of dealerships.

Three times a year the HOFEs are required to attend HOFE meetings in Chicago where the home office personnel have an opportunity to discuss Beltone business with them as a group (*see* 5111-12 D. Barnow; 7010 Westmoreland). At such meetings Beltone's business policies, such as what HOFEs can and cannot do, are stated and restated. In effect, the HOFEs are told that they cannot do anything that could be inferred as requiring that a dealer handle only Beltone or that would prohibit a dealer from buying and selling a competitive brand of hearing aid (*see* 19Z58; 7012-16 Westmoreland; 8700 Sivek).

Moreover, they are told that they cannot do anything that could be inferred as requiring the dealer to sell in any particular place or prohibit the dealer from selling outside his area of primary marketing responsibility (*see* RX 20W; 7012-16 Westmoreland).

HOFEs are also instructed that they cannot discuss the retail price at which a dealer resells his products and they cannot tell a dealer to whom he must sell his Beltone products (*see* RX 19Z61-62; 7053-54 Westmoreland; 8700 Sivek). [25]

The HOFEs are instructed, however, if the subject is brought up, that single-line merchandising, in Beltone's view, is in the best interest of the dealer, the manufacturer and the user, that a dealer is responsible to service users to whom he sells, that all users should be afforded the best service, including service on Beltone's guarantee, and that price gouging should be avoided (*see* RX 19Z59-Z64; RX 20W; *see* 8736-37 Sivek; 6395-96 D. Smith; 8465 Sauls).

Dealers, from time to time, will say to me, as they do to other Beltone employees, one reason or another they are selling competing lines. And we discussed with them very openly the good business reasons why we feel it might not be in the best interest of the hard of hearing persons, themselves and Beltone; but we very carefully and always remind them that it is their legal right as an independent businessman to sell anything they wanted to, as many competing brands they want to, and anyplace they want to at any time.

[6395 D. Smith].

Whenever termination of a dealer is contemplated the HOFEs are instructed that grounds for such termination can never be the fact that the dealer is selling competing brands of hearing aids, or selling hearing aids outside his area of primary marketing responsibility. Permissible grounds for termination are "inadequate market penetration" after all attempts have been made to try to help the dealer through suggested programs such as hiring additional manpower and obtaining additional leads (*see* 19Z58-Z62).

18. As a general rule Beltone dealers are selected from the ranks of employees of existing Beltone dealers. These are Beltone consultants, people who have worked with Beltone dealers for one or as many as five years or even more, or a competitive hearing aid dealer or a competitive consultant (6130-31 D. Smith). Some dealers, before appointment, had been engaged in businesses outside the hearing aid industry, but most of them became Beltone dealers prior to 1960.

All authorized dealers are aware of Beltone's desire to identify persons who, in Beltone's view, are prospective dealers, and the possibility of becoming a Beltone dealer is used by the dealers to recruit employees. Beltone has [26]a policy, however, of not appointing a dealer's employee as a dealer unless the dealer makes a recommendation (6131 D. Smith; 7073 Westmoreland). If a dealer's employee is appointed as a dealer in an area other than his employer's area, Beltone will compensate the dealer in the amount of \$400 to defray the expense of hiring and training a replacement (*see* CX 28Z186; 17051 Allen; 11486 Gorlin; 12611 Hood; 12389-90 Johnson; 15876 Azar).

19. When Beltone's field personnel identified a person whom they considered to be qualified, the applicant was requested to fill

out various personnel and financial information forms and was required to go to Chicago for interviewing at the Beltone plant. Beltone's general procedure was to have the applicant talk to the various heads of the different departments and be interviewed by a "screening committee" to ascertain whether his or her personal profile indicated he or she was the type of person who could succeed in a business (6131-36 D. Smith). In addition, Beltone's policy was to discuss with the applicants in probably general terms the rights and obligations of a Beltone dealer, along with Beltone's single-line philosophy, and Beltone's manner of doing business as set forth in the dealer agreement (see 6134, 6400 D. Smith). Some of the points that dealers recalled about this trip to Chicago was Beltone's "lead" procurement program (17375 Beattie; 11256 McCurdy), and the necessity that the dealer hire employees (consultants) to enable his dealership to call on these "leads" (2158-60 Benoit; 12992 Harlow; 11014 Mattingly). Other points of interest were the "potential" assigned to the dealer's area of primary marketing responsibility (1126 Sable; 3122 Stephen), and the dealers' service responsibilities to the Beltone users (14034 Culver; 15018 Pierson). In addition, the areas that were available and the applicant's choice of area was discussed (17033 Allen; 15246 Byron).

Following the Chicago interview, the applicant was advised, usually by the Beltone field man or by his dealer-employer, as to whether he had been approved by Beltone to be an authorized dealer. Usually the Beltone field executive in the region where the dealership was to be established arranged to meet the applicant at the place of the dealership (7076 Westmoreland).

This meeting, usually covering several days and maybe a week if the applicant had never been in business before, was the "induction" process. Beltone had "a formal induction process, a list of about 50 different chores that a regional [27]manager is responsible for doing to help a dealer become installed. And one of these things is reading through the entire franchise with the man to make sure he understands it" (6139-40 D. Smith).

Even if you take a man who has been in our business for several years and he goes to a strange city and attempts to open a business, it many times is overwhelming to him and there is so many things to get done if he is to start a business off in an organized fashion and become successful that we felt like it was necessary to record all of these things and furnish them to the regional manager.

These chores . . . include everything from in some cases helping him find a location, to helping him hire his office girl, setting up bookkeeping procedures, and finding insurance companies that can take care of his needs . . .

[6140 D. Smith].

After the HOFE had gone over the dealer agreement form in detail the applicant signed it, and the agreement was then sent to the Beltone factory and countersigned, an executed copy being sent to the applicant-dealer (*see* 6984 Westmoreland; 8677 Sivek).

20. During the induction or shortly thereafter, Beltone supplied the new dealer with a list of all users and prospects in the dealer's area of primary marketing responsibility, as contained in Beltone's computer (8916-20 Sivek). In addition Beltone would send to these users what is referred to as a "Dear Friend" letter signed by Sam Posen, whereby Beltone announced the appointment of the "new, local authorized Beltone dealer" and advising¹³ that "he is the *only* authorized dealer in your area" (Emphasis Beltone's) (CX 175; *see also* CX 176, 177B, 178, 179A, 180A, 208, 360, 390, 450; 8834 Sivek). In the event the new dealer had never been in the hearing aid business before, the HOFE [28] would also train him in the aspects of selling hearing aids, although with the advent of state licensing, the appointment of an untrained person as a dealer was a rare occurrence.

21. During this induction or shortly thereafter Beltone would begin to supply the new dealer with "leads", the names of persons who had responded to Beltone's national advertising. Along with the names Beltone also supplied the dealer with the material or non-working model of a hearing aid which the person had requested (*see* CX 28Z51). The dealer sent the material requested to the "lead" and shortly thereafter he or his consultant made a personal call upon that "lead" in order to sell the person a hearing aid (*see* 7293-96 Westmoreland).

On this call, or where the prospect came to the office, the dealer or consultant had an audiometer and a Beltone binaural Selectometer (*see* CX 28Z96). By these instruments he was able to test a prospect's hearing and determine the degree and type of hearing loss, if any, involved. By use of the Selectometer he can determine the hearing aid in the Beltone line suitable as to frequency and power to help the hard of hearing person (4766-67 D. Barnow; *see* CX 522). Upon making a sale of an instrument requiring an ear mold fitting, the salesperson would make an ear impression so that an ear mold could be made on special order from an ear mold laboratory (CX 28Z101). Beltone does not manufacture ear molds (*ibid.*) The dealer then orders the hearing aid from Beltone. Some dealers did carry a stock of hearing aids (7287 Westmoreland). On calls made on Beltone "leads" the dealer was required to report to Beltone on a form

¹³ In some "Dear Friend" letters the user is advised that the former dealer is "no longer the authorized Beltone Dealer in your area" (*see* CX 176, 208, 395) or has retired from the business (*see* CX 177B).

supplied for that purpose the results of the call (CX 28Z106-107, *see* CX 574-75). The dealer cannot use the Beltone "lead" for any purpose other than selling a Beltone hearing aid (CX 28Z107; CX 401, Art. 4; CX 487).

22. As part of Beltone's training and instruction of its dealers and the dealer's consultants it emphasizes the use of the "PAQ" presentation when the consultant calls on prospects in their homes. This procedure is set forth in the Beltone consultant's manual (*see* CX 522; *see also* RX 20Z5-Z6), the introduction to which reads as follows (CX 522 at p. 11): [29]

"PAQ" is a *planned* sales presentation—not a canned one. This successful system has been developed and refined through many years of successful selling by Beltone Dealers, consultants, members of the Beltone Field Sales Department and Home Office personnel. It represents the best thinking of all these people and is the system taught by Beltone in field sales training schools and at the National Sales Training Center. It is your framework for success in selling Beltones and for doing the greatest service for every hard of hearing person.

PAQ stands for the following:

P. PROBLEM BUILDING

In every successful sale a problem must be built. Unless your prospect has a problem and acknowledges it, he does not need nor desire any help. His problems must be clearly established.

A. AWARENESS OF THE SERIOUSNESS OF THE PROBLEM

It is not enough to just build the problem. Your prospect must be made aware of how serious the problem is. To delay the solution to the problem may be robbing him of many years of more enjoyable living. You must create, in your prospect's mind, real concern about his ability to function as a normal human being with his present hearing problem. He must be realistically informed of the dangers of postponing taking a step for better hearing.

Q. QUALIFY AS AN EXPERT

After the problem has been built and the prospect is aware of the seriousness of the problem, you must establish beyond any doubt that *you* are the person most qualified to help him with his problem [Emphasis in original].

23. Beltone supplies a complete training program for consultants and dealers (4749-52 D. Barnow). The dealer is supplied with a complete array of training materials [30]including films, manuals, and records (*see* CX 28Z58; CX 522). In addition the HOFEs stand ready to conduct training sessions at the dealer's office. In addition HOFEs will conduct training sessions at certain locations in their regions (CX 28Z183). Beltone also conducts a National Sales Training Center for new dealers and experienced consultants (*ibid.*).

HOFEs were instructed "to plan to go out and help these dealers who were having trouble achieving market penetration" (6112-13 D. Smith).

When the hearing aid ordered by the dealer is received from Beltone, the dealer calls on the purchaser, or the purchaser comes to the office, and the dealer fits the instrument or instruments and ear molds if they are required.

According to Beltone's service plan, the dealer is required to service this Beltone user at regular intervals thereafter (*see* 18302 Laster). The first followup call is made in approximately 30 days to make sure the user is getting the best use of his instrument (*see* 12170, 12184-85 Galloway; 14707-8 Bruner).

24. Beltone also requires the dealer, upon making delivery of the hearing aid, to send to Beltone a guarantee registration card (*see* CX 28Z91-Z93). The dealers are obligated by the dealer agreement (CX 401, Art. 5) to follow this procedure and they invariably do. The user will not receive his factory one-year warranty on the Beltone hearing aid unless the dealer registers it with Beltone (*see* CX 572). In addition the guarantee registration card must be filed within 120 days (plus 30-day grace period) from the date the instrument is sold by Beltone or the guarantee will not be issued (*see* CX 28Z91; 7282-83 Westmoreland). The dealers understand the reason why they are to do the registering is because the purchasers, who are usually persons over 60 years of age will not send them in, and some testified that this procedure was also to insure that the instrument was a new instrument (*see* 13384 Scheutzow; 15775 Wofford, Sr.; 17386 Beattie).

25. Every Beltone dealer "from the day [he is] considered for a dealer agreement" is given a "potential" for his area of primary marketing responsibility (6101 D. Smith). This potential, expressed in terms of units of new Beltone hearing aids ordered per month from Beltone is, according to Beltone, figured on such statistics as population, age of population, economic conditions in the area, etc. (*see* CX 28Z83). It is considered to be a normal, achievable [31]goal which the dealer attempts to achieve in his area of primary marketing responsibility, as per dealership agreement (7179 Westmoreland). Between various dealers, it provides a standard of comparison as to how well the dealers are progressing, their performance being expressed in percentage of potential achieved (6098-99 D. Smith). In effect, each geographic subdivision in an area of primary marketing responsibility, such as county, postal zone, etc., is given a "potential" (6098, 6102 D. Smith).

26. Dealers are encouraged to prospect for their own leads (*see* CX 28Z110; CX 522). In this respect, Beltone has a cooperative advertising plan based on the dealer's purchases of new Beltone hearing aids, a credit of \$7.50 being given for each such instrument

purchased (CX 28Z118). Local advertising by the dealer, if approved by Beltone, will receive credit of up to 50 percent (CX 28Z117).¹⁴ In certain metropolitan areas, for example, the Los Angeles area, dealers have formed "METRO" groups in order to take advantage of Beltone advertising in city-wide media (see CX 140). Any advertisement that mentions a "product competitive to those manufactured by Beltone" is not eligible for advertising credit (CX 28Z128). Beltone also encourages and gives cooperative advertising credit to dealers participating in fairs or other similar shows or events whereby leads may be prospected (CX 28Z126, Z145-52). The dealers usually turn over the leads so developed for prospects residing outside their area of primary marketing responsibility to either Beltone, or the dealers located in the other areas (9185 Bain; 14069, 14107 Culver).

27. All of Beltone authorized dealers are provided with a list of all other Beltone dealers as well as their respective areas of primary responsibility (see 13010 Harlow).

28. Every month Beltone compiles certain statistical information relative to each Beltone authorized dealer on a so-called "Beltone Dealer Progress Report" (8904 Sivek).¹⁵ In brief, the compilation reports the dealers' purchases of new hearing aids, their potential, and purchases in terms of percent of potential. In addition, it reports these sales as three month averages, and also reports past years' sales. Also the number of Beltone leads and a lead purchase ratio is reported, as well, and the number of inquiry result reports returned by the dealers. The number of guaranty registration cards is set forth and until 1973, the number of binaural sales were listed. The number of complaints and a complaint purchase ratio is also reported (see 6103-04 D. Smith; CX 28Z84-Z88). [32]

29. The retail prices at which new Beltone hearing aids are sold is set by the authorized dealers. Although Beltone had issued suggested retail prices sometime during the 1950s (see 14551 Langham; 12799 Keel), it hasn't had such suggested retail prices since then. The dealers testified that they determined their retail price on such factors as the wholesale price of the instrument, the cost of accesories, the salesman's commission or salary, overhead of the operation of the business, including service centers and branch offices, and the cost of servicing all of the users-customers, as well as a reasonable profit (see 18287-88 Laster; 17227-28, 17270 Martin). A few authorized dealers said they took competition into consideration (2475 Jeffrey; 17292 Moses; 14048 Culver; 11435 Gorlin) and several

¹⁴ In addition a Beltone dealer may be afforded a "100 percent Advertising Reserve" based on a percent of his purchases of cords and batteries from Beltone (CX 28Z117).

¹⁵ CX 482, 486, 491, 518-520, 535, 537, 543, 547, 550, 562, 568, 596, 600.

said they also took the estimated sales of new Beltones for the coming year into consideration (*see* 17384 Beattie; 11712 Lucas; 17480 Mitsdarffer; 14238 Owenby).

The record shows that the retail price is generally three times the wholesale cost of the instrument. Several dealers testified that at times they sold all instruments at a single retail price (17411 Beattie; 12942-44 Borgeois; 12465 Coppola; 17163-64 Durbin; 12055 Hulser).

30. Many of the dealers testified that they conducted service centers in various population centers within their area of primary marketing responsibility on a regular basis, usually once a month. The principal purpose of the service center is to afford users a more convenient opportunity to obtain regular service on their hearing aids than returning to the dealer's office or awaiting a house call from the dealer or one of the consultants (*see* 15678 Pruitt; 15604 Jones). These service centers were open for a half a day or until all users who visited them were serviced. The service centers were usually held in motel rooms or drug stores (*see* 12093 Galloway; 16268 Rice).

Many dealers also maintained branch offices or sub-offices. These branch offices were usually the headquarters for consultants, and some had branch managers. Many dealerships were created by a dealer's selling his business interest in a branch office, including furniture and user lists to his branch manager contingent upon Beltone's appointing that branch manager as an authorized Beltone dealer (*see* 12510-11 Hood; 11417 Gorlin; 12721 Ivy; 18202 Tabor).
[33]

Branch offices could not be created or set up by dealers except with Beltone's permission and dealers could not grant consultants in these branch offices any franchise rights (6161 D. Smith; *see also* CX 401, Art. 10).

31. The dealers attended Beltone's international conventions in the even numbered years and 3-day regional meetings during the odd numbered years (*see* CX 28Z184-85; 4884 D. Barnow).¹⁶ At these meetings, seminars relating to business were held at which the Beltone officials and employees would discuss Beltone and Beltone business with the dealers.

Beltone gives several awards to its dealers and consultants. For dealers there is the President's Cup, granted to the outstanding dealer in the United States (CX 28Z189). Dealers may also receive

¹⁶ The dealer agreement required and the dealers were expected to attend Beltone-conducted meetings (*see* CX 401 Art. 6; CX 548, 549).

the Dave Barnow Regional Award, one award being made for each of Beltone's regions (CX 28Z189).¹⁷ Every dealer who achieves or exceeds 100 percent of potential receives a "Pacesetter" award (CX 28Z191).

Consultants who sell over a certain number of hearing aids in any year receive special awards.

The names of dealers achieving 100 percent are listed in Beltone's Honor Roll that is published in the Beltone Dealer Newsletter along with the Consultant's Glory Sheet, wherein are listed the names of consultants who sold 10 or more hearing aids in the previous month (CX 28Z186-87; 12603 Hood).

All President's Cup winners who are active Beltone dealers are automatically members of Beltone's National Advisory Counsel which is comprised also of dealers nominated by the HOFEs and selected by the dealers in each region (see CX 28Z190, Z205). Beltone HOFEs and home office personnel are also members of this counsel, the purpose of which is to provide a "creative resource for new ideas, suggestions and proposals which contribute to the continual advancement of the Company and of all members of the Beltone Family" (CX 28Z205, *but see* CX 540). [34]

32. Throughout its history Beltone officials have expressed the idea of the "Beltone family" which consists of the people in the corporation, officers and employees, and the dealers and their employees, and the users.¹⁸ They have also promoted the concept of "loyalty" within the "family" (see CX 28D; see also CX 6Z157, *in camera*).

David Smith testified that he had used the word "loyal" in a speech given to the dealers at 3-day regional meetings one year (1970 or 1971). ". . . [E]very effort of the marketing division, from the very top through every staff member, to every HOFE in the organization, is [geared] and has as its objective to do everything in our power to earn the loyalty of our Beltone dealer organization" (6426):

They are our customer. When I say earn, I mean by doing advertising to help them, by helping them train their office staff, by helping them hire outside people, helping

¹⁷ No dealer can earn either the President's Cup or the Regional Award unless he has achieved at least 100 percent of potential during the year for which the award is made (CX 28Z190).

¹⁸ See CX 28Z185: "To demonstrate our interest in your selling organization, David Smith will send a personal letter of welcome to each new Consultant that you have told us has joined your organization.

"We believe that nothing will serve to bind the new Consultant closer to the Beltone Family than an awareness that the Family is personally interested in him."

David Smith also wrote a letter to the new dealer welcoming him "to the Beltone family of dealers, the hardest-hitting hearing aid sales organization in America." He added: "we all have confidence in you as a member of the great Beltone Team" (CX 513A; see also 536A, letter by Ben Wofford, Sr., National Field Sales Manager; 538G, letter by Shymanik).

In his letter to consultants David Smith welcomed them to "one of the closest-knit, hardest-working and fastest-growing sales organizations in the country" (CX 530).

them train them, do absolutely anything that will make them feel that Beltone is the kind of company that they want to do business with.

But in no way does that mean that they have to sell only our products in order to be loyal, if that is what you are driving at. But it is true we do anything we possibly can to earn their loyalty in terms of making them feel like they want to do business with Beltone.

The ultimate manifestation of the fact of loyalty is for dealers to buy only Beltones (6430-33 D. Smith). [35]

33. Dealers generally clean, adjust and service hearing aids in their offices, but are not equipped technologically to make repairs, other than minor ones such as replacing molding tubes, and must send aids in need of repair elsewhere, usually to the factory, for service (9082 Bain: Subminiaturization has made replacement of parts by dealers difficult; 9449-50 Selznick: "I don't repair hearing aids"; 11024-25 Mattingly: "hearing aids are so sophisticated today that the repairs that we can do are quite limited . . . if there is something wrong, we have to send it to the factory").

While non-Beltone repair laboratories exist and accept Beltones for repair, Beltone factory repairs are preferred by both dealers and customers (9449-50 Selznick: tried non-Beltone laboratory but returned to Beltone because of price and quality; 1488 Ziegler: "People that buy Beltones like to have them repaired at a Beltone factory"; 676, 679-80 Plyler: three customers refused to leave their aids for repair when told they would not be serviced by Beltone). Moreover, it is not disputed that Beltone refuses to sell repair parts or to provide schematics to other than authorized dealers and will not make specification sheets or other technical information available to unauthorized dealers (594-95 Wagner; 2075 Taylor; CX 169, 170, 164, 184), making dealers even more dependent on factory service for repairs. Thus, access to Beltone factory repair service is an important business asset of a dealer.

As already found (Finding 24), Beltone provides a one-year guarantee which includes free factory repair service, on its new Beltones if, and only if, a guarantee registration card is sent to the company by an authorized Beltone dealer within the 150 days specified.

If an aid under warranty is sent to the factory for repair by a dealer other than an authorized Beltone dealer, it is Beltone's policy to repair the aid but to return it either to an authorized dealer located near the user or to the user himself if there is no authorized dealer conveniently close to the user (CX 329, 351, 149, 152). This policy of by-passing the non-Beltone dealer has been implemented frequently, particularly in connection with terminated Beltone

dealers (2134 Benoit; 2658-60 Musselman; 673-76 Plyler; 1486 Ziegler).

It is Beltone's policy to provide factory repairs on Beltones not covered by warranty only when the repairs are requested by authorized Beltone dealers (CX 351; 513 Wagner: only authorized Beltone dealers could send in for repairs). [36]This policy has been manifested when terminated Beltone dealers who have sent in Beltones not under warranty have received the aids back unrepaired (CX 152; 2658 Musselman; 2134 Benoit).

About "Potentials"

34. Beltone assigned to each dealer a "potential" for his area of primary responsibility, expressed in terms of a number of hearing aids to be ordered from Beltone per month. The dealer was obligated by his dealer agreement to use his best efforts to achieve the potential set for his area (CX 401, Art. 1).

According to the Beltone Procedure Manual, the potential for each dealership was individually calculated and based on consideration of the (1) population of the area, (2) age of the population, (3) socio-economic condition of the population, and (4) density of the population. Further, the Manual states that potentials were maintained "as a means of stating in meaningful terms the normal, achievable goal for each Dealer." (CX 28Z83). D. Barnow testified that potential is "what the market has in it that can be produced" (4719). Dealers understood that "potential" represented the amount of hearing aid sales that could reasonably be expected to be made in an area determined by using strictly empirical data (17304 Moses: "the amount of potential business in a given area that is achievable"; 13262 Levy: "what the area could reasonably expect to do"; 13669 Paul: "what my marketing area could provide"; 16279-D Rice: the number of units that should be easily sold out of this area; 17149 Durbin: gauge as to potential market for hearing aids in the area of primary responsibility; 12102 Galloway: "what I would reasonably expect to do in terms of fittings of new instruments in the area"; 12529 Hood: figure achievable for that particular area). Actually, the four population factors noted were used to derive a formula whereby the Beltone company's total sales goal was divided among all its dealers (4721 D. Barnow). Thus, the "measurable, statistical, marketing facts" outlined in the Manual as the basis of the potentials (CX 28Z83) were actually used to distribute the company's sales goal rather than to set it. Evidence of this fact is the testimony of dealers who had their potentials increased despite decreases in population in their areas (11032-34 Mattingly; 16350 Metcalfe; 2864 Peterson). Respondents testified that they increased their potentials "from time

to time depending upon the increase in total volume that the company experienced" (5006 D. Barnow; *see* 8443 Sauls). [37] However, it was admitted that potentials had been set which exceeded the sales of the company and that potentials were set "ahead of what the average Beltone dealer is doing" (5009-10, 4721 D. Barnow; *see* 15806 Wofford, Sr.).

Potentials were, in effect, quotas and served as required minimum sales figures. Ex-HOFE Griffith testified that the designation "potential" was a misnomer because potential in the company's eyes was the "minimum acceptable performance sales-wise" of a dealer, rather than the possible number of sales for the area. "In that respect, the word would mean quota" (1816-17). In its communications with dealers, Beltone treated the potential as a minimum (CX 67: letter to dealer Taylor stating that "anything less than 100% of potential in an assigned marketing area is unacceptable"; CX 49: letter to dealer Wagner referring to 100% of potential as the minimum of performance). While the dealer's agreement obligated a dealer only to "use his best efforts" to achieve potential (CX 401, Art. 1), the HOFE's Manual lists failure to meet potential as grounds for termination (RX 20Y-20Z), and ex-HOFE Griffith testified that if a dealer continuously failed to meet his potential, he would be terminated (1818). Dealers were told by Beltone that their dealerships were perpetually contingent on their achieving 100 percent of potential (1193 G.G. Smith: was told during discussions preliminary to acquiring a Beltone dealership that "we would have to keep our quota up in order to retain the franchise"; CX 506: letter to dealer Lathrop advising him if he did not immediately build up his business to 100% of potential, a recommendation of termination would be forthcoming). Dealers were threatened with termination if they did not reach potential (4303 Davis; 3111 Stephen; 1145 Sable; 1325-26 Thompson). Other dealers feared termination if they did not reach potential (2225, 2227 Peters; 268 Thomas). It is not surprising that many persons associated with Beltone (dealers and HOFEs) regarded potentials as quotas (4357 Davis: his HOFE called it quota; 1143 Sable: HOFE Selznick referred to it as quota; 1816-17 Griffith: used the word quota when talking with other HOFEs but not when speaking with dealers; 3109 Stephen: regarded it as quota; 2116 Benoit: "we called it quota"; 2335 Archer: "quota, as far as I am concerned"; 1469, 1473-74 Ziegler: in my mind it was a quota; 2021 Taylor: "I call it quota").

Dealers were constantly reminded of their potentials. Not only did Beltone send to each dealer a monthly data form showing his performance in terms of achieving potential (2116 Benoit), but also it

contacted dealers who were not making potential, through its HOFEs or by mail, and exerted pressure on them to increase their sales (CX 67, 49, 506; [38]8172 Sauls; 4303 Davis; 2223-24 Peters; 3111 Stephen; 1212 G.G. Smith; 2117 Benoit; 2335 Archer; 1952 Taylor; 638 Plyler: "constant, unrelenting pressure"; 1646 Lathrop: "continual pressure bordering on harassment"). The Beltone Bonus Plan, which provided for bonuses for HOFEs based on increases in the percentage of potential reached by the dealers in their areas (RX 19Z19; 4932 D. Barnow) served as an incentive to HOFEs to encourage their dealers to reach potential. In addition to threats of termination as mentioned above, threats of reduction in advertising and leads were made by Beltone to dealers not reaching potential (1448-49, 1472, 1474 Ziegler). The effects of this constant pressure is made strikingly apparent by testimony of dealers who admitted that in order to achieve potential they had fit a Beltone when they knew another brand would better serve a customer or had fit a new, current-line Beltone when a cheaper one would perform adequately for a customer (used or discontinued model Beltones did not count towards achieving potential) (636-38 Plyler; 2118-19 Benoit; 2321 Archer).

As pointed out above, potentials were set above the level of what average Beltone dealers were achieving. Many dealers felt their potentials were set unrealistically high and were impossible to reach (2222 Peters: "I couldn't see how we could make that . . . potential"; 10948 Sloane: "I think the goal is too high"; 2116 Benoit: was unrealistic, "each time I would get closer to it the potential would go higher"; 2864 Peterson: "I found it extremely difficult . . . to meet the original potential").

35. The concept of potentials was used by Beltone to produce and insure adherence to its company policies. If a dealer was not reaching potential and also deviating from Beltone policy, he was likely to be terminated. D. Barnow testified that failure to meet potential was never the sole reason for termination. "If the man would meet us half-way and show evidence of making an effort to improve himself and to improve his skills and improve his volume of sales, we would worry along with him forever, if necessary, but where we did not get this kind of cooperation and this kind of evidence of intention to improve we had no alternative but to seek our representation elsewhere" (4724). The "evidence of making an effort to improve himself" to which Barnow referred was tantamount to strict adherence to Beltone policies (15968 Tibault: potential was "a realistic figure that can be obtained if you

undertake Beltone's program . . . if you implement Beltone's marketing program"). [39]

Beltone used the threat of termination for failure to meet potential as a club to force dealers to adhere to its single-line policy. Several dealers testified that potential could not be met if less than a dealer's total effort was spent encouraging Beltone sales (4301-02 Davis: couldn't make potential if efforts were directed at selling other brands; 3111 Stephen: didn't have time to sell other brands and still make potential; 1645 Lathrop; one couldn't direct efforts to selling brands other than Beltone and still make potential; 1952 Taylor: I probably couldn't make the potential the company wanted since I was multi-line). Dealers were advised by Beltone to stop selling other brands in order to make potential (1953, 2021 Taylor: was told he could never make potential selling other brands, 2576 Mussleman: was told he couldn't possibly make potential if he divided sales among more than one manufacturer). That Beltone's admonishments were effective is seen by the fact noted above that dealers sold Beltones though other brands would have been more suitable. Dealer Taylor testified that after reprimands regarding his sale of other brands and his not making potential, he sold fewer competitive brands because of the pressure to reach potential (1956).

Beltone compelled expansion of its dealers' businesses through the use of potentials (2223 Peters: one would have to have help from salesmen to make potential; 14574-75 Langham). When dealers failed to make potential, they were encouraged by Beltone to increase their manpower (16352 Metcalfe: Beltone suggested hiring more representatives; 4303 Davis: when didn't make potential, HOFE Sivek contacted him and advised him to hire more people; see 7235-36 Westmoreland). Dealers who did not follow Beltone's suggestion that they hire people were likely to be terminated (6116 D. Smith: "[I]f he was willing to hire more people, . . . we would continue with him indefinitely. But if . . . he refused to hire anybody to help him in his business . . . we probably would terminate him").

*About the Areas in which Beltone Authorized Dealers Sell
Beltone Products*

36. It is not disputed that Beltone appoints only one authorized dealer in any given area of primary marketing responsibility, and that Beltone sells its products only to authorized dealers (see 4731 D. Barnow).

Of the approximately seventy dealer-witnesses presented by respondents many testified that they never went outside of [40]their prescribed areas to make sales (17043 Allen; 12905 Borgeois; 15252

Byron; 17135 Durbin; 15496 Gilliam; 17884 Glaspie; 12495-96 Hood; 12335-36 Johnson; 12798 Keel¹⁹; 14550-60 Langham; 13510 Magures; 17233 Martin; 16338 Metcalfe; 14971 Miller²⁰; 16456 Partin; 13664 Paul; 15034 Pierson; 13452, 13470 Ribinowitz; 16251 Rice; 13318 Wheeler). Several dealers testified that when their consultants had made sales outside their respective areas they had admonished them to stay inside the assigned areas (12911-12 Borgeois; 12519 Hood; 15455 Jeter; 13570 Morris).

Some of respondents' dealer-witnesses testified that during the time that they were Beltone dealers they had made one or two sales outside their prescribed areas (15605 Jones²¹; 13209 Levy; 14890-92 Madsen; 13570 Morris; 13136 Pennet; 14334-36 Perisho; 16527-28 Rawlings; 15954 Tibault; 15768-69 Wofford, Sr.).

Mr. Bruner testified he never sold outside his area except when asked to do so by his neighboring Beltone dealer (14690).

Many of respondents' dealers testified that the sales that they made by actually going outside their prescribed areas were only in situations where they had personal referrals from one of their customers (15194 Bisel; 11938-39 Cato; 14042 Culver; 13008 Harlow; 12035 Hulser; 11705 Lucas; 11267 McCurdy; 18117 Osnowitz; 13387 Scheutzow; 9440 Selznick; 17967 Sturtz; 13096 Tabokin²²; 15676 Pruitt²³; 11564 Ugoretz). [41]

Some of respondents' dealer-witnesses testified that they did make some sales outside their prescribed areas (17381, 17416 Beattie: "once in a while", 4 or 5 at the most per year; 12436 Coppola: a few outside; 15340 Elias: "I imagine that I had stepped over the line"; 11428 Gorlin: some sales outside when West Palm Beach was open; 16184 Hudson; 12733-34 Ivy: doctor referrals and customer referrals; 15427 Jeter: "not [outside] as a regular thing"; 14789 Kindopp: rural routes; 11181 Lipin: direct referral from a client or some professional person; 11019 Mattingly: "numerous aids" in Putnam County; 17490 Mitsdarffer: "several occasions"; 17293 Moses: occasional sales outside; 14236-37, 14282 Owenby: since 1968 has sold outside only by invitation; a total of ten instruments; 15155-56 Proctor: a few referrals outside; 15883, 15926 Azar: fits in mountain areas even though out of his territory, a total of between 5 and 10 since 1963.)

¹⁹ Mr. Keel, a Beltone dealer for almost 30 years, stated that "most of the Beltone dealers are gentlemen enough to respect other people's rights" (12798).

²⁰ Mr. Miller stated that he never sold outside his area "for loyalty and good feelings, we just have our own area" (14971).

²¹ Jones testified that since 1957 he made one sale outside on a referral and that the neighboring Beltone dealer complained (15605-06).

²² Mr. Tabokin "felt it was not ethical for me to sell" in another area (13096).

²³ Mr. Pruitt testified he made sales outside his area on personal referral or where the post office was on the line, and that he contacted his neighboring Beltone dealer in advance of making such contact with the prospect (15678).

Of the remaining dealer-witnesses presented by respondents, several testified that they actually solicited business outside their respective areas of primary marketing responsibility. Mr. Bain testified that he made sales in San Bernadino during the time that it was in Mr. Abrams' area (9028). Mr. Galloway testified he sold hearing aids in surrounding counties, that "I have a right" (12091-92). Mr. Kauffman, a dealer in Chicago testified: "I sell them wherever I can" (9607). Mr. LaMontagne said "[i]f we feel we can service it we sell it" (18048). Mr. Laster sold in adjoining counties on recommendations and on answers to advertising (18294). Mr. Sloane stated that "if there was an opportunity to make a sale, they . . . ought to . . . try" (10940). And Mr. Wofford, Jr., another Beltone dealer in Chicago, sold outside his area (10091).

Most of the dealers testified that they would sell new Beltone hearing aids to persons who reside outside their respective areas when the person came to their offices, or other places of business. If the user did not plan to return to the dealer's office or service center for service, the user was referred to the Beltone dealer located in his home area, and many dealers would send the user's file to the other Beltone dealer (*see* CX 28Z198).

On this record there is no doubt that Beltone's authorized dealers as a general course of business practice confine their sales of new Beltone hearing aids to their respective areas of primary marketing responsibility (*see* Appendix A, pp. 1-15, *infra*). When asked, they all testified [42]that such a limitation was their own choice, most of them stating that either their own area was all they could take care of or it was not practical to try to service customers too far away from their offices or service centers.

37. Respondents deny that they *require* their selected dealers to sell Beltone products only within the assigned areas of primary marketing responsibility, contending that there is no such requirement in the dealer agreement and that the HOFEs are specifically instructed not to tell the dealers where they are to sell Beltone products (*see* RX 20W).

Beltone's Franchise Agreement provides as follows:

Article 1. BELTONE hereby appoints DEALER a retail DEALER for the sale of BELTONE Products within the following area of primary marketing responsibility: [the agreement designates a specific geographic area usually by town, county, or postal zone (or zip code)] DEALER hereby accepts such appointment and agrees to use his best efforts to promote and increase the sale of BELTONE Products throughout such area and to achieve the market potential determined, from time to time, by BELTONE [CX 401].

Counsel supporting the complaint assert that although the lan-

guage of Article 1 is not specifically phrased in terms of territorial exclusivity, the provisions thereof along with other provisions in the agreement have the effect of restricting dealers' sales to the designated areas. In this respect they point to the provision that requires a dealer to use his best effort to achieve a "market potential" within the assigned territory, the provision that prohibits establishment of branch offices, sub-offices or retail locations without specific permission of Beltone,²⁴ the provision that establishes a lead program wherein Beltone supplies a dealer only those "leads" residing within the dealer's area,²⁵ and the provision providing for termination of the agreement if any provision thereof is violated.

[43]

In addition, Beltone apparently requires that a dealer service the customers to whom he sells (7025 Westmoreland; 8724-25, 8812 Sivek). Actually the franchise agreement requires any dealer to service any Beltone user who seeks such service. Article 7 provides:

DEALER shall give full cooperation and assistance to all users of BELTONE Products whether or not purchased from him, and shall comply with all BELTONE service plans, including the BELTONE Certified Hearing Service Plan. Services performed by DEALER shall conform with the standards of quality established by BELTONE. DEALER shall not make excessive service charges and shall not make any service charge on BELTONE Products within guarantee, whether or not purchased from him.

As a regular practice Beltone dealers send to Beltone all "leads" procured by the dealers' own promotional efforts, including those physically located outside his area of primary marketing responsibility.²⁶ During the existence of the Los Angeles Metro Group, the dealers specifically arranged to have leads acquired at the fair and home show distributed among them according to their geographic areas.

Finally, Beltone has promoted the concept of the "Beltone family" and dealer "loyalty" one to the other, which according to the dealers,

²⁴ "Article 10. . . . No branch office, sub-dealership, or retail location other than set forth herein shall be established by DEALER without BELTONE's prior written consent."

²⁵ "Article 4. On all leads (names and addresses of prospective purchasers) furnished by BELTONE, DEALER shall report promptly to BELTONE, on forms supplied by BELTONE, the results of such leads and other information relating thereto, as BELTONE may, from time to time, require in its DEALER procedure manual or otherwise. All leads furnished to DEALER by BELTONE shall be and remain BELTONE's sole property and shall not be used by DEALER, at any time, for any purpose other than to sell BELTONE Products."

²⁶ Dealer Thomas testified that in order to get co-op money for fairs a dealer was required to send lead names accumulated at the fair to Beltone (408). Article 6 of the Franchise Agreement provides:

BELTONE shall make available to DEALER, from time to time, assistance, training, sales aids, advertising and promotional support, product information, and equipment (on loan or rental). DEALER shall make full use of all such assistance and material and shall participate in all BELTONE programs, such as its National Training Centers, Regional Meetings, and National Conventions. DEALER shall comply with all the terms of BELTONE cooperative advertising plans and other programs.

included respect for the areas assigned to other dealers. In this respect, it was Beltone's policy to announce to its dealers that it chose to do business with only one dealer in any given area (see 2315 Archer).

Of the twenty-one dealers who were presented by complaint counsel, eighteen of them testified about where [44]they sold Beltone products. Five dealers testified they never sold outside their assigned areas (2095 Benoit; 4300 Davis; 1644 Lathrop; 2865 Peterson; 484-85 Wagner).²⁷ Mr. Taylor testified that staying in one's own area was an "unwritten law, really" and that he "never digressed from that" and that he only went outside with permission of the dealer in that other area (1956, 1968). Mr. Sable testified that he sold Beltone products in Brockton (not a part of his area) when it was "open" (no Beltone dealer there) and that except for that period, he did not sell outside his assigned area (1137). Mr. Stephen instructed his consultants to sell only within his assigned area (3105).

Mr. Peters testified that the members of the Los Angeles Metro Group agreed that they could sell outside their areas on referrals, but that there were "very few" (2288-89).

Several dealer-witnesses testified that they understood their areas to be "protected", that no other dealer would sell Beltone products there (2315-16, 2352 Archer; 2228 Peters). And several dealers testified that they were instructed by their HOFEs as to where they should make their sales of Beltone products (1544 Ziegler: "good idea to stay within your own territory we were told"; 650-52 Plyler: could follow "leads" on mail route that crossed "boundaries" of area).

Some of the dealer-witnesses presented by complaint counsel testified that they made sales to customers outside their areas (825 H. Smith; 1460-61 Ziegler; 2327-28 Archer). Mr. Musselman, a dealer in Ohio, testified that he opened an office in Pennsylvania to service a particular doctor's referrals (2594, 2606). Mr. Thompson testified that on one instance when he made a sale outside his area "there was quite an uproar about that" (1334). Mr. Oldham testified he knew he wasn't supposed to go outside territorial bounds and he was admonished by his HOFE when he made a sale in another dealer's territory (3088). [45]

In several instances a dealer's office or sub-office was located very close to a boundary of his area. Nevertheless, these dealers did not cross that boundary to make calls on prospects (see 17169-75 Durbin; 15532-44 Gilliam; 14821-23 Kindopp).

Moreover, on the guarantee registration form there appears a box

²⁷ Mr. Thomas testified that he never solicited business outside of his area (219, 226).

"purchased in this territory but lives elsewhere" (CX 28Z92-93). Beltone explains: "This information should be provided whenever a sale is made to a prospect whose home address is outside your own area of primary marketing responsibility. This is important marketing information to us as it indicates the buying habits of hearing aid purchasers" (CX 28Z93).

Also the customer referral notice, which is designed to apprise another dealer of a customer or prospect in his area, does not provide for a situation where a dealer sells a hearing aid in another dealer's area. The three options are: "Purchased while visiting in our territory"; "Serviced while visiting in our territory"; "Resident moving out of our territory" (CX 28Z198).

That dealers generally considered their respective areas to be exclusively theirs is manifested by the number of them that registered complaints to Beltone about sales made by other dealers in their areas (2327, 2334 Archer; 1644-45 Lathrop; 13096 Tabokin; 2594-95 Musselman; 3087-88 Oldham; 1344 Thompson; 9125 Bain; 12519 Hood; 15606 Jones; 9627 Kauffman; 11112 Lipin; see CX 366, 452, 465, 467, 475B, 493).²⁸

It is found that Beltone did require its dealers to confine sales to their areas of primary marketing responsibility, and that the only exception that was permitted was in those instances when the dealer had a direct, personal referral from one of his customers and where subsequent service of that user could be performed by the dealer making the sale.

*About the Brands of New Hearing Aids Sold by Authorized
Beltone Dealers*

38. It is not disputed that Beltone has an announced policy that it believes that single-line dealing by a dealer is [46]beneficial to the dealer, user and manufacturer. This was stated in the letter that accompanied the 1957 dealer agreement that followed issuance of the Commission's 1956 order to cease and desist and was a constant instruction to the HOFE as one of the things he could say to a dealer when the question of competitive brands arose (4731-32, 4901-02 D. Barnow).

Many of the approximately seventy dealer-witnesses presented by Beltone testified that in their sales of new hearing aids they sold the

²⁸ See also: 6354-6359 D. Smith; 7022, 7163, 7268-69 Westmoreland; 8731 Sivek; 8444, 8470-71, 8241-43, 8476 Sauls; 10316, 10322-29, 10346-47, 10400, 10409-11, 10489 Nealon.

Beltone brand only (12901 Borgeois; 14687 Bruner; 15249, 15263 Byron²⁹; 12435 Coppola; 15340-46 Elias; 12077 Galloway³⁰; 12493-94, 12515 Hodd; 16142-43 Hudson; 15424 Jeter³¹; 12333 Johnson; 15598 Jones; 14549, 14556 Langham; 11698 Lucas; 17225 Martin; 11015-16 Mattingly; 11263-64 McCurdy; 14967 Miller; 13565 Morris; 16455, 16466, 16474 Partin; 16250, 16266-67 Rice; 9441-42 Selznick; 17960 Sturtz; 13090 Tabokin; 18209 Tabor; 15953, 15961 Tibault; 15680 Pruitt; 13317 Wheeler; 15764 Wofford, Sr.; 15881 Azar).

Some of these dealers testified that they made sales of non-Beltones on clinical referrals for specific brands only (15111-12 Proctor; 13467 Ribinowitz: except for one Rexon he won at a state meeting raffle; 13379-81, 13410 Sheutzow: except one Siemens in 1966 or 1967; 10966 Sloane; 13805-06 Yarlott; 17040-41, 17046-47 Allen: except one Starkey a lady asked for; 17379-80 Beattie; 13905-06 Burak: not quite 100% Beltone; 11927, 11978-79 Cato; 14036-37, 14085 Culver: "has quit this"; 15495, 15501 Gilliam: one referral; 11424-25 Gorlin; 12727-30 Ivy; 11101 Lipin; 13506 Magures: "if we get a request from a clinic"; 17288-90 Moses; 18112-13 Osnowitz: "primarily" Beltone except "occasionally we'd have a referral for a specific brand").³² [47]

And some of those dealers testified that they made occasional sales of other brands (13659 Paul: "occasionally"; 13175-76 Pernet: non-Beltone "small very negligible" percentage; 14345-46 Perisho: one Zenith and Starkey very recently; 10091 Wofford, Jr.; 15192, 15227 Bisel: not all on medical referrals; 17138 Durbin: "only two instances I can recall"; 17891 Glaspie: "a few Starkey"; 13002-03 Harlow: some competitive aids; 12034 Hulser: "a couple of occasions, but very seldom"; 14780-81 Kindopp: "Starkey . . . in the last 90 days . . . very few Starkeys"; 18043-44 LaMontagne: "By far the Beltone brand"; 13206-08 Levy: "on rare occasions" non-Beltone; "about a half dozen" Starkey custom mold aids; 14881 Madsen: "90% Beltone"; 12226-12228 McMillian; one Zenith, one Fidelity; 16332 Metcalfe: "Beltones with the exception of one instance"; 14234 Owenby; 9016-18 Bain: "primarily" Beltone).

Mr. Kaufmann testified that he had twenty companies listed with state agencies and that over the years he had sold other brands of hearing aids and had sold 50 Starkey hearing aids in 1974 (9610,

²⁹ Mr. Byron testified that he had experimented with Fidelity at one time but had replaced all of those fittings with Beltone hearing aids (15263-64).

³⁰ Mr. Galloway testified that for a 10-year period ending in 1969 he operated a separate business located in a department store through which he sold other brands (12083-84).

³¹ Mr. Jeter said he purchased some Fidelity but returned them, never having sold one (15425-26).

³² It should be noted that at dealers' meetings in San Francisco and Los Angeles in January 1975 dealers asked National Field Sales Manager Westmoreland what they should do when they received clinical referrals for other brands. Westmoreland told them they could do whatever they wanted to do with it (7060-66).

9666). Mr. Laster testified he had sold 25 Starkey aids (18289-90, 18335). Mr. Pierson testified he sold other brands, and at one time sold Audivox over 8 months with D. Smith's permission and purchased 15 to 18 Starkey aids (15024-30). Mr. St. James testified that before 1970 he bought some Electones from a friend and had fit other brands (12653-56)³³; Mr. Ugoretz testified he sold over 95% Beltone but had sold Fidelity and Dahlberg (11585).

The former Beltone dealers presented by complaint counsel also testified about the brands of new hearing aids they sold while a Beltone dealer. Mr. Lathrop sold only Beltones from 1964 to 1972 (1630-31, 1715). Mr. Oldham testified that he sold only Beltone and some used other brands (3068). Mr. Sable testified he dared not sell other brands (1093).

Mr. Benoit testified that except for isolated instances he sold Beltone, and was under the impression that if he sold other brands he would be terminated (2106). After 1970 he did sell other brands (2114). Mr. Davis who in 1961 considered his franchise "single line" (4292) testified that until 1972 he sold only Beltones (4294) although he might [48] have sold other brands "once or twice" on a clinical referral or to match a competitive one worn by a user (4380-81). Mr. Jeffrey testified that at the beginning of the authorized Beltone dealership he sold only Beltone, but later on sold other brands featuring AVC on specific clinical referrals (2442-43). Mr. Laird testified that from 1960 to 1965 he sold Beltones only, and, thereafter, a few other brands, either on medical or clinical referrals or special instruments not in competition with Beltone (2521-23, 2541).

Mr. Peterson testified that he sold mostly Beltone, some others on medical referral and one Siemens to a lady in South America (2861-62). Mr. Stephen testified he sold Beltone only, except when dealing with the State [of Texas] (3105-07, 3141). Mr. D. Thomas Smith testified that besides Beltone, he sold Norelco on clinical referrals and certain compression aids (AVC) (1893-94, 1897-98). Mr. G.G. Smith testified for the first four years of his Beltone dealership he sold Beltone only except for one Vicon he sold to a special customer when a Beltone did not help the user. After 1967 he sold other brands including Qualitone, but these sales were less than 10% of his total sales (1196-98). Mr. H. Smith testified he sold some other brands on specific referrals early in his dealership and later sold some other brands (787, 826-27). Mr. Taylor testified he sold only Beltones until 1965 or 1966 (2002, 2015). He became a Beltone dealer

³³ Most of these competing brands of hearing aids were replaced with Beltones (12655).

in 1947 (1945). Mr. Wagner testified he sold only Beltones from 1960 to 1965, and a total of 4 non-Beltones from 1965 to 1970. Thereafter he sold Audiotone and Oticon because he got better results with compression (486, 492-93).

Mr. Thomas testified that he sold Beltone only the first year of his dealership (243). Mr. Plyler testified he sold almost all Beltones, especially after his HOFÉ commented when he sold a special fitting of another brand, although he had sold Fidelity bone conductor instruments (631, 636, 709, 718).

Mr. Archer testified he sold only Beltones out of his Tacoma business which was his Beltone dealership, although he had another hearing aid business in Yakima where he sold other brands, but not Beltones (2360, 2317-20). Mr. Peters testified that he sold other brands after the Crown Corporation (Mr. Flarsheim) became a Beltone dealership. These were replacement aids for old non-Beltone customers. [49]After Flarsheim resigned, Crown went multi-line (2218, 2275, 2279).³⁴ Mr. Thompson testified that he sold other brands, after the first two years of selling only Beltones, and that he sold other brands of hearing aids after he purchased another hearing aid company in 1971 (1314, 1324, 1362, 1400-1401).

Mr. Ziegler testified that while he sold Beltone only,³⁵ he purchased some Electones to rent to certain users. Toward the end of his dealership, after a meeting with a Beltone HOFÉ, he started to sell Electones (1437, 1572). Mr. Mussleman testified he sold only Beltone until 1973 or 1974. Mr. Mussleman became an authorized Beltone dealer in 1963 (2559, 2570, 2597, 2728).

On this record there is no doubt that the Beltone authorized dealer was for all intents and purposes a single-line dealer in that he "carried"³⁶ only the Beltone line (see Appendix A, pp. 1-15, *infra*). Almost all of the dealer-witnesses who were presented by respondents testified further than they made the independent choice to "carry" Beltones only, giving as reasons for that choice (1) that Beltone had a complete or full line (see 17042 Allen; 15495 Gilliam; 16143 Hudson; 12035 Hulser; 11850 Nelson; 15026 Pierson: "complete line"; 15881 Azar), (2) that the Beltone hearing aid was a quality product (see 13907 Burak; 15245 Byron; 14036 Culver; 17134 Durbin; 15340 Elias; 12077-78 Galloway; 12729 Ivy: "clearer sounding instrument"; 15425 Jeter; 11100 Lipin; 11699 Lucas: "I don't feel

³⁴ Crown continued to handle Beltone hearing aids for a year after Mr. Flarsheim sold his interest in the business to Mr. Peters, although Beltone would not grant a dealership to Mr. Peters (2278-79).

³⁵ With exception of one Oticon purchased by a customer who requested that aid (1438-9).

³⁶ "Carry" in this sense means display and promote a product line. Occasional sales of other brands, on specific clinical referral ("prescription") or special preference of the customer (cosmetic appeal), does not change the status of a dealer as "single-line." (see 9023-4 Bain.)

there is a competitive aid that is any better"; 14219 Owenby; 16267 Rice; 18210 Tabor: "never found anything as good as Beltone"; 15954 Tibault; 10106 Wofford, Jr.; 15881 Azar; *see also* 2107 Benoit), (3) that they could fit any fittable hearing loss with an instrument in the Beltone line (*see* 17042 Allen; 12435 Coppola; 11392 Gorlin; 12797 Keel: "most any type of loss that can be helped by amplification"; 11264 Mattingly; 11585 Ugoretz: "we can fit practically anyone that has a fittable hearing loss with a Beltone"), (4) that they had no need [50]to carry competitors' products (*see* 12901 Borgeois; 15495 Gilliam; 17882-83 Glaspie; 11392 Gorlin; 12515 Hood: "I know what a Beltone will do. . . . it is sufficient for my business"; 18044 LaMontagne: "you just don't need any other hearing aids unless it's an exceptional thing"; 13208 Levy: other than custom mold aid, "I haven't had any need for" other brands; 13506 Magures; 12228 McMillian; 18113 Osnowitz: "I have always found what I needed in the line"; 16527 Rawlings: "fit all the needs of the hard of hearing impaired"; 13452 Ribinowitz: "I thought I could do anything I had to do with the Beltone line of hearing aids"; 10985 Sloane: "Beltone has at least as good and usually better a fitting than any other brand"; 15954 Tibault: "met the marketing needs of the people that I was serving"; 15680 Pruitt; *see also* 2107 Benoit), or (5) that Beltone gave the dealers a great amount of support (*see* 15250-51 Byron: "loaner aids" program; 12078 Galloway; 12035 Hulser: "guarantee, the backing . . . was there"; 15425 Jeter: "good service"; 12333 Johnson; 15598 Jones: "felt loyal to Beltone . . . and still do"; 12794 Keel; 11100 Lipin: "good repair program"; 17226 Martin: "I wanted to return that support"; 14967 Miller: "good product . . . good service . . . guarantee for my user"; 17289 Moses: best for the customer, "very quick service from the factory"; 16455 Partin: "liked the product . . . liked the company, their operations, their treatment of their dealers"; 15026 Pierson: "Beltone's help, consumer acceptance"; 17961 Sturtz: "loyalty and team business"; 13318 Wheeler: "with all the helps that Beltone offered, including product . . . had no . . . desire to become multiple line dealer"; 10106 Wofford, Jr.: good product, good service; *see also* 2107 Benoit: loyalty).

Some dealers testified that to carry one line was good business. (*see* 9061 Bain: it was good business to have one brand and have more users in a single product; 15346 Elias: "can't do justice to more than one"; 14549, 14556 Langham: "adequate job" didn't choose to sell other brand; 14881-82 Madsen: "I like to stay with one brand where possible to eliminate a lot of different service problems that I might not be familiar with"; 17479 Mitsdarffer: "Like to feel . . . I can stand behind" product he sells, "difficult enough to keep up with

technical information necessary in one line"; 13565 Morris: "do a much better job, specializing in one good company"; 16267 Rice: "just prefer doing business with one company"; *see also* 1631 Lathrop: "there was no time to sell anything else"). [51]

The representatives of other manufacturers testified that when they had attempted to get a Beltone dealer to carry non-Beltone products, they had been unsuccessful to such a degree that these other manufacturers' representatives did not usually bother to call on Beltone dealers (3720, 3722-31 Saad; 3911, 3919-22 Skadegard; *see also* 15993 Kojis; 14407 Winslow).

Moreover, they described the Beltone dealer as "a pretty satisfied guy who is quite successful" (14419 Winslow). "The average dealer appears to be less sure of himself, less secure, more searching for help, I guess information. The Beltone dealer by and large is self-sufficient, self-sustained and secure, if I may use that term" (4254 Sturtz). "The Beltone dealer is more successful than his competitor." He is in a "straight jacket of his liking" (4260-61 Sturtz).

39. Respondents deny that they *require* their selected dealers to sell Beltone products to the exclusion of other brands, contending that there is no such requirement in the dealer agreement and that the HOFEs are specifically instructed not to tell the dealers that they cannot sell competing brands of hearing aids.

Complaint counsel assert that Article 1 (*see supra* p. 42) of the dealer agreement could be interpreted as providing that the dealer sell only Beltone products. But they add that even if it is not so understood, there are other provisions of the dealer agreement, as well as Beltone's business dealing with its dealers, that, in effect, require "single-line" dealerships.

First, complaint counsel refer to that part of Article 1 that requires a dealer to achieve a sales quota ("potential") within the assigned territory and argue that most dealers, could not make the effort to sell, much less make sales, of non-Beltones, and at the same time achieve potential. Second, they point to Article 4 (*see n. 25 supra* p. 42) and the provision that states: "All leads furnished to DEALER by BELTONE shall be and remain BELTONE's sole property and shall not be used by DEALER, at any time, for any purpose other than to sell BELTONE Products." And third, complaint counsel point to Article 6 relating to the cooperative advertising programs and the Dealer Manual which excepts from cooperative credit any advertisement which mentions, directly or indirectly that the dealer sells any competitive product. [52]

There is abundant testimony that Beltone encouraged its dealers to abide by its "single-line" philosophy. Significantly, most Beltone

dealers use the name Beltone in their business style (*see* CX 28Z125). Wofford, Sr., testified: "I think it would be utterly foolish for a man to have the privilege of having Beltone and not advertise it" (15805).

40. There is no doubt that the Beltone dealership is a valuable asset. In fact, in the hearing aid business a Beltone dealership was considered "the ultimate goal, as far as being a dealer is concerned" (1425 Ziegler). Notwithstanding, the dealer agreement provides that the dealership could be terminated by either Beltone or the dealer for no reason with 30-day written notice by certified mail.³⁷ Dealers were well aware that their agreements contained this provision.

Although the Beltone dealer is an independent businessperson³⁸ the nature of the business operation of the dealership was necessarily patterned by the emphasis Beltone placed on "lead procurement" through national advertising and the necessity for the dealer to make a personal "in home" call upon the prospect in order to report back the results of the call. For most dealers, in order to make these "in home" calls and reach the "potential" assigned by Beltone, it was necessary to hire "consultants" or field salesmen. A dealer who had consultants was generally termed a "manpower" operation. And much of the HOFE's efforts was aimed at persuading the dealer to embark on a manpower program, and then assisting in the recruiting, hiring and training of these consultants. This training, was, of course, Beltone-oriented. [53]The equipment supplied such as the Selectometer, was designed to sell Beltone hearing aids, and the carrying cases were marked with the Beltone logo. A significant number of dealer witnesses who were consultants for other Beltone dealers after 1960 testified that they sold only Beltones while they were consultants (17028-29 Allen; 8952-53 Bain; 12426 Coppola; 14017, 14026 Hood; 16131 Hudson; 12026 Hulser; 12307 Johnson; 18033 LaMontagne; 13496 Magures; 11006 Mattingly; 12200 McMilian; 17474 Mitsdarffer; 18105-06 Osnowitz; 14186, 14205 Owenby; 14322 Perisho; 15010-11 Pierson; 16523 Rawlings; 13361 Scheutzow; 9302 Selznick; 17951, 17954 Sturtz; 18198 Tabor; 11574 Ugoretz; 13779 Yarlott; 15866 Azar). A few testified that they had sold other brands while consultants (15187-88 Bisel: rarely some others; 12975 Harlow: "one occasion . . . a price instrument . . . a Fidelity"; 14759

³⁷ Article 15 of the dealer agreement reads: "Either party hereto may terminate this Agreement, at any time, upon at least thirty (30) days prior written notice to the other party. However, upon violation of any provision of this Agreement by either such party, the other party shall have the right to terminate the Agreement, immediately, by written notice. . . ."

³⁸ Article 9 of the dealer agreement provides: "DEALER is an independent contractor. Neither DEALER nor any of his employees, agents, or representatives shall be deemed, expressly or by implication, to be BELTONE's employee, agent or representative. None of them shall have the right to make any representations or incur any obligations on BELTONE's behalf. Nothing herein shall interfere with or prevent BELTONE from operating under any present or future program for the sale of BELTONE Products, including its Audiometric Instruments Division sales programs and government sales programs."

Kindopp: "towards the end . . . Fidelity"; 11658 Lucas: "there was a short period of time we had carried Audivox"; 15666-67 Pruitt: Beltone and "[o]n a very, very rare occasion . . . a particular type of fitting that could be better handled through the type of glasses that Fid[e]lity had."

Part of the recruitment process for consultants was conveying the understanding to newly hired consultants that if they were successful salesmen there was a possibility that they might become Beltone dealers (*see* CX 28Z186).

All things considered, it is found that Beltone's desire that its dealers be single-line dealers and carry only Beltone products was in almost every instance of record honored by the dealer. Certainly, the dealer was in a position where to "please" Beltone would be in his best business interests.

To cement its desire into reality, Beltone rewarded its dealers in such a way that single-line dealers were singled out for distinction. Coupling this with the loyalty idea and the "Beltone family" feeling, Beltone was able to realize distribution through single-line dealers.

41. Complaint counsel contend that Beltone "expressed, communicated or emphasized to their authorized dealers Beltone's business policy of dissuading, discouraging or prohibiting sales of competitive brands" of hearing aids by such dealers by means of "persuasion, pressure, harrassment, or coercion, or intimidation of such dealers to sell only Beltone products and not to sell other brands" (Compl. par. 11(4); *see* CSCPF at pp. 25-27) [54]

The record contains evidence of direct statements by HOFES to dealers to the effect that they should not sell other brands. For example, Mr. Archer testified: "I was told on one occasion that as far as fitting or selling of Beltone instruments—let me put it this way. The question the way it came up was we have a problem with what happens if somebody comes in and we can't fit them with a Beltone? And the answer that I had gotten was to send them down the street. If we can't fit them with a Beltone—if I happen to have or if I knew of availability or had another instrument that was available that I knew would do that individual better, I was to sell them a Beltone if at all possible. . . . They would, as long as I was selling exclusively Beltones, then they would not come in with another person as a competitor of mine" (2315-16).

Mr. Benoit testified that at the beginning of his dealership HOFE Griffith said to him "that the reason why I was getting the franchise is because the previous franchise holder was carrying other brands and not making potential" (2098). Mr. Benoit added:

I went to some meetings in Chicago at the beginning of my dealership and at these

meetings we were briefed by Dave Barnow and during his discussions or his briefings he would mention that Beltone had chances to sell . . . their brands to Macy's and other department stores. However, they would not do this in loyalty to the dealers in their area, so therefore they expected the dealers to reciprocate by not selling other brands [2104].

Mr. Jeffrey testified that HOFE Griffith had said to him in essence that "he was displeased with this dealer for handling another aid and he was going to get on him about it as soon as he was up to Santa Barbara" (2441).

Mr. Mussleman testified that HOFE Sivek had "brought up the fact that . . . some Beltone dealers had . . . been toying around with other hearing aids other than Beltone; mentioned John Davis of Akron, Ohio, adjacent to me; and due to this fact they were going to fail or they were failing, and he certainly advised me not to take the same route and jeopardize my relationship with Beltone Electronics" (2580). [55]

Mr. Oldham testified that HOFE Ostott "mentioned there was another dealer that was handling another brand which was not authorized and he was going from my place to see him" (3067).

Mr. Peters testified that after he explained to HOFE Griffith that he had made a sale of an Otation to a client he said to Mr. Griffith: "Well, I either had to make the sale, Terry, or else send him down the street.' Terry looked at me, kind of grinned and said, 'You should have sent him down the street'" (2220).

Mr. Sable testified that HOFE Selznick "had come into my office and it was customary, every time he came in, he would walk around and inspect the various rooms and look it over. He walked to the area where we had kept our hearing aids, and he opened up the cabinet and looked it over, and he said, if we ever catch you selling another hearing aid, other than Beltone hearing aid, we will terminate your franchise. . . ." (1089).

Mr. Thomas testified that when HOFE Westmoreland discovered that he was selling hearing aids other than Beltone he said "You know we can't have this" (253).

The dealers' understood from such various conversations with their HOFEs and from other things that had been said to them by Beltone officials, that they were to carry and sell only Beltone hearing aids.

42. There is no question that before 1957 Beltone's authorized dealers were required to sell Beltone hearing aids exclusively in exclusive territories. Thereafter, according to respondents, the dealers were free to handle any brand of hearing aid they wanted and could sell Beltone hearing aids anywhere they wanted. Mr.

Elias, who became an authorized dealer in 1950 in Little Rock, and in 1956 became the authorized dealer in Memphis, said that the new franchise agreement "wasn't as binding as the old one" (15346). However, Mr. Elias also testified that he had never sold any other brand of hearing aid (15340, 15346). Mr. Jeter, who became the authorized Beltone dealer in Jackson, Mississippi, testified that a change in agreements was made in 1957 and that he was notified "that we no longer had a franchise agreement that it was simply . . . a working agreement or something to that effect" (15431, 15473). He further testified that "I have actually sold nothing except Beltone" (15424).

Mr. Galloway, who became a Beltone dealer in Rochester, New York, in 1949, testified that in 1957 he was notified by letter that he was no longer obligated to sell Beltones [56]exclusively and "that I could sell any hearing aids that I wanted to sell and they in turn could put other dealers or distributors in that particular area" (12068). He added that since 1957 he had "on occasion discussed . . . with numerous people, the general concept of that letter" (12133). Mr. Galloway sold only Beltones through his Beltone dealership (12077).

Mr. Jones, who became the Beltone dealer in Jefferson City in 1956 (15587-89) testified that the new agreement was no longer limiting as to territory or brand (15593). Yet Mr. Jones sold Beltones only: "[I] felt loyal to Beltone then and I still do" (15598).

Mr. Keel, who had been a Beltone dealer since 1950 in Columbus, Georgia (12786-87), testified that in 1957 "There was some changes made through FTC", and added that this had no effect on his agreement (12788). He further testified that he made no non-Beltone sales (12794; *but see* 13832-33).

Mr. Langham, who had been a Beltone dealer in Denver since 1954, testified that the agreement was altered and replaced in 1957 (14548-52). He further testified he sold only Beltones from 1957 to the day he testified (14549-56).

Mr. Miller who has been a Beltone dealer in Casper, Wyoming, since 1952, testified that his franchise agreement was changed in that he wasn't restricted to Beltone or an area (14966). He also testified that from 1952 to present he sold only Beltones (14967).

Mr. Morris, who has been a Beltone dealer in Reno since 1950 testified that he sold Beltones exclusively (13565), and didn't remember the 1957 change (13612). Mr. Partin who has been a Beltone dealer since 1952, testified that in 1957 there was a change made in his franchise operation and he could handle anything he

wanted to in hearing aids (16451). He also testified that he never sold anything but Beltone (16455-74).

Mr. Rice, who became a Beltone dealer in Kansas in 1948, testified that "the exclusive contract was replaced with a non-exclusive contract" in 1957 (16249). Yet from 1949 to present he sold only Beltone hearing aids (16250, 16267). [57]

Mr. Wofford, Sr., who at one time was Beltone's National Field Sales Manager (1955-1965) testified that the FTC proceeding "hardly changed our behavior at all except to write a new franchise. We literally dealt with our people on a trust us, trust you basis" (15808).

Jack Taylor, who had been a Beltone authorized dealer in Oakland, California from 1947 to 1971, testified that he sold Beltones exclusively until 1965 or 1966 (2002, 2015). He also testified that although the exclusive features were dropped from the agreement in 1957, "there were other things contrary to the [covering] letter" (1989-90).

43. The record shows that from 1960 to present there have been many innovations and improvements in hearing aids and that in the early 1970s Beltone was quite conservative in incorporating new features in its line (*see* 11130 Lipin; 16488-92 Partin; 11719 Lucas; 13711-13 Paul). Significantly, Beltone's "new breed" of instruments which started to become available to dealers in about 1972 when the Etude model was introduced (*see* 16389 Metcalfe; 13712 Paul), responded to many dealers' requests for new instruments (CX 541). With the advent of such features as ceramic microphones (CX 588; 16057 Kojis), directional microphones (CX 590, 592; *see* 16050-53 Kojis), automatic gain (volume) control ("AGC" or "AVC"), features which Beltone has since incorporated into its line (*see* CX 601-613), and the all-in-the-ear earmold aid, which Beltone does not manufacture, it would seem certain that an independent businessman would have purchased and carried instruments containing the new features that were not available through Beltone, unless he had an understanding or agreement that he could not do so under the terms of his relationship with Beltone (*see* CX 541, 546, 592, 594; 9045 Bain: ". . . my personal opinion is that Starkey is [a] darn good hearing aid, and Beltone ought to lean in that direction, because I think it is an area that they are missing people in").

It is significant that some Beltone dealers did sell some other brands that contained these new features when Beltone hearing aids did not (*see* 13962 Burak: Fidelity; 10966 Sloane; *see* Appendix "A", *infra*; *but see* 16493 Partin).

44. It is found as an inescapable fact that Beltone through its

dealer agreements as well as through its direct contacts with its dealers *required* them to carry Beltone hearing aids exclusively. [58]

About Dealers' Customers

45. As stated before, it is not disputed that Beltone appoints only one authorized dealer in any given area of primary marketing responsibility and that Beltone sells its products only to authorized dealers. And as noted, Article 1 of the dealer agreement provides that "BELTONE hereby appoints DEALER a retail DEALER . . ."

Most of the Beltone dealers presented by respondents testified that they had never made sales of new Beltone hearing aids to "competing non-Beltone" dealers. Many of these dealers testified that they not only had made no such sales but that they had never had any requests from such "competing non-Beltone" dealers (17048 Allen; 17385, 17440 Beattie; 12907 Borgeois; 14691 Bruner; 12437-38 Coppola; 17135, 17143-44 Durbin; 15341, 15350A Elias; 15498, 15502 Gilliam; 16154 Hudson; 15429 Jeter; 12339 Johnson; 15612 Jones; 12799 Keel; 14796 Kindopp; 18050-51 LaMontagne; 14552, 14562 Langham; 18295 Laster; 13213 Levy; 13575 Morris; 17297 Moses; 18119 Osnowitz; 16465-66, 16469 Partin; 13668 Paul; 13156 Pennet; 14336 Perisho; 15035 Pierson; 13454 Ribinowitz; 13402 Scheutzow; 9443 Selznick; 17968 Sturtz; 18215 Tabor; 15680 Pruitt; 13320 Wheeler; 15775 Wofford, Sr.; 15889 Azar).

Others testified that, although they had received requests, they chose not to sell new Beltones to "non-Beltone" dealers (15198 Bisel: "I have told them to send the people to me"; 15276 Byron: one request—"refused because of [the other dealer's] background"; 12095-96 Galloway: many requests, never sold—not sure it would be used properly; 17904-06 Glaspie: requesting dealer would not buy at the retail price; 11402, 11429 Gorlin: offered to do fitting; 12521 Hood: refused—"I don't wholesale"; 14896 Madsen: received first call in five years two weeks before testifying—didn't have item in stock; 17241 Martin: "on one or two occasions", didn't sell—"I want to know where my instruments are going"; 11047, 11023 Mattingly: wouldn't sell because "pretty proud of the fact that I sell Beltone hearing aids" . . . wanted to make sure it was fitted correctly; 11285 McCurdy: refused—"I have a responsibility for the instruments that are sold from my office"; 16340 Metcalfe: one request from a Kansas dealer, referred him to the local Beltone dealer,—"not in a position to provide service"; 14969 Miller: once last week, referred him to local dealer, "wouldn't be fair to [Beltone dealers in area]"; 15116 Proctor: one inquiry, never called [59]back; 16529-30, 16550B-C Rawlings: one request, refused, "not too sure how he was going to use it"—fear of complaint; 16273-74 Rice: a recent request, didn't sell—

"didn't like the way he operated his business"; 12661-62 St. James: "a couple of times"; 10090 Wofford, Jr.: refused to sell to competitors; 13814 Yarlott: refused to sell.).

Some dealers testified that they had made some sales of new Beltone hearing aids to non-Beltone dealers (13908-09 Burak: three requests, sold to two dealers³⁹; 11940-41 Cato: once—refused all others because of service; 13019 Harlow: sold an Etude model; 12039-40 Hulser: sold once to old "Sonotone" friend—normally turns them down, not "fair to particular other Beltone dealer in the area"; 12736 Ivy: sold to another dealer on a "Rehab" referral; 11713 Lucas: "very rarely", sold two hearing aids to a Boston dealer; 13512, 13551 Magures: on one occasion sold to non-Beltone dealer in his area—"I would not sell to anyone out of my area"; 12237-38 McMilian: sold Beltone to his Zenith dealer-brother, and refused a subsequent request, referring them to local dealer; 17483-84 Mitsdarffer: sold once to Chicago dealer; 10944-45, 10969, 10999 Sloane: sold to non-Beltone dealers on two occasions, refused one request, "I don't like the way that man does business"; 15954-55 Tibault: sold to non-Beltone dealer in Pennsylvania; 11593, 11595-96 Ugoretz: sold one to a non-Beltone dealer at outset of his dealership, subsequent request but no sale after he set price at his salesman's cost instead of at wholesale).

The rest of the dealers presented by respondents testified generally as follows: Mr. Bain testified he had received requests for Beltones from non-Beltone dealers and that he sold to at least two of them (9020, 9022, 9222-24). Mr. Culver testified that he has sold to non-Beltone dealers on four or five occasions (14050-51, 14086). Mr. Kauffman testified that he has had such requests and that he usually complies (9616, 9670-72). Mr. Lipin testified he has sold new Beltone hearing aids to other dealers (11118). Mr. Owenby testified he swaps with non-Beltone dealers per arrangement (14235). Mr. Toboken testified he didn't know whether his dealership had made sales to non-Beltone dealers (13100). [60]

Some of the former Beltone dealers presented by counsel supporting the complaint testified that they did not make sales of new Beltone hearing aids to "unauthorized" (non-Beltone) dealers (4314, 4378 Davis: He had many requests from "practically all" the non-Beltone dealers in his area, never sold to them; 2585 Musselman; 2241 Peters; 1225J-K G.G. Smith; 229 Thomas; 512 Wagner). Others did make such sales (2455-57 Jeffrey: sold two Beltone aids to Mr. Peters, a former Beltone dealer; 2524-25 Laird: sold aids to LaPera, a

³⁹ Mr. Burak sold Beltone parts to Mr. Conn, a former Beltone dealer located in San Diego, California (13929).

former Beltone dealer; 829-30 H. Smith: sold a Beltone to James Davis, a Zenith dealer; 1346 Thompson: sold a Beltone to a former consultant of his who was a Maico dealer).

In addition Mr. Davis testified that the reason why he did not sell Beltones to non-Beltone dealers was because he was in fear of cancellation. HOFE Sivek had told him he was to be a retail dealer only (4314, 4378). Mr. Jeffrey testified that Beltone dealers "weren't supposed to sell hearing aids to anybody but Beltone dealers or retail sales" (2456). Mr. Musselman testified that he was told not to sell to unauthorized dealers, that will "jeopardize your relationship" (2582). Mr. Peters testified he was not allowed to sell to non-Beltone, unauthorized, dealers and he didn't make such sales because he did not want to lose his franchise (2241). Mr. Sable testified that HOFE Selznick advised him that he couldn't sell to non-Beltone dealers (1095-96). Mr. G.G. Smith testified that it was not Beltone's policy to have its dealers wholesaling Beltone products (1225J). Mr. H. Smith testified that after his sale to the Zenith dealer he did not sell to other dealers because he did not want to get in trouble (835-36). HOFE Sauls advised him that such sales "wouldn't be tolerated, accepted, and not to do that again" (817). Mr. Thomas testified that he "wasn't to sell Beltone hearing aids to other competitive dealers" and he did not because he thought it "would possibly cost me my franchise" (229). Mr. Thompson testified that "it was understood that we weren't supposed to sell" to non-Beltone dealers (1345). Mr. Wagner also testified that it was his understanding that he was not supposed to make such sales (512).

Mr. Peterson testified that he sold new Beltone hearing aids to non-Beltone dealers on about ten occasions (2871) and that he bought some after termination of his dealership agreement (2873). Mr. Taylor and Mr. Benoit also testified that they had bought Beltones since their respective "terminations" (2197-98 Benoit; 2075 Taylor).

[61]

Complaint counsel contend that Beltone prohibits its dealers from selling new Beltones to non-Beltone dealers and that such restriction fosters the exclusive territorial nature of the Beltone dealerships and the dealers practice of carrying only Beltones (*see* CSCPFF pp. 127-128).

Respondents claim that dealers are free to sell new Beltones anywhere and to any purchaser and that the fact that they do not as a general rule is a result of their independent choices (*Resp. Ans. Br.* p. 8).

Each Beltone hearing aid is marked on its case with a serial number and Beltone retains a record of what instruments it sells to

its various authorized dealers. As already found (p. 30) Beltone requires its dealers to file a guarantee registration form containing the name and address of the purchaser of each particular numbered hearing aid. It is on the basis of this registration that Beltone issues directly to the purchaser the one-year factory guarantee of the instrument. Beltone does not guarantee an instrument unless the registration form is filed by an authorized Beltone dealer (2871-72 Peterson). In certain circumstances Beltone can and does trace serial numbers of instruments to ascertain the dealer to whom Beltone has sold the instrument and this information has been made available to its HOFEs and to other dealers (8445-48 Sauls; 2582 Musselman; 1095 Sable; 2498, 2524 Laird; 11713-14 Lucas; 2457 Jeffrey; CX 28Z188).

Some of the dealers or former dealers testified that when they sold Beltone hearing aids to non-Beltone dealers, they themselves would register the instrument to obtain the guarantee (*see* 2871-73 Peterson; 1348 Thompson; 9225 Bain; 11118 Lipin).

Moreover, as already found, Beltone will not make specification sheets or other technical information available to unauthorized dealers (*see* p. 35 *supra*). In addition Beltone will not repair a Beltone hearing aid submitted by an unauthorized dealer if the instrument is not under the one-year factory guarantee; if covered by guarantee, Beltone will make the necessary repairs, but will return the instrument directly to the user.⁴⁰ [62]

Article 8 provides:

DEALER shall not, during the term hereof or thereafter, commit any act, make any representations, or advertise in any manner, which may adversely affect any BELTONE right or be detrimental to BELTONE's name and reputation, BELTONE Products, or any other BELTONE DEALER.

And as has been pointed out above (*supra*, p. 34), Beltone's concept of "loyalty" and "Beltone family" relates to any practice on the part of one dealer that would encroach on another dealer's area of primary marketing responsibility, namely selling Beltones at wholesale to a competing non-Beltone dealer located in another Beltone dealer's area.

On the record in this case it is found that respondents do *prohibit* their dealers from wholesaling Beltone hearing aids to non-Beltone dealers and accordingly restrict the potential customers to whom dealers may sell. Moreover, with Beltone's requirement that dealers make sales of new Beltones only in their respective areas of primary

⁴⁰ When an instrument is returned to the factory for repair the dealer retains possession of the accessories such as the ear mold and the tubing and battery (*see* 28Z138).

marketing responsibility, Beltone further restricts the potential customers to whom a dealer may sell.

About Non-Beltone Dealers

46. There is no dispute that respondents do not sell Beltone products to dealers who are not Beltone authorized dealers (*see* CX 156, 170, 184). As just found Beltone prohibits its dealers from selling new Beltone hearing aids to unauthorized dealers and through the use of serial numbers on the instruments, is able to trace any instrument so distributed. As previously found, respondents refuse to sell Beltone repair parts⁴¹ or to provide schematics to unauthorized dealers or to persons engaged in the business of repairing or servicing hearing aids (*see* 4779-80, 4791-92 D. Barnow).

Moreover, it does not appear to be disputed that respondents refuse to supply to unauthorized dealers Beltone promotional and advertising materials or price lists, although under the circumstances it would be surprising if they have ever been asked to supply such materials. There is [63]some testimony that Beltone refuses to supply specifications or performance information to all dealers. But there is also testimony that certain specification or performance information, perhaps identical to that supplied to dealers, is made available to audiologists and hearing clinics as a matter of routine distribution (*see* 4792-93 D. Barnow).

As already found Beltone will not repair hearing aids out of warranty unless they are sent to the factory by an authorized dealer (p. 35, *supra*).

About Beltone's Use of Dealer's Customer Lists

47. Mr. Gorlin, the authorized Beltone dealer in Miami, Florida, testified that the list of Beltone users is the "most important part of the business . . . the biggest asset" (11458, 11469).⁴²

Since early in its history Beltone has compiled the names of persons who are known to either wear Beltone hearing aids, or wear other brands of hearing aids, or are prospects for hearing aids. In recent years this information is stored in a "computer", and may be retrieved by county, city, or postal zone (zip code).

The source of names and addresses for this collection appears to be manifold. First, Beltone for many years has been the leader in national advertising designed to create a lead flow of high quality (*see* CX 6Z52, *in camera*). These "leads" are distributed to the

⁴¹ There is also some testimony that Beltone's newest aids are so constructed that the component parts, especially the circuitry, are sealed in plastic and that dealers do not engage in major repair work on such aids (4779 D. Barnow; 11025 Mattingly; 9082 Bain: "sub-miniaturization", *but see* 2075-76 Taylor).

⁴² *See also* 11367 McCurdy: user files "absolutely" a business asset; 1972 Taylor: "This is the most prized possession we have in our business, is the names and addresses of our clients" . . . the value of the business is the number of names.

authorized dealers who are *required* by the terms of their dealer agreement to call upon each "lead". The result of that call is required to be returned to Beltone on an "Inquiry Result Report" ("IRR") which is in the form of a "computer card". The dealer is supposed to designate on that card whether the lead was sold a hearing aid, whether the lead was already a user of Beltone hearing aids or of another brand, and whether the lead, if not a hearing aid user, was a prospect for a hearing aid. If the lead is a prospect or user, his/her name and address is added to Beltone's computerized list (*see* CX 286B; 3653-56, 3689-90 Rosen).

The second source of names for Beltone's computer collection is the guaranty registration forms on all new [64]Beltone hearing aids sold and fitted, that the dealer is required to submit to Beltone. The dealers may have made the initial contact with the customer in one of many ways such as through (1) a Beltone lead originating from national advertising; (2) a "lead" supplied by another dealer either directly or through Beltone; (3) the dealer's own promotional and advertising efforts, which are "co-oped" by Beltone; (4) the dealer's own efforts not "co-oped" by Beltone; (5) referrals from doctors or hearing aid clinics; and (6) referral from satisfied users or other clients.

A third source of input is the names of prospects (not Beltone users) that may be obtained by the dealers. The record shows that as a general rule, Beltone dealers voluntarily submit the names of "leads" (prospects) that they have secured on their own efforts, but have not sold a hearing aid, to Beltone for inclusion in the "computer".⁴³

Beltone uses this computerized collection of names and addresses for many purposes. First, Beltone periodically mails a Beltone newsletter to all Beltone users. Second, Beltone will send at the request of the dealer a service center bulletin to a particular dealer's customers, coordinating this mailing with the dealer's promotions. Third, Beltone will make special promotional mailings at the request of a dealer to all of the customer users or prospects who reside in his area of primary marketing responsibility. Fourth, Beltone will supply up-to-date printouts or address labels to the dealer upon request. Fifth, Beltone supplies the new Beltone dealer with the names of all users and prospects in his appointed area and, generally mails a "Dear Friend" letter to those users and prospects announcing the appointment of a new dealer (2343 Archer; 4305 Davis; 2510-

⁴³ There is some testimony that in order to obtain cooperative advertising credit for a dealer's promotional program such as participation in a fair booth, it is necessary that the dealer submit to Beltone the "leads" obtained through said promotion (408 Thomas).

12 Laird; 2232-34 Peters; 2867 Peterson; 659 Plyler; 1219-20 G.G. Smith; 1973 Taylor; 510 Wagner; 1589 Ziegler).⁴⁴ [65] Finally, during a period of approximately four years, Beltone rented lists of names of users and prospects to companies outside the hearing aid industry, such as vitamin companies, wig manufacturers and insurance companies. The users and prospects received promotional mailings from such companies (4965-66 D. Barnow).⁴⁵ This rental practice, ostensibly to supplement the fund from which Beltone paid for national advertising, was engaged in without the permission of the dealer or the user. In fact most of the dealer witnesses who testified in this case did not know that Beltone had rented these names until asked various questions on the witness stand.

The record in this case shows that when dealers sell their businesses, the user list and files⁴⁶ are usually considered to be part of the assets, and in certain instances the amount of consideration was calculated on the number of user names in the selling dealer's business files (11407 Gorlin; 16193 Hudson; 9663 Kauffman; 14772 Kindopp; 18089 LaMontagne; 18279 Laster; 11678 Lucas; 11308 McCurdy; 13143 Pennet; 13372-73 Scheutzow; 12650 St. James; 2163 Benoit; 4350 Davis; 1701-02 Lathrop; 2695 Mussleman; 656 Plyler; 348 Thomas).

48. Complaint counsel contend that actually respondents appropriate and use for their own purposes the names and addresses of their dealers' customers.

Respondents, on the other hand, contend that these names are rightfully their property and that they can use them for any legitimate business purpose, including the rental thereof to firms outside the hearing aid industry.

On this record it appears that Beltone treats the customers of its authorized dealers as customers of Beltone. But if the authorized dealer is an independent businessman as Beltone claims (and as stated in the dealer agreement and which is found as fact in this case) no such relationship can exist between Beltone and the Beltone user. [66]

The requirement that the user name and address be submitted to Beltone for warranty purposes should limit Beltone's use of the name and address to that purpose. If other names, including leads, are submitted to Beltone for mailing purposes their use should be

⁴⁴ Some of these "Dear Friend" letters announcing a new dealer also indicated that the old dealer was no longer in business contrary to fact, or that he was no longer an authorized dealer (2130, 2132-33 Benoit; 1589 Ziegler; CX 395).

⁴⁵ See CX 211-269, 271-306.

⁴⁶ There is a significant difference between a user list and a user file in that the former is merely a name and address whereas the file usually consists of all information concerning the user customer, the hearing test results, and the fitting.

limited to that purpose. Other uses, such as delivering them to succeeding dealers when the former authorized dealer is still a hearing aid dealer in the same general locale, or renting the lists, is found to be a misappropriation of the dealers' property. This is so notwithstanding the clause in the dealer agreement that provides that upon termination the dealer is to return the names and addresses to Beltone (*see* Article 18 of 1971 form agreement (CX 398)).⁴⁷

Moreover, the possibility that Beltone could deliver a dealer's customers' names to another dealer gives Beltone coercive power over the dealer's practices with respect to brands sold, the geographic area sold in, and the customers sold to, as well as any other of his practices whether prescribed in the dealer's agreement or not, relating to the conduct of the dealer's business. The percentage of sales made by the dealer from Beltone leads is relatively small, ranging from 15 to 25 percent. The greatest number of sales apparently come from repeat business with users⁴⁸ and referrals from satisfied users (11564 Ugoretz).

There is a certain degree of brand loyalty practiced by customers, which is cultivated by Beltone in its periodic mailings, as well as in its "Beltone family" approach.

About Terminations of Beltone Dealers

49. The dealer agreement provides in pertinent part (CX 401, Art. 15): [67]

Either party hereto may terminate this Agreement, at any time, upon at least thirty (30) days prior written notice to the other party. However, upon violation of any provision of this Agreement by either such party, the other party shall have the right to terminate the Agreement, immediately, by written notice . . .

Significantly, most of the dealer-witnesses were well aware of the termination provision of the dealer agreement (17063 Allen; 17390 Beattie: "for . . . gross incompetency or malfeasance . . . [I]f I am not ethical"; 12923-24 Borgeois; 14711 Bruner; 13941 Burak; 15297 Byron; 12446 Coppola; 14061-62 Culver; 17147 Durbin; 15353 Elias; 12097 Galloway; 17911 Glaspie; 11452 Gorlin; 12522 Hood; 16158 Hudson; 12040 Hulser; 12738 Ivy; 12339 Johnson; 15617 Jones; 12803 Keel; 14812 Kindopp; 18051 LaMontagne; 14568-69 Langham; 18308 Laster: "if there were a great number of complaints . . . and you weren't conducting your business ethically"; 13219-20 Levy; 11686

⁴⁷ "Upon termination of this Agreement, however occurring, any BELTONE property, such as BELTONE Manuals, operating forms supplied by BELTONE, leads, user names, and equipment and other articles in DEALER's possession, on loan, rental, or license from BELTONE, shall be returned to BELTONE immediately."

⁴⁸ See CX 522. It is estimated that a hearing aid wearer will purchase a new instrument every 3.4 years (CX 1B).

Lucas; 14943 Madsen; 13522 Margures; 11039 Mattingly; 11263, 11343 McCurdy: "if you violate a provision of your franchise agreement"; 12207-08, 12244 McMilian: "only negative thing [about Beltone dealer arrangement] would be either termination clause"; 14979 Miller; 13578 Moses; 18124 Osnowitz; 14252 Owenby; 13673 Paul; 13156 Pennet; 16533 Rawlings; 13449 Ribinowitz; 16279 Rice: "abusing the Beltone concept or any concept"; 13378-9 Scheutzow; 10931 Sloane; 1266-67 St. James; 17974-75 Sturtz; 13104 Tabokin; 18219 Tabor: if she "did something awful"; 15966 Tibault; 15683 Pruitt; 11562 Ugoretz; 9846-47 Wofford, Jr.; 15782 Wofford, Sr.; 13831 Yarlott; *but see* 15895 Azar: didn't know if there was a provision; 16345 Metcalfe: "sure there are").

Several dealers testified that they had discussed the termination provision with their HOFEs (11452 Gorlin: with Sauls; 16489-90 Partin: Hilpert "threatened to cancel my dealership . . . back in 1959 or 60").

As heretofore found, about 12 to 15 Beltone dealers are terminated each year by Beltone (5842-43 Shymanik; 6328 D. Smith).

In this connection, the HOFEs are instructed in their HOFE Procedural Manual as follows (RX 20Z): [68]

The best way to assure that neither *you* nor the *company* are suspected of an *improper* pattern of behavior in terminations is to create and maintain a file of *written* communications relative to *every* termination. This file eventually will show the many times you have discussed with the Dealer his failures and derelictions; the many offers of help which you extended to him to solve his problems; his attitudes and responses to your discussions and offers; and the resultant necessity, for the best interests of the company (and many times of the Dealer, himself), to terminate his Dealer Agreement. Of course, we all hope that during the course of such discussions and correspondence the Dealer's problems *can be solved* and his business developed into a profitable and successful Beltone Dealership. But, in the event that happy result cannot be reached, and termination must be accomplished, there will be a *written record*—a complete written documentation—of our *sincere* attempts to *help* the Dealer, showing the *full* justification for the resultant termination [Emphasis in original].

As already found when an authorized Beltone dealer was not purchasing new hearing aids from Beltone in an amount that approximated the dealer's "potential," he was contacted by Beltone. It was the custom of the Regional Manager to discuss "adequate market penetration" with the dealer and attempt to get him to agree to certain programs designed to increase his sales of new Beltone hearing aids. Foremost in such a program was the recruiting and hiring of consultants (*see* CX 38, 40, 43, 70, 71, 79, 452, 471, 517, 548). One of the primary responsibilities of the HOFE was the ongoing program designed to train these consultants, employees of the dealers, in the selling and fitting techniques that Beltone had found