

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 Otologists (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 convering 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).

